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Selected Materials on Whether the Elderly Can Fund Pooled Special Needs Trusts Without Penalty

The statutes

1. Medicaid – General mandate to States to comply with Congressional mandates – 42 U.S.C. § 1396a(a)(18)
2. Medicaid – Transfer provision and relevant exceptions – 42 U.S.C. § 1396p(c) and (2)(A) and (B)
3. Medicaid – Transfer availability and transfer provision 42 U.S.C. 1396p(d)
4. SSI - added in 1999 - 42 U.S.C. § 1382b(c) and (e)

The legislative history

5. Congressional Research Service, Summary of HR 2138
6. H.R. 2138, Table of Contents and Section 5111 (as proposed)
7. H.R. 2264, Table of Contents and Section 5111 (as passed by House)
8. H.R. 2264 Table of Contents and Sections 7422 and 7423 (as passed by Senate)
9. H.R. Conf.Rep. 103-213

Agency comments –

10. Transmittal 64
    a. § 3257 (definitions)
    b. § 3258.4E (look-back periods for transfers to trusts that are penalized)
    c. § 3258.10 (express statutory exceptions)
    d. § 3259 (treatment of trusts).

The early cases

11. *In re Pooled Trust Advocate*, 813 N.W.2d 130, 141-146 (S.D. 2012)
12. *Center for Special Needs Trust Administration v. Olson*, 676 F.3d 688, 700-703 (8th Cir. 2012)

The later cases

13. *Hutson v. Mosier,* 54 Kan. App. 2d 679, 401 P.3d 673, 678-682 (2017)
14. *Cox v. Iowa Department of Human Services*, 920 N.W.2d 545, 530-555, 559-563 (Iowa 2018) and its dissent
15. *Richardson v. Hamilton,* No. 2:17-cv-00134-JAW, 2018 WL 1077275 (D. Me. 2018), pp 1, 32-39.
    Richardson was appealed sub nom. *Maine Pooled Disability Trust*, 1st Cir., No. 18-1223 (pending). The original briefs are available at www.landsmanlawgroup.com/. Following oral argument, the Court asked CMS to express its views and invited the parties to respond. The CMS brief supported the Maine Medicaid agency; the plaintiff and the amici supporting plaintiff responded.
    a. CMS Brief
    b. The responses
        i. Appellant Maine Pooled Disability Trust
        ii. National Academy of Elder Law Attorneys and Guardian Community Trust
        iii. Special Needs Alliance

The statutes

1.

Medicaid – General mandate to States to comply with Congressional mandates – 42 U.S.C. § 1396a(a)(18)

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XIX - GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS
Sec. 1396a - State plans for medical assistance
From the U.S. Government Publishing Office, www.gpo.gov

§1396a. State plans for medical assistance

(a) Contents

[...]

(18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;

[...]

2.

Medicaid – Transfer provision and relevant exceptions – 42 U.S.C. § 1396p(c) and (2)(A) and (B)

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XIX - GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS
Sec. 1396p - Liens, adjustments and recoveries, and transfers of assets
From the U.S. Government Publishing Office, www.gpo.gov

§1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except—

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual—

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home,

except as provided in paragraph (2).

[...]

3.

Medicaid – Transfer availability and transfer provision 42 U.S.C. 1396p(d)

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XIX - GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS
Sec. 1396p - Liens, adjustments and recoveries, and transfers of assets
From the U.S. Government Publishing Office, www.gpo.gov

§1396p. Liens, adjustments and recoveries, and transfers of assets

(c) Taking into account certain transfers of assets

(1)(A) In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) (or, in the case of a noninstitutionalized individual, for the services described in subparagraph (C)(ii)) during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

[...]

(B) the assets—

(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse,

(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse,

(iii) were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or

(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title);

[...]

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XIX - GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS
Sec. 1396p - Liens, adjustments and recoveries, and transfers of assets
From the U.S. Government Publishing Office, www.gpo.gov

§1396p. Liens, adjustments and recoveries, and transfers of assets

(d) Treatment of trust amounts

(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:

(i) The individual.
(ii) The individual's spouse.
(iii) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse.
(iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

(C) Subject to paragraph (4), this subsection shall apply without regard to—

(i) the purposes for which a trust is established,
(ii) whether the trustees have or exercise any discretion under the trust,
(iii) any restrictions on when or whether distributions may be made from the trust, or
(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust—

(i) the corpus of the trust shall be considered resources available to the individual,
(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and
(iii) any other payments from the trust shall be considered assets disposed of by the individual for purposes of subsection (c).

(B) In the case of an irrevocable trust—

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

(I) to or for the benefit of the individual, shall be considered income of the individual, and

(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter; and

(iii) the State makes medical assistance available to individuals described in section 1396a(a)(10)(A)(ii)(V) of this title, but does not make such assistance available to individuals for nursing facility services under section 1396a(a)(10)(C) of this title.

(C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

(5) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

(6) The term "trust" includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

4.

SSI - added in 1999 - 42 U.S.C. § 1382b(c) and (e)

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XVI - SUPPLEMENTAL SECURITY INCOME FOR AGED, BLIND, AND DISABLED
Part A - Determination of Benefits
Sec. 1382b - Resources
From the U.S. Government Publishing Office, www.gpo.gov

§1382b. Resources

(c) Disposal of resources for less than fair market value

(1)(A)(i) If an individual or the spouse of an individual disposes of resources for less than fair market value on or after the look-back date described in clause (ii)(I), the individual is ineligible for benefits under this subchapter for months during the period beginning on the date described in clause (iii) and equal to the number of months calculated as provided in clause (iv).

[...]

(B)(i) Notwithstanding subparagraph (A), this subsection shall not apply to a transfer of a resource to a trust if the portion of the trust attributable to the resource is considered a resource available to the individual pursuant to subsection (e)(3) (or would be so considered but for the application of subsection (e)(4)).

(ii) In the case of a trust established by an individual or an individual's spouse (within the meaning of subsection (e)), if from such portion of the trust, if any, that is considered a resource available to the individual pursuant to subsection (e)(3) (or would be so considered but for the application of subsection (e)(4)) or the residue of the portion on the termination of the trust—

(I) there is made a payment other than to or for the benefit of the individual; or

(II) no payment could under any circumstance be made to the individual,

then, for purposes of this subsection, the payment described in clause (I) or the foreclosure of payment described in clause (II) shall be considered a transfer of resources by the individual or the individual's spouse as of the date of the payment or foreclosure, as the case may be.

(C) An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that—

(i) the resources are a home and title to the home was transferred to—

(I) the spouse of the transferor;

(II) a child of the transferor who has not attained 21 years of age, or is blind or disabled;

(III) a sibling of the transferor who has an equity interest in such home and who was residing in the transferor's home for a period of at least 1 year immediately before the date the transferor becomes an institutionalized individual; or

(IV) a son or daughter of the transferor (other than a child described in subclause (II)) who was residing in the transferor's home for a period of at least 2 years immediately before the date the transferor becomes an institutionalized individual, and who provided care to the transferor which permitted the transferor to reside at home rather than in such an institution or facility;

(ii) the resources—

(I) were transferred to the transferor's spouse or to another for the sole benefit of the transferor's spouse;

(II) were transferred from the transferor's spouse to another for the sole benefit of the transferor's spouse;

(III) were transferred to, or to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of, the transferor's child who is blind or disabled; or

(IV) were transferred to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of an individual who has not attained 65 years of age and who is disabled;

(iii) a satisfactory showing is made to the Commissioner of Social Security (in accordance with regulations promulgated by the Commissioner) that—

(I) the individual who disposed of the resources intended to dispose of the resources either at fair market value, or for other valuable consideration;

(II) the resources were transferred exclusively for a purpose other than to qualify for benefits under this subchapter; or

(III) all resources transferred for less than fair market value have been returned to the transferor; or

(iv) the Commissioner determines, under procedures established by the Commissioner, that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Commissioner.

[...]

Excerpt from:

42 U.S.C.
United States Code, 2017 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 7 - SOCIAL SECURITY
SUBCHAPTER XVI - SUPPLEMENTAL SECURITY INCOME FOR AGED, BLIND, AND DISABLED
Part A - Determination of Benefits
Sec. 1382b - Resources
From the U.S. Government Publishing Office, www.gpo.gov

§1382b. Resources

(e) Trusts

(1) In determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.

(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if any assets of the individual (or of the individual's spouse) are transferred to the trust other than by will.

(B) In the case of an irrevocable trust to which are transferred the assets of an individual (or of the individual's spouse) and the assets of any other person, this subsection shall apply to the portion of the trust attributable to the assets of the individual (or of the individual's spouse).

(C) This subsection shall apply to a trust without regard to—

(i) the purposes for which the trust is established;

(ii) whether the trustees have or exercise any discretion under the trust;

(iii) any restrictions on when or whether distributions may be made from the trust; or

(iv) any restrictions on the use of distributions from the trust.

(3)(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made shall be considered a resource available to the individual.

(4) The Commissioner of Social Security may waive the application of this subsection with respect to an individual if the Commissioner determines that such application would work an undue hardship (as determined on the basis of criteria established by the Commissioner) on the individual.

(5) This subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title.

(6) For purposes of this subsection—

(A) the term "trust" includes any legal instrument or device that is similar to a trust;

(B) the term "corpus" means, with respect to a trust, all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust); and

(C) the term "asset" includes any income or resource of the individual (or of the individual's spouse), including—

(i) any income excluded by section 1382a(b) of this title;

(ii) any resource otherwise excluded by this section; and

(iii) any other payment or property to which the individual (or of the individual's spouse) is entitled but does not receive or have access to because of action by—

(I) the individual or spouse;

(II) a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or

(III) a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

[...]

The Legislative History

5.
Congressional Research Service, Summary of HR 2138

I

103D CONGRESS
1ST SESSION

H. R. 2138

To provide for budget reconciliation with respect to part B of the medicare program, the medicaid program, and other health programs within the jurisdiction of the Committee on Energy and Commerce.

IN THE HOUSE OF REPRESENTATIVES

MAY 17, 1993

Mr. WAXMAN introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and Ways and Means

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A BILL

To provide for budget reconciliation with respect to part B of the medicare program, the medicaid program, and other health programs within the jurisdiction of the Committee on Energy and Commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—SHORT TITLE

SEC. 101. SHORT TITLE.

This Act may be cited as the "Medicare and Medicaid Budget Reconciliation Act of 1993".

Sec. 5081. Hospice information to home health beneficiaries.
Sec. 5082. Health maintenance organizations.
Sec. 5083. Miscellaneous and technical corrections.

CHAPTER 3—PROVISIONS RELATING TO MEDICARE SUPPLEMENTAL INSURANCE POLICIES

Sec. 5091. Standards for medicare supplemental insurance policies.

Subtitle B—Medicaid Program and Other Health Care Provisions

CHAPTER 1—MEDICAID PROGRAM

SUBCHAPTER A—PROGRAM SAVINGS PROVISIONS

PART I—REPEAL OF MANDATE

Sec. 5101. Personal care services furnished outside the home as optional benefit.

PART II—OUTPATIENT PRESCRIPTION DRUGS

Sec. 5106. Permitting prescription drug formularies under State plans.
Sec. 5107. Elimination of special exemption from prior authorization for new drugs.
Sec. 5108. Technical corrections relating to section 4401 of OBRA–1990.

PART III—RESTRICTIONS ON DIVESTITURE OF ASSETS AND ESTATE RECOVERY

Sec. 5111. Transfer of assets.
Sec. 5112. Medicaid estate recoveries.
Sec. 5113. Closing loophole permitting wealthy individuals to qualify for medicaid.

PART IV—IMPROVEMENT IN IDENTIFICATION AND COLLECTION OF THIRD PARTY PAYMENTS

Sec. 5116. Liability of third parties to pay for care and services.
Sec. 5117. Health Coverage Clearinghouse.

"TITLE XXI—HEALTH COVERAGE CLEARINGHOUSE

"Sec. 2101. Establishment of clearinghouse.
"Sec. 2102. Provision of information.
"Sec. 2103. Requirement that employers furnish information.
"Sec. 2104. Data bank.

Sec. 5118. Medical child support.

PART V—ASSURING PROPER PAYMENTS TO DISPROPORTIONATE SHARE HOSPITALS

Sec. 5121. Assuring proper payments to disproportionate share hospitals.

SUBCHAPTER B—MISCELLANEOUS PROVISIONS

PART I—ANTI-FRAUD AND ABUSE PROVISIONS

Sec. 5131. Application of medicare rules limiting certain physician referrals.

PART III—RESTRICTIONS ON DIVESTITURE OF ASSETS AND ESTATE RECOVERY

SEC. 5111. TRANSFER OF ASSETS.

(a) PERIOD OF INELIGIBILITY.—

(1) EXTENDING LOOK-BACK PERIOD TO 36 MONTHS.—Section 1917(c)(1) (42 U.S.C. 1396p(c)(1)) is amended by striking "30-month period" and inserting "36-month period".

(2) ELIMINATING 30-MONTH LIMIT ON PERIOD OF INELIGIBILITY.—The second sentence of such section is amended by striking "equal to" and all that follows and inserting the following: "equal to—

"(A) the total uncompensated value of the resources so transferred; divided by

"(B) the average monthly cost, to a private patient at the time of the application, of nursing facility services in the State or, at State option, in the community in which the individual is institutionalized.".

(3) CUMULATIVE PERIODS OF INELIGIBILITY IN THE CASE OF MULTIPLE TRANSFERS.—Such sentence is further amended by inserting "(or, in the case of a transfer which occurs during a period of ineligibility attributable to a previous transfer, the first month after the end of all periods of ineligibil-

ity attributable to any previous transfer)'' after ''shall begin with the month in which such resources were transferred''.

(b) CRITERIA FOR UNDUE HARDSHIP EXCEPTION.—Section 1917(c)(2)(D) (42 U.S.C. 1396p(c)(2)(D)) is amended to read as follows:

''(D) the State agency determines, under procedures established by the State (in accordance with standards specified by the Secretary) that the denial of eligibility would work an undue hardship (in accordance with criteria established by the Secretary).''.

(c) TREATMENT OF JOINTLY HELD ASSETS.—Section 1917(c) (42 U.S.C. 1936p(c)) is further amended by adding at the end the following new paragraph:

''(6) For purposes of this subsection, in the case of an asset held by an individual in common with another person or persons in a joint tenancy or a similar arrangement, the asset (or the affected portion thereof) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.''.

(d) MEDICAID QUALIFYING TRUSTS.—Section 1902(k) (42 U.S.C. 1396a(k)) is amended to read as follows:

"(k) TREATMENT OF TRUST AMOUNTS.—

"(1) IN GENERAL.—For purposes of determining an individual's eligibility for or amount of benefits under a State plan under this title, subject to paragraph (4), the following rules shall apply to a trust (which term includes, for purposes of this subsection, any similar legal instrument or device, such as an annuity) established by such individual:

"(A) REVOCABLE TRUSTS.—In the case of a revocable trust—

"(i) the corpus of the trust shall be considered resources available to the individual,

"(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

"(iii) any other payments from the trust shall be considered a transfer of assets by the individual subject to section 1917(c).

"(B) IRREVOCABLE TRUSTS WHICH MAY BENEFIT GRANTOR.—In the case of an irrev-

ocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual—

"(i) the corpus of the trust (or that portion of the corpus from which, or from the increase whereof, payment to the individual could be made) shall be considered resources available to the individual, and payments from that portion of the corpus (or increase)—

"(I) to or for the benefit of the individual, shall be considered income of the individual, and

"(II) for any other purpose, shall be considered a transfer of assets by the individual subject to the provisions of section 1917(c); and

"(ii) any portion of the trust from which (or from the income whereof) no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed), a transfer of assets by the individual subject to section

1917(c), and payments from such portion of the trust after such date shall be disregarded.

"(C) IRREVOCABLE TRUSTS WHICH CANNOT BENEFIT GRANTOR.—In the case of an irrevocable trust, if no payment may be made from the trust under any circumstances to or for the benefit of the individual—

"(i) the corpus of the trust shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed), a transfer of assets subject to section 1917(c), and

"(ii) payments from the trust after the date specified in clause (i) shall be disregarded.

"(2) DETERMINATION OF GRANTOR.—

"(A) TREATMENT OF ACTS BY INDIVIDUAL AND OTHERS.—For purposes of this subsection, an individual shall be considered to have established a trust if—

"(i) the individual (or the individual's spouse), or a person (including a court or administrative body) with legal authority

to act in place of or on behalf of such individual (or spouse), or any person (including any court or administrative body) acting at the direction or upon the request of such individual (or spouse), established (other than by will) such a trust, and

"(ii) assets of the individual (as defined in subparagraph (B)) were used to form all or part of the corpus of such trust.

"(B) ASSETS.—For purposes of this paragraph, assets of an individual include all income and resources of the individual and of the individual's spouse, including any income or resources which the individual (or spouse) is entitled to but does not receive because of action by the individual (or spouse), by a person (including a court or administrative body) with legal authority to act in place of or on behalf of such individual (or spouse), or by any person (including any court or administrative body) acting at the direction or upon the request of such individual (or spouse).

"(C) TRUSTS CONTAINING ASSETS OF MORE THAN ONE INDIVIDUAL.—In the case of

a trust whose corpus includes assets of an individual (as determined pursuant to subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

"(3) APPLICATION; RELATION TO OTHER PROVISIONS.—Subject to paragraph (4), this subsection shall apply without regard to—

"(A) the purposes for which the trust is established,

"(B) whether the trustees have or exercise any discretion under the trust,

"(C) any restrictions on when or whether distributions may be made from the trust, or

"(D) any restrictions on the use of distributions from the trust.

"(4) EXCEPTIONS AND HARDSHIP WAIVER.—

"(A) EXCEPTION FOR CERTAIN TRUSTS.—This subsection shall not apply to any of the following trusts:

"(i) A trust established for the benefit of a disabled individual (as determined under section 1614(a)(3)) by a parent,

grandparent, or other representative payee of the individual.

"(ii) A trust established in a State for the benefit of an individual if—

"(I) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

"(II) the State will receive any amounts remaining in the trust upon the death of the individual, and

"(III) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V), but does not make such assistance available to any group of individuals under section 1902(a)(10)(C).

"(B) SPECIAL TREATMENT OF ANNUITIES.—In this subsection, the term 'trust' includes an annuity only to such extent and in such manner as the Secretary specifies.

"(C) HARDSHIP WAIVER.—The State agency shall establish procedures (in accordance with standards specified by the Secretary)

under which the agency waives the application of this subsection with respect to an individual if the individual establishes (under criteria established by the Secretary) that such application would work an undue hardship on the individual.''.

(e) EFFECTIVE DATE.—(1) The amendments made by this section shall apply, except as provided in this subsection, to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

(2) The amendments made by this section shall not apply—

(A) to medical assistance provided for services furnished before October 1, 1993,

(B) with respect to resources disposed of before May 11, 1993,

(C) with respect to trusts established before May 11, 1993, or

(D) with respect to inter-spousal transfers.

SEC. 5112. MEDICAID ESTATE RECOVERIES.

(a) REQUIRING ESTABLISHMENT OF ESTATE RECOVERY PROGRAMS.—

(1) IN GENERAL.—Section 1902(a)(51) (42 U.S.C. 1396a(a)(51)) is amended by striking "and (B)" and inserting "(B) provide for an estate recovery program that meets the requirements of section 1917(b)(1), and (C)".

(2) REQUIREMENTS FOR ESTATE RECOVERY PROGRAMS.—Section 1917(b) (42 U.S.C. 1396p(b)) is amended—

(A) in paragraph (1)—

(i) by striking "(b)(1)" and inserting "(2)", and

(ii) by striking "(a)(1)(B)" and inserting "(a)(1)(B)(i)";

(B) in paragraph (2), by striking "(2) Any adjustment or recovery under" and inserting "(3) Any adjustment or recovery under an estate recovery program under"; and

(C) by inserting before paragraph (2), as designated by subparagraph (A), the following:

"(b)(1) For purposes of section 1902(a)(51)(B), the requirements for an estate recovery program of a State are as follows:

"(A) The program provides for identifying and tracking (and, at the option of the State, preserving) resources (whether excluded or not) of individuals

who are furnished any of the following long-term care services for which medical assistance is provided under this title:

"(i) Nursing facility services.

"(ii) Home and community-based services (as defined in section 1915(d)(5)(C)(i)).

"(iii) Services described in section 1905(a)(14) (relating to services in an institution for mental diseases).

"(iv) Home and community care provided under section 1929.

"(v) Community supported living arrangements services provided under section 1930.

"(B) The program provides for promptly ascertaining—

"(i) when such an individual dies;

"(ii) in the case of such an individual who was married at the time of death, when the surviving spouse dies; and

"(iii) at the option of the State, cases in which adjustment or recovery may not be made at the time of death because of the application of paragraph (3)(A) or paragraph (3)(B).

"(C)(i) The program provides for the collection consistent with paragraph (3) of an amount (not to exceed the amount described in clause (ii)) from—

"(I) the estate of the individual;

"(II) in the case of an individual described in subparagraph (B)(ii), from the estate of the surviving spouse; or

"(III) at the option of the State, in a case described in subparagraph (B)(iii), from the appropriate person.

"(ii) The amount described in this clause is the amount of medical assistance correctly paid under this title for long-term care services described in subparagraph (A) furnished on behalf of the individual.".

(b) HARDSHIP WAIVER.—Section 1917(b) (42 U.S.C. 1396p(b)) is further amended by adding at the end the following new paragraph:

"(4) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection if such application would work an undue hardship (in accordance with criteria established by the Secretary).".

(c) DEFINITION OF ESTATE.—Section 1917(b) (42 U.S.C. 1396(b)) is further amended by adding at the end the following new paragraph:

"(5) For purposes of this section, the term 'estate', with respect to a deceased individual, includes all real and personal property and other assets in which the individual had any legally cognizable title or interest at the time of his death, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, survivorship, life estate, living trust, or other arrangement.".

(d) EFFECTIVE DATE.—

(1)(A) The amendments made by subsections (a) and (b) apply (except as provided under subparagraph (B)) to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations or standards to carry out such amendments have been promulgated by such date.

(B) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to

meet the additional requirements imposed by the amendments made by subsections (a) and (b), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

SEC. 5113. CLOSING LOOPHOLE PERMITTING WEALTHY INDIVIDUALS TO QUALIFY FOR MEDICAID.

(a) IN GENERAL.—Section 1902(r)(2) (42 U.S.C. 1396a(r)(2)) is amended by adding at the end the following:

"(C)(i) Notwithstanding subparagraph (A), except as provided in clause (ii), a State plan may not provide pursuant to this paragraph for disregarding any assets—

6.

H.R. 2138, Table of Contents and Section 5111 (as proposed)

CONGRESS.GOV

H.R.2138 - Medicare and Medicaid Budget Reconciliation Act of 1993

103rd Congress (1993-1994)

Sponsor: Rep. Waxman, Henry A. [D-CA-29] (Introduced 05/17/1993)

Committees: House - Energy and Commerce; Ways and Means

Latest Action: 08/10/1993 For Further Action See H.R.2264 (All Actions)

Tracker: Introduced

Summary (1) Text (1) Actions (5) Titles (2) Amendments (0) Cosponsors (0) Committees (2) Related Bills (1)

There is one summary for H.R.2138. Bill summaries are authored by CRS.

Shown Here:
Introduced in House (05/17/1993)

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of 1993

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Medicaid, and Other Health Programs

Subtitle A: Medicare Program

Subtitle B: Medicaid Program and Other Care

Provisions

Title I: Short Title - Medicare and Medicaid Budget Reconciliation Act of 1993

Title II: Table of Contents - (Sec. 201) Sets forth the table of contents of this Act.

Title III: References to Omnibus Budget Reconciliation Act of 1993 - (Sec. 301) Declares that any references to the Omnibus Budget Reconciliation Act of 1993 shall be references to this Act.

Title IV: Other References in Act- (Sec. 401) Declares that, except as otherwise specifically provided, whenever in this Act an amendment is expressed in terms of an amendment to or repeal of a section or other provision, it shall be considered a reference to the Social Security Act (SSA).

States that, in this Act, the terms "OBRA-1986," "OBRA-1987," "OBRA-1989", and "OBRA-1990" refer to the Omnibus Budget Reconciliation Act of 1986 (Public Law 99-509), the Omnibus Budget Reconciliation Act of 1987 (Public Law 100-203), the Omnibus Budget Reconciliation Act of 1989 (Public Law 101-239), and the Omnibus Budget Reconciliation Act of 1990 (Public Law 101-508), respectively.

Title V: Reconciliation Provisions Relating to Medicare, Medicaid, and Other Health Programs - Subtitle A: Medicare Program - Chapter 1: Provisions Relating to Part B - Subchapter A: Physicians' Services - (Sec. 5001) Amends part B (Supplementary Medical Insurance) of SSA Title XVIII (Medicare) to reduce the default update for physicians' services (except primary care services) in 1994.

(Sec. 5002) Revises certain formulae to increase: (1) the Medicare Volume Performance Standards (MVPS) performance standard factor; and (2) the maximum reduction permitted in the annual default update to the Medicare Fee Schedule.

(Sec. 5003) Classifies primary care services as a separate category of services for purposes of setting volume performance standards and annual updates.

(Sec. 5004) Provides for a phased-in reduction in practice cost relative value units for certain services.

(Sec. 5005) Provides for phased-in limitations on payment for anesthesia services where concurrent services are provided under the supervision of an anesthesiologist.

(Sec. 5006) Requires that payments for anesthesia services be based on actual time.

(Sec. 5007) Requires separate payment for the interpretation of electrocardiograms.

(Sec. 5008) Repeals the requirement that payments for new physicians and practitioners be reduced during their first four years of practice.

(Sec. 5009) Requires: (1) consultation with representatives of physicians in the review of geographic adjustment factors for medicare physicians' services; and (2) use of the most recent data in determining such adjustment.

(Sec. 5010) Revises extra-billing limits with respect to Medicare beneficiaries overcharged by nonparticipating physicians or suppliers that do not accept payment on an assignment-related basis.

(Sec. 5011) Directs the Secretary of Health and Human Services (HHS) to develop relative values for use in payment of pediatric services.

(Sec. 5012) Revises the coverage of antigens under the Medicare Fee Schedule.

(Sec. 5013) Prohibits fee charges for certain claims administration functions. Revises requirements for permissible substitute billing arrangements.

Subchapter B: Outpatient Hospital Services and Ambulatory Surgical Services - (Secs. 5021 and 5022) Extends: (1) the ten percent reduction in payments for capital-related costs of outpatient hospital services; and (2) the current 5.8 percent reduction in payments for other costs of outpatient hospital services.

(Sec. 5023) Provides for a one-year freeze in ambulatory surgery rates.

(Sec. 5024) Revises the definition of eye or eye and ear hospitals.

(Sec. 5025) Extends the cap on payments for intraocular lenses.

Subchapter C: Durable Medical Equipment - (Sec. 5031) Revises the payment rules for durable medical equipment (DME), including prosthetic and orthotic items, by substituting the national median for the national weighted average.

(Sec. 5032) Provides for a one-year freeze on payments for parenteral and enteral nutrients, supplies, and equipment.

(Sec. 5033) Revises the categorization of nebulizers and aspirators under the DME fee schedules.

(Sec. 5034) Establishes a certification program for DME suppliers. Prohibits DME suppliers for distributing, for commercial purposes, completed or partially completed certificates of medical necessity to physicians or individuals entitled to benefits.

(Sec. 5035) Requires DME suppliers to use the part B carrier for the area in which the Medicare beneficiary lives. Prohibits carrier shopping.

(Sec. 5036) Prohibits unsolicited telephone contacts from DME suppliers to Medicare beneficiaries.

(Sec. 5037) Prohibits kickback arrangements between DME suppliers and entities that refer patients for covered items.

(Sec. 5038) Revises the treatment of beneficiary liability for noncovered DME services.

(Sec. 5039) Authorizes the Secretary of HHS to adjust DME payments in accordance with a policy of inherent reasonableness.

(Sec. 5040) Sets forth a formula for lump-sum payments for surgical dressings.

(Sec. 5041) Provides for a reduction in payments for TENS devices.

Subchapter D: Part B Premium - (Sec. 5051) Extends the authority for the determination of the part B premium.

Subchapter E: Other Provisions - (Sec. 5061) Reduces to the 76th percentile the national limitation of fee schedules for clinical diagnostic laboratory tests. Limits the annual update to fees to two percent.

(Sec. 5062) Includes inpatient hospital services and diagnostic and therapeutic X-ray services among those covered by rural health clinics and federally qualified health centers.

(Sec. 5063) Applies specified mammography certification requirements to Medicare standards for screening mammography facilities.

(Sec. 5064 and 5066) Extends the Alzheimer's disease demonstration program and certain municipal health service demonstration projects.

(Sec. 5065) Provides Medicare coverage for certain oral cancer drugs.

(Sec. 5067) Provides for treatment of certain Indian health programs and facilities as Federally-qualified health centers.

(Sec. 5068) Revises the ceilings for payment of "clean claims" under Medicare and the circumstances under which interest payments may be made on delayed claims.

(Sec. 5069) Provides for Medicare coverage of certified nurse-midwife services performed outside the maternity cycle.

(Sec. 5069A) Increases the annual cap on the amount of Medicare payments for outpatient physical therapy and occupational therapy services. Requires the Physician Payment Review Commission (PPRC) to study and report to specified congressional committees on the appropriateness of continuing an annual limitation on the amount of such payments.

Chapter 2: Provisions Relating to Parts A and B - (Sec. 5071) Repeals the requirement for a special overhead add-on for the overhead of hospital-based home health agencies.

(Sec. 5072) Directs the Secretary of HHS to study the methodology used to determine payments to hospitals under the Medicare program for the costs of medical residency training, including analysis of the causes of variation among such programs in the per-resident costs of direct graduate medical education, especially the support for them from non-hospital sources.

(Sec. 5073) Revises specified aspects of the Medicare-as-secondary-payer program.

(Sec. 5074) Extends the ban on physician self-referrals to additional designated health services, including home infusion therapy services. Revises specified exceptions to such ban.

(Sec. 5075) Reduces Medicare payments for erythropoietin.

(Sec. 5076) Requires any hospital with organ donors to make an agreement only with the designated organ procurement organization for the geographic area in which the hospital is located.

(Sec. 5077) Amends OBRA-1986 to extend the health maintenance organization (HMO) waiver for the Watts Health Foundation.

(Sec. 5078) Directs the Secretary of HHS to undertake certain outreach activities to increase participation in the Qualified Medicare Beneficiary program.

(Sec. 5079) Amends OBRA-1987 to extend and expand the social health maintenance organization demonstration program.

(Sec. 5080) Amends SSA to repeal the Peer Review Organization (PRO) precertification (second opinion) requirement for certain surgical procedures.

(Sec. 5081) Grants home health agency beneficiaries the right to be informed about Medicare hospice benefits.

(Sec. 5082) Provides, with respect to health maintenance organizations, for: (1) adjustments in Medicare capitation payments to account for regional variations in the application of secondary payor requirements; and (2) revision of the payment methodology for risk contractors.

Chapter 3: Provisions Relating to Medicare Supplemental Insurance Policies - (Sec. 5091) Revises OBRA-1990 with respect to standards for Medicare supplemental insurance policies.

Subtitle B: Medicaid Program and Other Health Care Provisions - Chapter 1: Medicaid Program - Subchapter A: Program Savings Provisions - Part I: Repeal of Mandate - (Sec. 5101) Amends SSA Title XIX (Medicaid) to: (1) repeal the mandate for inclusion of certain personal care services among home health care services in State medical assistance programs; and (2) allow States to provide an optional benefit for personal care services furnished outside the home.

Part II: Outpatient Prescription Drugs - (Sec. 5106) Authorizes States to establish formularies limiting the coverage of prescription drugs under their Medicaid programs.

(Sec. 5107) Repeals the prohibition on the imposition of prior authorization controls on new drugs for the first six months after Food and Drug Administration (FDA) approval.

Part III: Restrictions on Divestiture of Assets and Estate Recovery - (Sec. 5111) Revises the restrictions on the transfer of assets by an individual subsequently applying for Medicaid benefits as an institutionalized individual. Extends the look-back period and repeals the limit on the period of ineligibility because of prohibited transfers, providing for cumulative periods for multiple transfers. Provides for a waiver of eligibility penalties because of undue hardship, and exempts certain trusts for the benefit of disabled individuals from the transfer rules.

(Sec. 5112) Requires States to establish a program for identifying and recovering Medicaid benefits from estates of deceased beneficiaries who have received nursing home or other long-term care services.

(Sec. 5113) Prohibits a State plan from disregarding any assets: (1) to the extent that payments are made under a long-term care insurance policy; or (2) because an individual has received (or is entitled to receive) benefits for a specified period of time under such a policy.

Part IV: Improvement in Identification and Collection of Third Party Payments - (Sec. 5116) Requires States to prohibit insurers, HMOs, and self-funded plans (under the Employee Retirement Income Security Act of 1974 (ERISA)) from denying payment for health services to insured individuals who are also Medicaid beneficiaries.

(Sec. 5117) Directs the Secretary of HHS to establish a Health Coverage Clearinghouse to identify insurers, HMOs, ERISA plans, and other third parties which may be liable for payment for services to Medicaid or Medicare beneficiaries. Requires employers to include group health coverage information on employees' W-2 forms.

(Sec. 5118) Requires States to have in effect certain medical child support laws, including a requirement that an insurer (including an HMO or ERISA plan) enroll under family health coverage any child whose parent (otherwise eligible for such coverage) is required by court or administrative order to provide the child with medical support.

Part V: Assuring Proper Payments to Disproportionate Share Hospitals - (Sec. 5121) Prohibits States from designating a hospital as a Medicaid disproportionate share hospital unless at least one percent of its inpatient days were attributable to Medicaid patients. Limits payment adjustments to State or locally-owned or operated hospitals to the costs incurred in providing services to Medicaid-eligible patients and uninsured (indigent without health care coverage) patients, less certain payments received.

Subchapter B: Miscellaneous Provisions- Part I: Anti-fraud and Abuse Provisions - (Sec. 5131) Revises the Medicare rules limiting certain physician referrals for clinical laboratory services.

(Sec. 5132) Provides for intermediate sanctions for kickback violations.

(Sec. 5133) Requires States to expend a certain minimum amount of funds annually for Medicaid fraud control units.

Part II: Managed Care Provisions - (Sec. 5135) Sets forth with respect to Medicaid managed care organizations: (1) prohibitions against affiliations with individuals debarred by Federal agencies; (2) requirements for State conflict-of-interest safeguards in Medicaid risk contracting; (3) financial information disclosure requirements; (4) marketing fraud prohibitions; (5) adequate equity requirements for for-profit entities; (6) requirements for adequate provision against risk of insolvency; and (7) net earnings and additional benefits reporting requirements. Requires the Secretary of HHS to report to the Congress on the earnings of organizations with contracts to receive Medicaid payments on a prepaid capitation or any other risk basis.

(Sec. 5136) Revises the treatment of HMO enrollees in computing the Medicaid inpatient utilization rate in qualifying hospitals as disproportionate share hospitals.

(Secs. 5137 and 5138) Extends: (1) the period of applicability of the enrollment mix requirement to certain HMOs providing services under the Dayton Area Health Plan; and (2) the Medicaid waiver for the Tennessee Primary Care Network.

(Sec. 5139) Waives application of the Medicaid enrollment mix requirement to the District of Columbia Chartered Health Plan, Inc.

(Sec. 5140) Extends the Minnesota Prepaid Medicaid Demonstration Project.

Part III: Emergency Services to Undocumented Aliens - (Sec. 5141 and 5142) Increases the Federal financial participation for emergency medical assistance to undocumented aliens.

(Sec. 5142) Limits Federal Medicaid matching payments to bona fide emergency services for undocumented aliens.

Part IV: Miscellaneous Provisions - (Sec. 5144) Increases the limit on Federal Medicaid matching payments to Puerto Rico and other territories.

(Sec. 5145) Sets forth criteria for Departmental Appeals Board determinations of whether disallowances of Federal Medicaid matching payments to States should be reduced.

(Sec. 5146) Renews the unfunded demonstration project for low-income pregnant women and children.

(Sec. 5147) Provides for optional Medicaid coverage of TB-related services for certain TB-infected individuals.

(Sec. 5148) Specifies the application of mammography certification requirements under the Medicaid program.

(Sec. 5149) Repeals the termination date on the extension of eligibility for working families.

(Sec. 5150) Extends the moratorium on the treatment of certain facilities as institutions for mental diseases.

(Sec. 5150A) Deems as a federally-qualified health center any entity treated as a comprehensive federally funded health center as of January 1, 1990.

(Sec. 5150B) Revises specified nursing facility requirements.

Subchapter C: Miscellaneous and Technical Corrections Relating to OBRA-1990 - (Secs. 5151-5174) Makes technical and conforming amendments to specified sections of OBRA-1990.

Chapter 2: Universal Access to Childhood Immunizations - (Sec. 5181) Amends the Public Health Service Act to establish entitlement and monitoring programs with respect to childhood immunizations.

Directs the Secretary of HHS, acting through the Director of the Centers for Disease Control and Prevention (CDC), to provide for the purchase and delivery on behalf of any applicant State of sufficient quantities of pediatric vaccines to immunize each eligible child in the State who is a Medicaid beneficiary or is uninsured.

Entitles: (1) each State to receive from the Secretary sufficient free vaccine to provide to all eligible children in the State; (2) each health care provider to receive from the State sufficient free vaccine to provide to all eligible children in his or her practice, and (3) each eligible child to receive free vaccine from any willing provider licensed to administer immunizations in the State. Requires participant States to agree to such entitlements. Authorizes eligible children to enforce the rights of the provider if the State fails to carry out its obligation.

Requires States to make health care provider participation voluntary only. Prohibits providers from charging for free vaccine. Allows charges for immunization itself.

Directs the Secretary to publish in the Federal Register criteria for the delivery on behalf of the States of federally-supplied pediatric vaccines to program-registered providers in the State.

Sets forth general State compliance requirements.

Allows States to purchase pediatric vaccine for the immunization of additional categories of otherwise ineligible children.

Requires the Secretary to negotiate with manufacturers of pediatric vaccines for a reasonable purchase price, which would also be available to States that wished to purchase vaccine for otherwise ineligible children.

Requires the Secretary to enter into multi-source contracts with multiple manufacturers of vaccine. Allows such contracts to be for more than one year.

Requires the Secretary to establish: (1) a list of pediatric vaccines recommended for administration to all children for immunization (subject to any established contraindications); and (2) a schedule of nonbinding recommendations for administration of such immunizations.

Establishes the National Childhood Immunization Trust Fund for the immunization program.

Directs the Secretary, acting through the CDC Director, to make formula grants to States annually to establish and maintain a national system, composed of State registries, for monitoring the immunization status of children. Prescribes kinds of data to be collected. Authorizes appropriations.

Authorizes the Secretary, acting through the CDC Director, to make grants to States for carrying out specified activities with respect to achieving certain objectives established by the Secretary for the year 2000 for the immunization status of children in the United States. Authorizes appropriations.

(Sec. 5182) Amends OBRA-1989 and the Public Health Service Act with respect to the National Vaccine Injury Compensation Program.

(Sec. 5183) Amends SSA title XIX (Medicaid) to provide for: (1) immunization outreach through the early and periodic screening, diagnostic, and treatment (EPSDT) services program; (2) coordination with the maternal and child health block grant programs and WIC (Women, Infants, and Children) programs; (3) coverage of public housing health centers as federally-qualified health centers; (4) adequate payment rates for vaccine administration to children; (5) denial of Federal financial participation for administration of single-antigen vaccines if combined-antigen vaccines are medically appropriate; and (6) Medicaid managed care plan compliance with immunization and other EPSDT requirements.

(Sec. 5184) Authorizes a State plan to pay a vaccine manufacturer directly under a voucher replacement program following certain guidelines.

(Sec. 5185) Amends the Public Health Service Act to authorize the Secretary to make operating grants for up to 21 demonstration projects to provide specified Healthy Start for Infants services in order to meet year 2000 health status objectives for the U.S. population. Prescribes project requirements. Authorizes appropriations.

(Sec. 5186) Increases the authorization of appropriations for the Maternal and Child Health Services Block Grant Program.

7.

H.R. 2264, Table of Contents and Section 5111 (as passed by House)

103D CONGRESS
1ST SESSION

H. R. 2264

AN ACT

To provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994.

bus Budget Reconciliation Act of 1987 (Public Law 100–203), the Omnibus Budget Reconciliation Act of 1989 (Public Law 101–239), and the Omnibus Budget Reconciliation Act of 1990 (Public Law 101–508), respectively.

(c) TABLE OF CONTENTS OF SUBTITLE.—The table of contents of this subtitle is as follows:

Subtitle B—Medicaid Program and Other Health Care Provisions

Sec. 5100. References in subtitle; table of contents of subtitle.

CHAPTER 1—MEDICAID PROGRAM

SUBCHAPTER A—PROGRAM SAVINGS PROVISIONS

PART I—REPEAL OF MANDATE

Sec. 5101. Personal care services furnished outside the home as optional benefit.

PART II—OUTPATIENT PRESCRIPTION DRUGS

Sec. 5106. Permitting prescription drug formularies under State plans.
Sec. 5107. Elimination of special exemption from prior authorization for new drugs.
Sec. 5108. Technical corrections relating to section 4401 of OBRA–1990.

PART III—RESTRICTIONS ON DIVESTITURE OF ASSETS AND ESTATE RECOVERY

Sec. 5111. Transfer of assets.
Sec. 5112. Medicaid estate recoveries.
Sec. 5113. Closing loophole permitting wealthy individuals to qualify for medicaid.

PART IV—IMPROVEMENT IN IDENTIFICATION AND COLLECTION OF THIRD PARTY PAYMENTS

Sec. 5116. Liability of third parties to pay for care and services.
Sec. 5117. Health Coverage Clearinghouse.

"TITLE XXI—HEALTH COVERAGE CLEARINGHOUSE

"Sec. 2101. Establishment of clearinghouse.
"Sec. 2102. Provision of information.
"Sec. 2103. Requirement that employers furnish information.
"Sec. 2104. Data bank.".

Sec. 5118. Medical child support.

(ii) by striking "the Committees on Aging of the Senate and the House of Representatives" and inserting "the Committee on Aging of the Senate";

(9) in paragraph (4)(A), by striking "each" and by striking the semicolon and inserting a comma; and

(10) by striking paragraphs (5) and (6).

PART III—RESTRICTIONS ON DIVESTITURE OF ASSETS AND ESTATE RECOVERY

SEC. 5111. TRANSFER OF ASSETS.

(a) PERIOD OF INELIGIBILITY.—

(1) EXTENDING LOOK-BACK PERIOD TO 36 MONTHS.—Section 1917(c)(1) (42 U.S.C. 1396p(c)(1)) is amended by striking "30-month period" and inserting "36-month period".

(2) ELIMINATING 30-MONTH LIMIT ON PERIOD OF INELIGIBILITY.—The second sentence of such section is amended by striking "equal to" and all that follows and inserting the following: "equal to—

"(A) the total uncompensated value of the resources so transferred; divided by

"(B) the average monthly cost, to a private patient at the time of the application, of nursing facility services in the State or, at State option, in the

community in which the individual is institutionalized.".

(3) CUMULATIVE PERIODS OF INELIGIBILITY IN THE CASE OF MULTIPLE TRANSFERS.—Such sentence is further amended by inserting "(or, in the case of a transfer which occurs during a period of ineligibility attributable to a previous transfer, the first month after the end of all periods of ineligibility attributable to any previous transfer)" after "shall begin with the month in which such resources were transferred".

(b) CRITERIA FOR UNDUE HARDSHIP EXCEPTION.—Section 1917(c)(2)(D) (42 U.S.C. 1396p(c)(2)(D)) is amended to read as follows:

"(D) the State agency determines, under procedures established by the State (in accordance with standards specified by the Secretary) that the denial of eligibility would work an undue hardship (in accordance with criteria established by the Secretary).".

(c) TREATMENT OF JOINTLY HELD ASSETS.—Section 1917(c) (42 U.S.C. 1936p(c)) is further amended by adding at the end the following new paragraph:

"(6) For purposes of this subsection, in the case of an asset held by an individual in common with another

person or persons in a joint tenancy or a similar arrangement, the asset (or the affected portion thereof) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.".

(d) MEDICAID QUALIFYING TRUSTS.—Section 1902(k) (42 U.S.C. 1396a(k)) is amended to read as follows:

"(k) TREATMENT OF TRUST AMOUNTS.—

"(1) IN GENERAL.—For purposes of determining an individual's eligibility for or amount of benefits under a State plan under this title, subject to paragraph (4), the following rules shall apply to a trust (which term includes, for purposes of this subsection, any similar legal instrument or device, such as an annuity) established by such individual:

"(A) REVOCABLE TRUSTS.—In the case of a revocable trust—

"(i) the corpus of the trust shall be considered resources available to the individual,

"(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

"(iii) any other payments from the trust shall be considered a transfer of assets by the individual subject to section 1917(c).

"(B) IRREVOCABLE TRUSTS WHICH MAY BENEFIT GRANTOR.—In the case of an irrevocable trust, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual—

"(i) the corpus of the trust (or that portion of the corpus from which, or from the increase whereof, payment to the individual could be made) shall be considered resources available to the individual, and payments from that portion of the corpus (or increase)—

"(I) to or for the benefit of the individual, shall be considered income of the individual, and

"(II) for any other purpose, shall be considered a transfer of assets by the individual subject to the provisions of section 1917(c); and

"(ii) any portion of the trust from which (or from the income whereof) no

payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed), a transfer of assets by the individual subject to section 1917(c), and payments from such portion of the trust after such date shall be disregarded.

"(C) IRREVOCABLE TRUSTS WHICH CANNOT BENEFIT GRANTOR.—In the case of an irrevocable trust, if no payment may be made from the trust under any circumstances to or for the benefit of the individual—

"(i) the corpus of the trust shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed), a transfer of assets subject to section 1917(c), and

"(ii) payments from the trust after the date specified in clause (i) shall be disregarded.

"(2) DETERMINATION OF GRANTOR.—

"(A) TREATMENT OF ACTS BY INDIVIDUAL AND OTHERS.—For purposes of this subsection, an individual shall be considered to have established a trust if—

"(i) the individual (or the individual's spouse), or a person (including a court or administrative body) with legal authority to act in place of or on behalf of such individual (or spouse), or any person (including any court or administrative body) acting at the direction or upon the request of such individual (or spouse), established (other than by will) such a trust, and

"(ii) assets of the individual (as defined in subparagraph (B)) were used to form all or part of the corpus of such trust.

"(B) ASSETS.—For purposes of this paragraph, assets of an individual include all income and resources of the individual and of the individual's spouse, including any income or resources which the individual (or spouse) is entitled to but does not receive because of action by the individual (or spouse), by a person (including a court or administrative body) with legal

authority to act in place of or on behalf of such individual (or spouse), or by any person (including any court or administrative body) acting at the direction or upon the request of such individual (or spouse).

"(C) TRUSTS CONTAINING ASSETS OF MORE THAN ONE INDIVIDUAL.—In the case of a trust whose corpus includes assets of an individual (as determined pursuant to subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

"(3) APPLICATION; RELATION TO OTHER PROVISIONS.—Subject to paragraph (4), this subsection shall apply without regard to—

"(A) the purposes for which the trust is established,

"(B) whether the trustees have or exercise any discretion under the trust,

"(C) any restrictions on when or whether distributions may be made from the trust, or

"(D) any restrictions on the use of distributions from the trust.

"(4) EXCEPTIONS AND HARDSHIP WAIVER.—

"(A) EXCEPTION FOR CERTAIN TRUSTS.—This subsection shall not apply to any of the following trusts:

"(i) A trust established for the benefit of a disabled individual (as determined under section 1614(a)(3)) by a parent, grandparent, or other representative payee of the individual.

"(ii) A trust established in a State for the benefit of an individual if—

"(I) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

"(II) the State will receive any amounts remaining in the trust upon the death of the individual, and

"(III) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V), but does not make such assistance available to any group of individuals under section 1902(a)(10)(C).

"(B) SPECIAL TREATMENT OF ANNUITIES.—In this subsection, the term 'trust' includes an annuity only to such extent and in such manner as the Secretary specifies.

"(C) HARDSHIP WAIVER.—The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency waives the application of this subsection with respect to an individual if the individual establishes (under criteria established by the Secretary) that such application would work an undue hardship on the individual.".

(e) EFFECTIVE DATE.—(1) The amendments made by this section shall apply, except as provided in this subsection, to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

(2) The amendments made by this section shall not apply—

(A) to medical assistance provided for services furnished before October 1, 1993,

(B) with respect to resources disposed of before May 11, 1993,

(C) with respect to trusts established before May 11, 1993, or

(D) with respect to inter-spousal transfers.

SEC. 5112. MEDICAID ESTATE RECOVERIES.

(a) REQUIRING ESTABLISHMENT OF ESTATE RECOVERY PROGRAMS.—

(1) IN GENERAL.—Section 1902(a)(51) (42 U.S.C. 1396a(a)(51)) is amended by striking "and (B)" and inserting "(B) provide for an estate recovery program that meets the requirements of section 1917(b)(1), and (C)".

(2) REQUIREMENTS FOR ESTATE RECOVERY PROGRAMS.—Section 1917(b) (42 U.S.C. 1396p(b)) is amended—

(A) in paragraph (1)—

(i) by striking "(b)(1)" and inserting "(2)", and

(ii) by striking "(a)(1)(B)" and inserting "(a)(1)(B)(i)";

(B) in paragraph (2), by striking "(2) Any adjustment or recovery under" and inserting "(3) Any adjustment or recovery under an estate recovery program under"; and

8.

H.R. 2264 Table of Contents and Sections 7422 and 7423 (as passed by Senate)

103D CONGRESS
1ST SESSION

H. R. 2264

AMENDMENT

June 29 (legislative day, June 22), 1993

Ordered to be printed as passed

SUBPART E—OTHER PROVISIONS

Sec. 7261. Payments for clinical diagnostic laboratory tests.

PART III—PROVISIONS RELATING TO PARTS A AND B

Sec. 7301. Payments for direct graduate medical education costs.
Sec. 7302. Revision of home health agency cost limits.
Sec. 7303. Medicare as secondary payer.
Sec. 7304. Extension of self-referral ban to additional specified services.
Sec. 7305. Reduction in payment for erythropoietin.

Subtitle B—Medicaid Program

PART I—PROGRAM SAVINGS PROVISIONS

SUBPART A—REPEAL OF MANDATE

Sec. 7401. Personal care services furnished outside the home as optional benefit.

SUBPART B—OUTPATIENT PRESCRIPTION DRUGS

Sec. 7411. Permitting prescription drug formularies under State plans.
Sec. 7412. Elimination of special exemption from prior authorization for new drugs.
Sec. 7413. Modifications to drug rebate program.

SUBPART C—RESTRICTIONS ON DIVESTITURE OF ASSETS AND ESTATE RECOVERY

Sec. 7421. Medicaid estate recoveries.
Sec. 7422. Transfers of assets.
Sec. 7423. Treatment of certain trusts.

SUBPART D—IMPROVEMENT IN IDENTIFICATION AND COLLECTION OF THIRD PARTY PAYMENTS

Sec. 7431. Liability of third parties to pay for care and services.
Sec. 7432. Medical child support.
Sec. 7433. Offset of payment obligations relating to medical assistance against overpayments of State and Federal income taxes.

SUBPART E—ASSURING PROPER PAYMENTS TO DISPROPORTIONATE SHARE HOSPITALS

Sec. 7441. Assuring proper payments to disproportionate share hospitals.

SUBPART F—ANTI-FRAUD AND ABUSE PROVISIONS

Sec. 7451. Application of medicare rules limiting certain physician referrals.

PART II—OTHER MEDICAID PROVISIONS

Sec. 7501. Extension of demonstration project on the effect of allowing States to extend medicaid coverage to certain low-income families.

Subtitle C—Income Security Programs

Sec. 7601. Matching of State administrative costs.
Sec. 7602. State paternity establishment programs.
Sec. 7603. Fees for Federal administration of State supplementary payments.

section if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.".

(c) DEFINITION OF ESTATE.—Section 1917(b) (42 U.S.C. 1396p(b)), as amended by subsection (b), is amended by adding at the end the following new paragraph:

"(4) DEFINITION.—For purposes of this section, the term 'estate', with respect to a deceased individual—

"(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State law with respect to inheritance, and

"(B) may include, at the option of the State, any or all other real or personal property or other assets in which the individual had any legal title or interest at the time of death, including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.".

(d) EFFECTIVE DATE.—(1)(A) Except as provided in subparagraph (B), the amendments made by this section shall apply to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993.

(B) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirements imposed by the amendments made by this section, the State plan shall not be regarded as failing to comply with the requirements imposed by such amendments solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the preceding sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(2) The amendments made by this section shall not apply to individuals who died before October 1, 1993.

SEC. 7422. TRANSFERS OF ASSETS.

(a) MANDATORY AND OPTIONAL PERIODS OF INELIGIBILITY.—Section 1917(c) (42 U.S.C. 1396p(c)) is amended—

(1) by amending paragraph (1) to read as follows:

"(1)(A) In order to meet the requirements of this subsection for purposes of section 1902(a)(18), the State plan shall provide that any institutionalized individual (or the spouse of such individual) who disposes of assets for less than fair market value on the date specified in subparagraph (B)(ii), or at any time thereafter during such individual's lifetime, is ineligible for medical assistance for—

"(i) nursing facility services,

"(ii) a level of care in any institution equivalent to that of nursing facility services, and

"(iii) home or community-based services under subsection (c) or (d) of section 1915,

during any and all applicable periods specified in paragraph (2).

"(B)(i) The date specified in this clause, with respect to an institutionalized individual, is the first date as of which the individual—

"(I) is an institutionalized individual, and

"(II) has applied for or is receiving medical assistance under the State plan.

"(ii) The date specified in this clause, with respect to an institutionalized individual, is the date 30 months before the date specified in clause (i) (or, at the option of the State, such earlier date as provided by the State in accordance with paragraph (3)(A)(iii)).";

(2) by redesignating paragraphs (2) through (5) as paragraphs (4) through (7) and by inserting after paragraph (1) the following new paragraphs:

"(2) The period of ineligibility required under paragraph (1) with respect to an institutionalized individual—

"(A) shall be a number of months equal to—

"(i) the total uncompensated value of all assets transferred by the individual or the individual's spouse on or after the date specified in paragraph (1)(B)(ii), divided by

"(ii) the average cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) on the date specified in paragraph (1)(B)(i) based on costs which include the cost of services included in the State's nursing facility reimbursement rate; and

"(B) shall begin with the first month in which—

"(i) the individual—

"(I) is an institutionalized individual,

"(II) is (or but for the provisions of this subsection would be) entitled to have medical assistance paid under the State plan for services specified under paragraph (1), and

"(III) is receiving or is an applicant for such medical assistance, and

"(ii) the State has become aware that assets have been transferred.

"(3)(A) The State plan may include, in accordance with this paragraph, any or all of the following provisions concerning eligibility for medical assistance of individuals who (or whose spouses) dispose of assets for less than fair market value:

"(i) The State plan may provide for periods of ineligibility for medical assistance for long-term care services specified by the State and approved by the Secretary for any or all individuals (or groups of individuals) otherwise eligible for such medical assistance, in addition to the individuals specified in paragraph (1).

"(ii) Subject to such restrictions as the Secretary may impose, the State plan may provide for periods of ineligibility for medical assistance for any long-term care services (in addition to the services specified in paragraph (1)(A)) for which medical assistance is otherwise available under the plan.

"(iii) The State plan may provide for a date on and after which transfers of assets are subject to re-

view earlier than the date specified in paragraph (1)(B)(ii), but not earlier than 4 years before—

"(I) in the case of an institutionalized individual, the date specified in paragraph (1)(B)(i), or

"(II) in the case of any other individual, the date on which the individual applied for medical assistance under the State plan.

"(B)(i) The period of ineligibility imposed by the State pursuant to this paragraph for services other than those specified in paragraph (1)(A) shall not be longer than the period of ineligibility that would have resulted if the individual had expended the assets transferred for the costs of medical care furnished on and after the date the individual applied for medical assistance, as determined by the State in accordance with clause (ii).

"(ii) In determining the period of ineligibility of an individual pursuant to clause (i), the State—

"(I) may presume that the individual's cost of medical care furnished is equal to the average cost to a private patient for such care on a daily, monthly, or other basis, or

"(II) may use any other method approved by the Secretary.";

(3) in paragraph (4), as redesignated—

(A) by amending subparagraph (B) to read as follows:

"(B) the resources—

"(i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse and did not exceed the amount permitted under section 1924(f)(1);

"(ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse and did not exceed the amount permitted under section 1924(f)(1); or

"(iii) were transferred to the individual's child described in subparagraph (A)(ii)(II);";

(B) in subparagraph (C)—

(i) by striking "any";

(ii) by striking "or (ii)" and inserting "(ii)"; and

(iii) by striking "; or" and inserting ", or (iii) all assets transferred by an individual for less than fair market value have been returned to the individual;";

(C) by amending subparagraph (D) to read as follows:

"(D) the State determines (in accordance with regulations promulgated by the Secretary) that denial of eligibility would work an undue hardship; or";

(D) by adding at the end the following new subparagraph:

"(E) the State determines that the total fair market value of all of the assets transferred by the individual during the period between the date specified in paragraph (1)(B)(i) and the date specified by the State under paragraph (1)(B)(ii) are below an amount determined appropriate by the State and approved by the Secretary."; and

(E) by adding at the end the following flush sentence:

"In determining whether an individual has made a satisfactory showing to the State under subparagraph (C)(ii), the State shall consider the individual's health status at the time of the transfer of assets and whether, at the time of such transfer, the individual retained assets sufficient to meet the individual's foreseeable future health care needs based on such health status.";

(4) by striking paragraph (5), as redesignated, and inserting the following:

"(5) For purposes of this subsection, in the case of an asset held by an individual in common with another person

or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset, except to the extent an action taken by a person other than the individual is an action consistent with partial ownership of the asset, as provided in regulations issued by the Secretary.";

(5) by adding the following at the end of paragraph (6), as redesignated: "In the case of a transfer by the spouse of an institutionalized individual which results in a period of ineligibility for medical assistance under a State plan for the institutionalized individual, a State shall apply a reasonable methodology to transfer all or a portion of any such period of ineligibility to such spouse if the spouse becomes an institutionalized individual."; and

(6) by amending paragraph (7), as redesignated, to read as follows:

"(7) For purposes of this subsection:

"(A) The term 'assets', with respect to an individual, includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or such in-

dividual's spouse is entitled to but does not receive because of action—

"(i) by the individual or such individual's spouse,

"(ii) by a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or such individual's spouse, or

"(iii) by any person, including any court or administrative body, acting at the direction or upon the request of the individual or such individual's spouse.

"(B) The term 'income' has the meaning given such term in section 1612.

"(C) The term 'resources' has the meaning given such term in section 1613, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.

"(D) The term 'institutionalized individual' means, and the term 'individual is institutionalized' refers to, an individual receiving any of the services specified in paragraph (1)(A).".

(b) CONFORMING AMENDMENTS.—(1) Section 1902(a)(51) (42 U.S.C. 1396a(a)(51)) is amended—

(A) by striking "(A)"; and

(B) by striking ", and (B)" and all that follows and inserting a semicolon.

(2) Section 1924(f)(1) (42 U.S.C. 1396r–5(f)(1)) is amended by striking "transfer an amount" and inserting "transfer an amount sufficient to make the resources of the community spouse".

(c) REQUIREMENTS FOR NURSING FACILITIES.—

(1) MEDICAID PROGRAM.—Section 1919(c)(5)(A)(i) (42 U.S.C. 1396r(c)(5)(A)(i)) is amended by striking "and (III)" and inserting "(III) not require individuals applying to reside or residing in the facility, or family members of such individuals, to provide any financial information other than to identify the source of payment for such individual's stay in the facility, and (IV)".

(2) MEDICARE PROGRAM.—Section 1819(c)(5)(A)(i) (42 U.S.C. 1395i–3(c)(5)(A)(i)) is amended by striking "and (III)" and inserting "(III) not require individuals applying to reside or residing in the facility, or family members of such individuals, to provide any financial information other than to identify the source of payment for such individual's stay in the facility, and (IV)".

(d) EFFECTIVE DATE.—(1)(A) Except as provided in subparagraph (B), the amendments made by this section

shall apply to calendar quarters beginning on or after October 1, 1993.

(B) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirements imposed by the amendments made by this section, the State plan shall not be regarded as failing to comply with the requirements imposed by such amendments solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the preceding sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(2) The amendments made by this section shall not apply with respect to assets disposed of before the date which is 60 days after the date of the enactment of this Act.

SEC. 7423. TREATMENT OF CERTAIN TRUSTS.

(a) IN GENERAL.—Section 1917 (42 U.S.C. 1396p) is amended by adding at the end the following:

"(d)(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title, the following rules shall apply to a trust established by such individual:

"(A) In the case of a revocable trust—

"(i) the corpus of the trust shall be considered resources available to the individual,

"(ii) payments from the trust to or for the benefit of the individual shall be considered income of the individual, and

"(iii) any other payments from the trust shall be considered a transfer of assets by the individual subject to subsection (c).

"(B) In the case of an irrevocable trust—

"(i) the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—

"(I) to or for the benefit of the individual, shall be considered income of the individual, and

"(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and

"(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) a transfer of assets by the individual subject to subsection (c), and payments from such portion of the trust after such date shall be disregarded.

"(2)(A) For purposes of this subsection, an individual shall be considered to have established a trust if—

"(i) any of the following individuals established such trust other than by will:

"(I) the individual,

"(II) the individual's spouse,

"(III) a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, or

"(IV) a person, including any court or administrative body, acting at the direction or

upon the request of the individual or the individual's spouse; and

"(ii) assets of the individual were used to form all or part of the corpus of the trust.

"(B) In the case of a trust the corpus of which includes assets of an individual (as determined under subparagraph (A)) and assets of any other person or persons, the provisions of this subsection shall apply to the portion of the trust attributable to the assets of the individual.

"(3) This subsection shall apply without regard to—

"(A) the purposes for which a trust is established,

"(B) whether the trustees have or exercise any discretion under the trust,

"(C) any restrictions on when or whether distributions may be made from the trust, or

"(D) any restrictions on the use of distributions from the trust.

"(4)(A) This subsection shall not apply to any of the following trusts:

"(i) A trust containing the assets of a disabled individual (as determined under section 1614(a)(3)) established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remain-

ing in the trust upon the death of such individual up to an amount equal to the total medical assistance received by the individual under a State plan under this title.

"(ii) A trust established in a State for the benefit of an individual if—

"(I) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

"(II) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance received by the individual under a State plan under this title, and

"(III) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V), but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C).

"(B) For purposes of this subsection, the term 'trust' includes any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such manner as the Secretary specifies.

"(C) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under

which the agency waives the application of this subsection with respect to an individual if the individual establishes that such application would work an undue hardship on the individual as determined on the basis of criteria established by the Secretary.

"(5) For purposes of this subsection, the terms 'assets', 'income', and 'resources' shall have the meaning given to such terms under subsection (c)(7).".

(b) CONFORMING AMENDMENTS.—(1) Section 1902(a)(18) (42 U.S.C. 1396a(a)(18)) is amended by striking "and transfers of assets" and inserting ", transfers of assets, and treatment of certain trusts".

(2) Section 1902 (42 U.S.C. 1396a) is amended by repealing subsection (k).

(c) EFFECTIVE DATE.—(1)(A) Except as provided in subparagraph (B), the amendments made by this section shall apply to payments under title XIX of the Social Security Act for calendar quarters beginning on or after October 1, 1993.

(B) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirements imposed by the amendments made by this section,

the State plan shall not be regarded as failing to comply with the requirements imposed by such amendments solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the preceding sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

(2) The amendments made by this section shall not apply with respect to trusts established before the date which is 60 days after the date of the enactment of this Act.

Subpart D—Improvement in Identification and Collection of Third Party Payments

SEC. 7431. LIABILITY OF THIRD PARTIES TO PAY FOR CARE AND SERVICES.

(a) LIABILITY OF ERISA PLANS.—(1) Section 1902(a)(25)(A) (42 U.S.C. 1396a(a)(25)(A)) is amended by striking "insurers)" and inserting "insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), service benefit plans, and health maintenance organizations)".

(2) Section 1903(o) (42 U.S.C. 1396b(o)) is amended by striking "regulation)" and inserting "regulation and in-

9.
H.R. Conf.Rep. 103-213

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**1088P.L. 103-66, *1 OMNIBUS BUDGET RECONCILIATION ACT OF 1993
DATES OF CONSIDERATION AND PASSAGE
House: May 27, August 5, 1993
Senate: June 23, 24, 25, August 6, 1993
Cong. Record Vol. 139 (1993)
House Report (Budget Committee) No. 103-111,
May 25, 1993 (To accompany H.R. 2264)
House Conference Report No. 103-213,
Aug. 3, 1993 (To accompany H.R. 2264)

HOUSE CONFERENCE REPORT NO. 103–213
August 4, 1993
[To accompany H.R. 2264]

**0 The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2264) to provide for reconciliation pursuant to section 7 of the concurrent resolution on the budget for fiscal year 1994, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Omnibus Budget Reconciliation Act of 1993".

SEC. 2. TABLE OF CONTENTS.

The table of contents is as follows:

*2 TITLE I–AGRICULTURE AND RELATED PROVISIONS

TITLE II–ARMED SERVICES PROVISIONS

TITLE III–BANKING AND HOUSING PROVISIONS

TITLE IV–STUDENT LOANS AND ERISA PROVISIONS

TITLE V–TRANSPORTATION AND PUBLIC WORKS PROVISIONS

TITLE VI–COMMUNICATIONS LICENSING AND SPECTRUM ALLOCATION PROVISIONS

TITLE VII–NUCLEAR REGULATORY COMMISSION PROVISIONS

TITLE VIII–PATENT AND TRADEMARK OFFICE PROVISIONS

TITLE IX–MERCHANT MARINE PROVISIONS

TITLE X–NATURAL RESOURCES PROVISIONS

TITLE XI–CIVIL SERVICE AND POST OFFICE PROVISIONS

TITLE XII–VETERANS' AFFAIRS PROVISIONS

TITLE XIII–REVENUE, HEALTH CARE, HUMAN RESOURCES, INCOME SECURITY, CUSTOMS AND TRADE PROVISIONS, FOOD STAMP PROGRAM, AND TIMBER SALE PROVISIONS

TITLE XIV–BUDGET PROCESS PROVISIONS

TITLE I–AGRICULTURAL PROGRAMS

SEC. 1001. SHORT TITLE AND TABLE OF CONTENTS.

(a) Short Title.–This title may be cited as the "Agricultural Reconciliation Act of 1993".

(b) Table of Contents.–The table of contents of this title is as follows:

Short title and table of contents.

Sec. 1001.

Sec. 13603.	Optional medicaid coverage of TB-related services for certain TB-infected individuals.
Sec. 13604.	Limiting Federal medicaid matching payment to bona fide emergenc y services for undocumented aliens.
Sec. 13605.	Coverage of nurse-midwife services performed outside the materni ty cycle.
Sec. 13606.	Treatment of certain clinics as Federally-qualified health cente rs.

PART II–ELIGIBILITY

Sec. 13611.	Transfers of assets; treatment of certain trusts.
Sec. 13612.	Medicaid estate recoveries.

PART III–PAYMENTS

Sec. 13621.	Assuring proper payments to disproportionate share hospitals.
Sec. 13622.	Liability of third parties to pay for care and services.
Sec. 13623.	Medical child support.
Sec. 13624.	Application of medicare rules limiting certain physician referra ls.
Sec. 13625.	State medicaid fraud control.

Drug Rebate Program Modifications (Section 13602).–Permits States to operate prescription drug formularies meeting certain requirements. Removes current law prohibition on the imposition of prior authorization controls with respect to new drugs during the first 6 months following FDA approval. Repeals the weighted average manufacturer price (WAMP) inflation formula for calculating the additional rebate under current law. Effective October 1, 1993. The conference agreement does not contain a specific administrative or judicial appeal requirement. The conferees intend to preserve any appeal rights that are available to beneficiaries and providers (including drug manufacturers) under State and Federal law.

Optional Coverage of TB-Related Services (Section 13603).–Allows States to cover prescribed drugs, directly observed therapy, and other ambulatory services for low-income individuals infected with tuberculosis. Effective January 1, 1994. The House bill would have provided coverage for persons who "test positively" for TB infection. Because of concern about both false positive and false negative test results, the Conferees modified the House provision to include all low-income persons who are "infected with" TB rather than relying on these test results. The conferees have further specified that TB-related services include confirmatory tests for the infection. The conferees are aware that traditional TB tests and diagnostic methods are of questionable value, particularly among persons with low immune function. Because of the seriousness of the emerging TB epidemic, the conferees intend that eligibility be interpreted as broadly as possible in this area in order to allow the maximum number of TB-infected persons to receive services.

Bona Fide Emergency Services for Undocumented Aliens (Section 13604).–Clarifies that emergency services for which Federal Medicaid matching funds are available with respect to illegal aliens under current law do not include care and services related to organ transplant procedures. Effective for services furnished on or after date of enactment.

Coverage of Nurse Midwife Services (Section 13605).–Expands the scope of nurse midwife services required under current law to include services that midwives are authorized to perform under State law that are outside the maternity cycle. Effective October 1, 1993.

Treatment of Certain Clinics as FQHCs (Section 13606).–Designates entities treated as comprehensive Federally funded health centers as of January 1, 1990, as Federally qualified health centers for purposes of Medicaid. Effective July 1, 1993.

**1523*834 Part II--Eligibility

Transfers of Assets; Treatment of Certain Trusts (Section 13611).–Provides for a delay in Medicaid eligibility for institutionalized individuals (or their spouses) who dispose of assets for less than fair market value on or after a specified look-back date (36 months prior to either the date of application for benefits or the date of institutionalization, whichever is later). The number of months of delay in eligibility is equal to the total, cumulative uncompensated value of all assets transferred or after the look-back date, divided by the average monthly cost to a private patient of nursing facilities in the State. The period of delay begins with the first month during which the assets were disposed of. Penalties are not applied to transfers to spouses, transfers to minor or disabled children, or transfers to trusts solely for the benefit of disabled individuals under 65. Effective with respect to assets disposed of on or after enactment.

Sets forth rules under which funds and other assets of an individual placed in trust by or on behalf of an individual (or the individual's spouse) are treated, for purposes of Medicaid eligibility, as resources available to the individual, and under which payments from the trust are to be considered assets disposed of by the individual. Specifies that, for purposes of applying transfer of assets prohibitions, the look-back period with respect to trusts is 60 months. Provides exceptions for trusts containing the assets of a disabled individual under 65, specified income trusts in certain States, and "pooled" trusts for disabled individuals. Requires States to establish procedures for waiving the application of these rules in cases of undue hardship. Effective with respect to trusts

Drug Rebate Program Modifications (Section 13602).–Permits States to operate prescription drug formularies meeting certain requirements. Removes current law prohibition on the imposition of prior authorization controls with respect to new drugs during the first 6 months following FDA approval. Repeals the weighted average manufacturer price (WAMP) inflation formula for calculating the additional rebate under current law. Effective October 1, 1993. The conference agreement does not contain a specific administrative or judicial appeal requirement. The conferees intend to preserve any appeal rights that are available to beneficiaries and providers (including drug manufacturers) under State and Federal law.

Optional Coverage of TB-Related Services (Section 13603).–Allows States to cover prescribed drugs, directly observed therapy, and other ambulatory services for low-income individuals infected with tuberculosis. Effective January 1, 1994. The House bill would have provided coverage for persons who "test positively" for TB infection. Because of concern about both false positive and false negative test results, the Conferees modified the House provision to include all low-income persons who are "infected with" TB rather than relying on these test results. The conferees have further specified that TB-related services include confirmatory tests for the infection. The conferees are aware that traditional TB tests and diagnostic methods are of questionable value, particularly among persons with low immune function. Because of the seriousness of the emerging TB epidemic, the conferees intend that eligibility be interpreted as broadly as possible in this area in order to allow the maximum number of TB-infected persons to receive services.

Bona Fide Emergency Services for Undocumented Aliens (Section 13604).–Clarifies that emergency services for which Federal Medicaid matching funds are available with respect to illegal aliens under current law do not include care and services related to organ transplant procedures. Effective for services furnished on or after date of enactment.

Coverage of Nurse Midwife Services (Section 13605).–Expands the scope of nurse midwife services required under current law to include services that midwives are authorized to perform under State law that are outside the maternity cycle. Effective October 1, 1993.

Treatment of Certain Clinics as FQHCs (Section 13606).–Designates entities treated as comprehensive Federally funded health centers as of January 1, 1990, as Federally qualified health centers for purposes of Medicaid. Effective July 1, 1993.

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Sets forth rules under which funds and other assets of an individual placed in trust by or on behalf of an individual (or the individual's spouse) are treated, for purposes of Medicaid eligibility, as resources available to the individual, and under which payments from the trust are to be considered assets disposed of by the individual. Specifies that, for purposes of applying transfer of assets prohibitions, the look-back period with respect to trusts is 60 months. Provides exceptions for trusts containing the assets of a disabled individual under 65, specified income trusts in certain States, and "pooled" trusts for disabled individuals. Requires States to establish procedures for waiving the application of these rules in cases of undue hardship. Effective with respect to trusts

Agency comments

10.
Transmittal 64

a. § 3257 (definitions)
b. §3258.4E (look-back periods for transfers to trusts that are penalized)
c. §3258.10 (express statutory exceptions)
d. §3259 (treatment of trusts).

Selected Excerpts From:
STATE MEDICAID MANUAL
"Transmittal 64"
GENERAL AND CATEGORICAL
ELIGIBILITY REQUIREMENTS

3257. TRANSFERS OF ASSETS AND TREATMENT OF TRUSTS

A. General. -- Section 13611 of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) amended §1917 of the Act by incorporating in §§1917(c) and (d) new requirements for treatment of transfers of assets for less than fair market value and for treatment of trusts. The following instructions apply only to transfers made and trusts established after the effective date explained in §3258.2. For transfers made and trusts established before that effective date, the old policies regarding treatment of trusts and transfers apply. See §§3215 and 3250 for instructions on the treatment of trusts established and transfers made before August 11, 1993.

B. Definitions. -- The following definitions apply, as appropriate, to both transfers of assets and trusts:

1. Individual. -- As used in this instruction, the term "individual" includes the individual himself or herself, as well as:
   - The individual's spouse, where the spouse is acting in the place of or on behalf of the individual;
   - A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
   - Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

2. Spouse. -- This is a person who is considered legally married to an individual under the laws of the State in which the individual is applying for or receiving Medicaid.

3. Assets. -- For purposes of this section, assets include all income and resources of the individual and of the individual's spouse. This includes income or resources which the individual or the individual's spouse is entitled to but does not receive because of any action by:
   - The individual or the individual's spouse;
   - A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
   - Any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

   For purposes of this section, the term "assets an individual or spouse is entitled to" includes assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets.

[...]

3258. TRANSFERS OF ASSETS FOR LESS THAN FAIR MARKET VALUE

3258.4 Look-Back Date and Look-Back Period. -- The look-back date is the earliest date on which a penalty for transferring assets for less than fair market value can be assessed. Penalties can be assessed for transfers which take place on or after the look-back date. Penalties cannot be assessed for transfers which take place prior to the look-back date. The look-back date varies for individuals transferring assets, depending on whether they are institutionalized, and there are special rules for some trusts, as described in subsection E.

[...]

E. Look-Back Period for Transfers of Assets Involving Trusts. -- When an individual establishes a revocable trust a portion of which is disbursed to someone other than the grantor or for the benefit of the grantor, that portion is treated as a transfer of assets for less than fair market value. When an individual establishes an irrevocable trust in which all or a portion of the trust cannot be disbursed to or on behalf of the individual, that portion is treated as a transfer of assets for less than fair market value. When a portion of a trust is treated as a transfer, the look-back period discussed in subsection D is extended to 60 months from:

- The date the individual applied for Medicaid and was institutionalized; or,
- For a noninstitutionalized individual, the date the individual applied for Medicaid or, if later, the date the transfer was made.

When a trust is irrevocable but some or all of the trust can be disbursed to or for the benefit of the individual, the look-back period applying to disbursements which could be made to or for the individual but are made to another person or persons is 36 months.

When the trust is revocable, the transfer is considered to take place on the date upon which the payment to someone other than the grantor was made. If the trust is irrevocable, the transfer is considered to have been made as of the date the trust was established or, if later, the date upon which payment to the grantor was foreclosed.

When an individual places assets into an irrevocable trust and can still benefit from those assets, the amount transferred is any of those assets which have been paid out for a purpose other than to or for the benefit of the individual. When an individual places assets in an irrevocable trust and can no longer benefit from some or all of those assets, that unavailable portion of the trust is considered as transferred for less than fair market value. The value of these assets is not reduced by any payments from the trust which may be made from these unavailable assets at a later date.

See §§3259ff. for a discussion of treatment of trusts in determining eligibility for Medicaid.

See §3259.6 for rules which apply when assets which may involve a transfer of assets for less than fair market value are placed in a trust.

[...]

3258.10 Exceptions to Application of Transfer of Assets Penalties. -- There are a number of instances where, even if an asset is transferred for less than fair market value, the penalties discussed above do not apply. These exceptions are:

A. The asset transferred is the individual's home, and title to the home is transferred to:

- The spouse of the individual;
- A child of the individual who is under age 21;
- A child who is blind or permanently and totally disabled as defined by a State program established under title XVI in States eligible to participate in such programs or blind or disabled as defined by the SSI program in all other States;
- The sibling of the individual who has an equity interest in the home and who has been residing in the home for a period of at least one year immediately before the date the individual becomes institutionalized; or
- A son or daughter of the individual (other than a child as described above) who was residing in the home for at least two years immediately before the date the individual becomes institutionalized, and who (as determined by the State) provided care to the individual which permitted the individual to reside at home, rather than in an institution or facility.

B. The assets were:

- Transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
- Transferred from the individual's spouse to another for the sole benefit of the individual's spouse;
- Transferred to the individual's child, or to a trust (including a trust described in §3259.7) established solely for the benefit of the individual's child (The child must be blind or permanently and totally disabled, as defined by a State program established under title XVI, in States eligible to participate in such programs or blind or disabled as defined under SSI in all other States); or
- Transferred to a trust (including a trust as discussed in '3259.7) established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI.

[...]

3259. TREATMENT OF TRUSTS

3259.1 General. -- Under the trust provisions in §1917(d) of the Act, you must consider whether and to what extent a trust is counted in determining eligibility for Medicaid. The following instructions explain the rules under which trusts are considered. These instructions apply to eligibility determinations for all individuals, including cash assistance recipients and others who are otherwise automatically eligible and whose income and resources are not ordinarily measured against an independent Medicaid eligibility standard. Also, these instructions apply to post-eligibility determinations as well as eligibility determinations.

A. Definitions. -- The following definitions apply to trusts.

1. Trust. -- For purposes of this section, a trust is any arrangement in which a grantor transfers property to a trustee or trustees with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and manifested by a valid trust instrument or agreement. A trustee holds a fiduciary responsibility to hold or manage the trust's corpus and income for the benefit of the beneficiaries. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. Such trusts must be dealt with using applicable cash assistance program policies.

2. Legal Instrument or Device Similar to Trust. -- This is any legal instrument, device, or arrangement which may not be called a trust under State law but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section). The grantor makes the transfer with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.

3. Trustee. -- A trustee is any individual, individuals, or entity (such as an insurance company or bank) that manages a trust or similar device and has fiduciary responsibilities.

4. Grantor. -- A grantor is any individual who creates a trust. For purposes of this section, the term "grantor" includes:
    - The individual;
    - The individual's spouse;
    - A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; and
    - A person, including a court or administrative body, acting at the direction or upon the request of the individual, or the individual's spouse.

5. Revocable Trust. -- A revocable trust is a trust which can under State law be revoked by the grantor. A trust which provides that the trust can only be modified or terminated by a court is considered to be a revocable trust, since the grantor (or his/her representative) can petition the court to terminate the trust. Also, a trust which is called irrevocable but which

terminates if some action is taken by the grantor is a revocable trust for purposes of this instruction. For example, a trust may require a trustee to terminate a trust and disburse the funds to the grantor if the grantor leaves a nursing facility and returns home. Such a trust is considered to be revocable.

6. Irrevocable Trust. -- An irrevocable trust is a trust which cannot, in any way, be revoked by the grantor.

7. Beneficiary. -- A beneficiary is any individual or individuals designated in the trust instrument as benefiting in some way from the trust, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor himself, another individual or individuals, or a combination of any of these parties.

8. Payment. -- For purposes of this section a payment from a trust is any disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.

9. Annuity. -- An annuity is a right to receive fixed, periodic payments, either for life or a term of years. See §3258.9.B for a discussion of how to treat annuities.

3259.2 Effective Date. -- This section applies to all trusts established on or after August 11, 1993. However, the provisions in this instruction are effective December 13, 1994. For the period prior to this date, you may use any reasonable interpretations of the statute in dealing with trusts. Trusts established before August 11, 1993, are treated under the rules in §3215. Also, trusts established before August 11, 1993, but added to or otherwise augmented on or after that date are treated under the rules in §3215. (However, additions to an established trust on or after August 11, 1993, may be considered transfers of assets for less than fair market value under §§3258ff.) While this section applies to trusts established on or after August 11, 1993, you cannot deny eligibility for Medicaid or apply the rules under this section based on an individual creating a trust until October 1, 1993. For a trust established on or after August 11, 1993, but prior to October 1, 1993, apply pre-OBRA 1993 rules until October 1. On October 1, begin using the OBRA 1993 rules for treating trusts.

When the Secretary determines that your State requires enabling legislation (other than legislation to appropriate funds) to implement the trust provisions in §§3259ff, you may delay complying with the effective date of the statute (October 1, 1993). The compliance date can be delayed until after the close of the first regular legislative session that begins after August 10, 1993. It can be delayed until the first day of the first calendar quarter beginning after this session closes. In the case of a 2-year legislative session, each year is considered a separate regular session.

The statutory effective date of October 1, 1993, remains in effect even if a State is granted a delayed compliance date. However, no compliance action will be taken against a State which requires legislation to enact the trust provisions. Once enabling legislation is enacted, a State can choose whether to enforce the trust provisions retroactively.

To obtain a delayed compliance date, submit a written request to your HCFA regional office with an opinion from the State's Attorney General concerning the necessity of passing enabling legislation.

3259.3 Individuals to Whom Trust Provisions Apply. -- This section applies to any individual who establishes a trust and who is an applicant for or recipient of Medicaid. An individual is considered to have established a trust if his or her assets (regardless of how little) were used to form part or all of the corpus of the trust and if any of the parties described as a grantor in §3259.1 established the trust, other than by will. (See also §3257 for a definition of individual as it is used in this section.)

3259.4 Individual's Assets Form Only Part of Trust. -- When a trust corpus includes assets of another person or persons as well as assets of the individual, the rules in §§3259ff apply only to the portion of the trust attributable to the assets of the individual. Thus, in determining countable income and resources in the trust for eligibility and post-eligibility purposes, you must prorate any amounts of income and resources, based on the proportion of the individual's assets in the trust to those of other persons.

3259.5 Application of Trust Provisions. -- The rules set forth in this section apply to trusts without regard to:

- The purpose for which the trust is established;
- Whether the trustee(s), has or exercises any discretion under the trust;
- Any restrictions on when or whether distributions can be made from the trust; or
- Any restrictions on the use of distributions from the trust.

This means that any trust which meets the basic definition of a trust can be counted in determining eligibility for Medicaid. No clause or requirement in the trust, no matter how specifically it applies to Medicaid or other Federal or State programs (i.e., an exculpatory clause), precludes a trust from being considered under the rules in §§3259ff.

NOTE: While exculpatory clauses, use clauses, trustee discretion, and restrictions on distributions, etc., do not affect a trust's countability, they do have an impact on how the various components of specific trusts are treated. (See §3259.6 for a detailed discussion of how various types of trusts are treated.)

3259.6 Treatment of Trusts. -- How a specific trust is counted for eligibility purposes depends on the characteristics of the trust. The following are the rules for counting various kinds of trusts.

A. Revocable Trust. -- In the case of a revocable trust:

- The entire corpus of the trust is counted as an available resource to the individual;
- Any payments from the trust made to or for the benefit of the individual are counted as income to the individual (see §3257 for the definition of income);
- Any payments from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value. (See §§3258ff. for the treatment of transfers of assets for less than fair market value.)

When a portion of a revocable trust is treated as a transfer of assets for less than fair market value, the look-back period described in §3258.4 is extended from the usual 36 months to 60 months. (See §3258.4 for how to determine the look-back period for transfers of assets for less than fair market value.)

EXAMPLE: Mr. Baker establishes a revocable trust with a corpus of $100,000 on March 1, 1994, enters a nursing facility on November 15, 1997, and applies for Medicaid on February 15, 1998. Under the terms of the trust, the trustee has complete discretion in disbursing funds from the trust. Each month, the trustee disburses $100 as an allowance to Mr. Baker and $500 to a property management firm for the upkeep of Mr. Baker's home. On June 15, 1994, the trustee gives $50,000 from the corpus to Mr. Baker's brother.

In this example, the $100 personal allowance and the $500 for upkeep of the house counts as income each month to Mr. Baker. Because the trust is revocable, the entire value of the corpus is considered a resource to Mr. Baker. Originally, this was $100,000. However, in June 1994, the trustee gave away $50,000. Thus, only the remaining $50,000 is countable as a resource to Mr. Baker.

However, the giveaway is treated as a transfer of assets for less than fair market value. When a trust is revocable, the look-back period for such transfers is 60 months rather than the usual 36 months. The look-back period in this case starts on February 15, 1993, (60 months prior to February 15, 1998, the date Mr. Baker was both in an institution and applied for Medicaid). Because the transfer occurred in June 1994, it falls within the look-back period. Thus, a penalty under the transfer of assets provisions is imposed, beginning June 1, 1994, (the beginning of the month in which the transfer occurred). This penalty, which is denial of payment for Mr. Baker's nursing home care, is based on the amount of the transfer ($50,000), divided by the State's average monthly cost of private nursing facility care. (See §3258ff. for the transfer of assets rules.)

B. Irrevocable Trust - Payment Can Be Made to Individual Under Terms of Trust. -- In the case of an irrevocable trust, where there are any circumstances under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply to that portion:

- Payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual;
- Income on the corpus of the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual;
- The portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and
- Payments from income or from the corpus that are made but not to or for the benefit of the individual are treated as a transfer of assets for less than fair market value. (See §§3258ff. for treatment of transfers for less than fair market value.)

EXAMPLE: Use the same facts that were used in the previous example, but treat the trust as an irrevocable trust. The trustee has discretion to disburse the entire corpus of the trust and all income from the trust to anyone, including the grantor. The $100 personal allowance and $500 for home upkeep are income to Mr. Baker. The $50,000 left after the gift to Mr. Baker's brother is a countable resource to Mr. Baker, since there are circumstances under which payment of this amount could be made to Mr. Baker. The $50,000 gift to Mr. Baker's brother is treated as a transfer of assets for less than fair market value. However, the look-back period for this type of trust is only 36 months. (See §3258.4 for transfer look-back periods as they apply to trusts.) The transfer occurred outside of the look-back period. Thus, no penalty for transferring an asset for less than fair market value can be imposed.

C. Irrevocable Trust - Payments From All or Portion of Trust Cannot, Under Any Circumstances, Be Made to or for the Benefit of the Individual. -- When all or a portion of the corpus or income on the corpus of a trust cannot be paid to the individual, treat all or any such portion or income as a transfer of assets for less than fair market value, per instructions in §§3258ff.

In treating these portions as a transfer of assets, the date of the transfer is considered to be:

- The date the trust was established; or,
- If later, the date on which payment to the individual was foreclosed.

In determining for transfer of assets purposes the value of the portion of the trust which cannot be paid to the individual, do not subtract from the value of the trust any payments made, for whatever purpose, after the date the trust was established or, if later, the date payment to the individual was foreclosed. If the trustee or the grantor adds funds to that portion of the trust after these dates, the addition of those funds is considered to be a new transfer of assets, effective on the date the funds are added to that portion of the trust.

Thus, in treating portions of a trust which cannot be paid to an individual, the value of the transferred amount is no less than its value on the date the trust is established or payment is foreclosed. When additional funds are added to this portion of the trust, those funds are treated as a new transfer of assets for less than fair market value.

When that portion of a trust which cannot be paid to an individual is treated as a transfer of assets for less than fair market value, the usual 36 month look-back period is extended to 60 months. (See §3258.4 for the look-back period for transfers of assets for less than fair market value.)

EXAMPLE: Use the same facts that are used in the examples in subsections A and B, except that the trustee is precluded by the trust from disbursing any of the corpus of the trust to or for the benefit of Mr. Baker. Again, the $100 and $500 (which come from income to the trust) count as income to Mr. Baker. Because none of the corpus can be disbursed to Mr. Baker, the entire value of the corpus at the time the trust was created ($100,000 in March 1994) is treated as a transfer of assets for less than fair market value.

As with the revocable trust discussed in subsection A, the date of transfer is within the 60 month look-back period that applies to portions of trusts that cannot be disbursed to or for the individual. Thus, a transfer of assets is considered to have occurred as of March 1, 1994. The

fact that $50,000 was actually transferred out of the trust to Mr. Baker's brother does not alter the amount of the transfer upon which the penalty is based. That amount remains $100,000, even after the gift to Mr. Baker's brother.

If, at some point after establishing the trust, Mr. Baker places an additional $50,000 in the trust, none of which can be disbursed to him, that $50,000 is treated as an additional transfer of assets. The penalty period that applies to that $50,000 starts when those funds are placed in the trust, provided no penalty period from the previous transfer of $100,000 is still running. If a previous penalty period is still in effect, the new penalty period cannot begin until the previous penalty period has expired. (See §§3258ff. for transfers of assets for less than fair market value.)

Amounts are considered transferred as of the time the trust is first established or, if later, payment to the individual is foreclosed. Each time the individual places a new amount into the trust, payment to the individual from this new portion is foreclosed. It is this later date that determines when a transfer has occurred.

D. Payments Made From Revocable Or Irrevocable Trusts to or on Behalf of Individual.-- Payments are considered to be made to the individual when any amount from the trust, including an amount from the corpus or income produced by the corpus, is paid directly to the individual or to someone acting on his/her behalf, e.g., a guardian or legal representative.

Payments made for the benefit of the individual are payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment. For example, such payments could include purchase of clothing or other items, such as a radio or television, for the individual. Also, such payments could include payment for services the individual may require, or care, whether medical or personal, that the individual may need. Payments to maintain a home are also payments for the benefit of the individual.

NOTE: A payment to or for the benefit of the individual is counted under this provision only if such a payment is ordinarily counted as income under the SSI program. For example, payments made on behalf of an individual for medical care are not counted in determining income eligibility under the SSI program. Thus, such payments are not counted as income under the trust provision.

E. Circumstances Under Which Payments Can or Cannot Be Made. -- In determining whether payments can or cannot be made from a trust to or for an individual, take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust.

For example, if an irrevocable trust provides that the trustee can disburse only $1,000 to or for the individual out of a $20,000 trust, only the $1,000 is treated as a payment that could be made under the rules in subsection B. The remaining $19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains $50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly,

if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances.

F. Placement of Excluded Assets in Trust. -- Section 1917(e) of the Act provides that, for trust and transfer purposes, assets include both income and resources. Section 1917(e) of the Act further provides that income has the meaning given the term in §1612 of the Act and resources has the meaning given that term in §1613 of the Act. The only exception is that for institutionalized individuals, the home is not an excluded resource.

Thus, transferring an excluded asset (either income or a resource, with the exception of the home of an institutionalized individual) for less than fair market value does not result in a penalty under the transfer provisions because the excluded asset is not an asset for transfer purposes. Similarly, placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded. As noted in the previous paragraph, the only exception is the home of an institutionalized individual. Because §1917(e) of the Act provides that the home is not an excluded resource for institutionalized individuals, placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource.

G. Use of Trust vs. Transfer Rules for Assets Placed in Trust. -- When a nonexcluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place. An individual placing an asset in a trust generally gives up ownership of the asset to the trust. If the individual does not receive fair compensation in return, you can impose a penalty under the transfer of assets provisions.

However, the trust provisions contain specific requirements for treatment of assets placed in trusts. As discussed in subsections A through C, these requirements deal with counting assets placed in trusts as available income, available resources, and/or a transfer of assets for less than fair market value, depending on the circumstances of the particular trust. Application of the trust provisions, along with imposition of a penalty for the transfer of the assets into the trust, could result in the individual being penalized twice for actions involving the same asset.

To avoid such a double penalty, application of one provision must take precedence over application of the other provision. Because the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust, the trust provisions are given precedence in dealing with assets placed in trusts. Deal with assets placed in trusts exclusively under the trust provisions (which, in some instances, require that trust assets be treated as a transfer of assets for less than fair market value).

3259.7 Exceptions to Treatment of Trusts Under Trust Provisions. -- The rules concerning treatment of trusts set forth in §3259.6 do not apply to any of the following trusts, i.e., the trusts discussed below are treated differently in determining eligibility for Medicaid. Funds entering and leaving these trusts are generally treated according to the rules of the cash assistance programs, the State's more restrictive rules under §1902(f) of the Act, or more liberal rules under §1902(r)(2) of the Act, as appropriate.

As is noted in each exception below, one common feature of all of the excepted trusts is a requirement that the trust provide that upon the death of the individual, any funds remaining

in the trust go to the State agency, up to the amount paid in Medicaid benefits on the individual's behalf. When an individual has resided in more than one State, the trust must provide that the funds remaining in the trust are distributed to each State in which the individual received Medicaid, based on the State's proportionate share of the total amount of Medicaid benefits paid by all of the States on the individual's behalf. For example, if an individual received $20,000 in Medicaid benefits in one State and $10,000 in benefits in another State, the first State receives two-thirds of the amount remaining in the trust, and the second State receives one-third, up to the amount each State actually paid in Medicaid benefits.

A. Special Needs Trusts. -- A trust containing the assets of an individual under age 65 who is disabled (as defined by the SSI program in §1614(a)(3) of the Act) and which is established for the sole benefit of the individual by a parent, grandparent, legal guardian of the individual, or a court is often referred to as a special needs trust. To qualify for an exception to the rules in this section, the trust must contain a provision stating that, upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under your State Medicaid plan. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

When a trust is established for a disabled individual under age 65, the exception for the trust discussed above continues even after the individual becomes age 65. However, such a trust cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition or augmentation after age 65 involves assets that were not the assets of an individual under age 65. Thus, those assets are not be subject to the exemption discussed in this section.

To qualify for this exception, the trust must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program, rather than any more restrictive criteria you may use under your State plan. The only exception to this requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in §§3259ff. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. If not, you must use the disability criteria of the SSI program.

> NOTE: Establishment of a trust as described above does not constitute a transfer of assets for less than fair market value if the transfer is made into a trust established solely for the benefit of a disabled individual under age 65. However, if the trust is not solely for the benefit of the disabled person or if the disabled person is over age 65 transfer penalties may apply. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

B. Pooled Trusts. -- A pooled trust is a trust containing the assets of a disabled individual as defined by the SSI program in §1614(a)(3) of the Act, that meets the following conditions:

- The trust is established and managed by a non-profit association;
- A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;
- Accounts in the trust are established solely for the benefit of disabled individuals by the individual, by the parent, grandparent, legal guardian of the individual, or by a court (see §3257 for a definition of the term "solely for the benefit of"); and
- To the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State the amount remaining in the account up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under your State Medicaid plan. To meet this requirement, the trust must include a provision specifically providing for such payment.

To qualify as an excepted trust, the trust account must be established for a disabled individual, as defined in §1614(a)(3) of the Act. When the individual in question is receiving either title II or SSI benefits as a disabled individual, accept the disability determination made for those programs. If the individual is not receiving those benefits, you must make a determination concerning the individual's disability. In making this determination, follow the normal procedures used in your State to make disability determinations for Medicaid purposes. If you are a 209(b) State, you must use the disability criteria of the SSI program. The only exception to this requirement is if you had a more restrictive trust policy in general in 1972 than the policy described in this instruction. If so, you may use any more restrictive definition of disability which applied to that 1972 policy. If not, you must use the disability criteria of the SSI program.

> NOTE: Establishing an account in the kind of trust described above may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty. (See §3258.10 for the exceptions to imposing penalties for certain transfers of assets.)

While trusts for the disabled (as well as Miller trusts described in subsection C) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving both kinds of exempt trusts for the disabled.

1. Trusts Established with Income. -- While most trusts for the disabled are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. When an exempt trust for a disabled individual is established using the individual's income (i.e., income considered to be received by the individual under the rules of the SSI program), the policies set forth in subsection C for treatment of income used to create Miller trusts apply.

NOTE: The following policies assume that the income placed in the trust is the individual's own income, placed in the trust after he or she receives it. When the right to income placed in the trust actually belongs to the trust and not the individual the income does not count under SSI rules as income received by the individual.

The policies pertaining to treatment of income belonging to the individual include:

- Not counting for eligibility purposes income before it is placed in the trust;
- Application of transfer of assets rules (where a transfer into trust for a disabled individual is not exempt from penalty under the exceptions to the transfer of assets rules explained in §3258.10);
- Application of post-eligibility treatment of income rules to income placed in the trust;
- Counting as income, per cash assistance rules, funds paid out of the trust to or for the benefit of the individual (This rule applies to any payment from an exempt trust, regardless of whether the trust is established using income, resources, or both.); and
- Spousal impoverishment provisions as they apply to exempt trusts.

For a detailed discussion of how these policies apply to income placed in an exempt trust for a disabled individual, see subsection C.

2. Trusts Established with Resources. -- When an exempt trust is established for a disabled individual using resources either in whole or in part, those resources are treated as follows.

   Resources placed in an exempt irrevocable trust for a disabled individual may or may not count as resources to the individual in determining eligibility, depending on the circumstances. Resources are counted as resources only during those months in which they are in the possession of the individual, up to but not including the month in which the resources are placed in the trust. Beginning with the month the resources are placed in the trust, they are exempt from being counted as resources to the individual.

   Resources placed in an exempt trust for a disabled individual are subject to imposition of a penalty under the transfer of assets provisions unless the transfer is specifically exempt from penalty as explained in §3258.10 or unless the resources placed in the trust are used to benefit the individual, and the trust purchases items and services for the individual at fair market value. See subsection C for the rules concerning application of the transfer of assets provisions to assets placed in an exempt trust. These rules apply to both income and resources placed in the exempt trusts discussed in this section.

C. Miller-Type or Qualifying Income Trusts (QIT). -- This type of trust, established for the benefit of an individual, meets the following requirements:

- The trust is composed only of pension, Social Security, and other income to the individual, including accumulated interest in the trust; and

- Upon the death of the individual, the State receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual under your State Medicaid plan. To qualify for this exception, the trust must include a provision to this effect.

  NOTE: HCFA has interpreted §1917(d)(4)(B) of the Act as explained below to avoid reading it as a nullity. This interpretation applies to those situations in which an individual first receives income and then places it into a Miller trust. It does not apply to situations in which an individual has irrevocably transferred his or her right to receive income to the trust. Under SSI rules, this income is no longer considered to be the individual's income. As a result, a trust established with income the right to which has been transferred to the trust does not meet the requirements for exemption under this section, since the statute requires that a Miller trust be established using the income of the individual.

This type of trust is applicable in your State only if your State Medicaid plan provides Medicaid to individuals eligible under a special income level, as described in §1902(a)(10)(A)(ii)(V) of the Act but does not provide Medicaid for nursing facility services to the medically needy, who are described in §1902(a)(10)(C) of the Act.

To qualify for this exception, the trust must be composed only of income to the individual, from whatever source. The trust may contain accumulated income, i.e., income that has not been paid out of the trust. However, no resources, as defined by SSI, may be used to establish or augment the trust. Inclusion of resources voids this exception.

While Miller trusts (as well as the trusts for the disabled described in subsections A and B) are exempt from treatment under the trust rules described in §3259.6, funds entering and leaving them are not necessarily exempt from treatment under the rules of the appropriate cash assistance program. The following are rules applicable to funds entering and leaving Miller trusts.

1. Miller Trust Meets All Requirements for Exemption Under §1917(d)(4)(B) of the Act. -- When a trust meets all requirements for exemption, and is irrevocable, the corpus of the trust is exempt from being counted as available to the individual. A revocable trust is exempt under the Miller trust provisions. However, a revocable trust is counted under SSI rules as an available resource to the individual.

2. Income Placed In Miller Trust. -- Income placed in a trust that meets all of the requirements for exemption as a Miller trust meets the SSI definition of income but is not counted in determining the individual's eligibility for Medicaid. Thus, any income, including Social Security benefits, VA pensions, private pensions, etc., can be placed directly into a Miller trust by the recipient of those funds, without those funds adversely affecting the individual's eligibility for Medicaid. Also, income generated by the trust which remains in the trust is not income to the individual.

3. Application of Transfer of Assets Provisions of OBRA 1993. --The transfer of assets provisions described in §§3258ff. apply to funds placed in a Miller trust. Under the transfer of assets provisions, income is considered to be an asset. In placing income in

an irrevocable trust, including a Miller trust, an individual gives up direct access to and control over that income. Thus, placement of funds, including income, in a trust can be a transfer of assets for less than fair market value. As such, placing funds in a Miller trust normally subjects the individual to the penalties provided for under the transfer of assets provisions.

However, transfer of assets penalties do not apply to income placed in a Miller trust to the extent that the trust instrument provides that the income placed in the trust will, in turn, be paid out of the trust for medical care provided to the individual, including nursing home care and care under a home and community-based waiver. When such payments are made, the individual is considered to have received fair market value for the income placed in the trust, up to the amount actually paid for medical care provided to the individual and to the extent that the payments purchased care at fair market value.

Because of certain exemptions from the transfer of assets penalties, funds placed in a Miller trust can be transferred for the sole benefit of a spouse without incurring such penalties. This can include, among other things, payments by the trust for medical care for the community spouse. Section 1917(c)(2)(B) of the Act provides that transfer penalties do not apply to assets transferred to a spouse or to a third party for the sole benefit of the spouse. A trust could be considered a third party for purposes of this transfer exemption. For an individual to avoid the transfer penalty that results from a transfer of property to a trust, the trust must be drafted to require that this particular property can be used only for the benefit of the individual's spouse while the trust exists and that the trust cannot be terminated and distributed to any other individuals or entities for any other purpose.

When payments are made for the individual's medical care you must require that the payments be made at intervals specified by your State (e.g., every month or by the end of the month following the month the funds were placed in the trust). An individual cannot be considered to have received fair market value for funds placed in a trust until payments for some item or service are actually made. Thus, funds cannot be allowed to accumulate indefinitely in a Miller trust and still avoid transfer of assets penalties.

The individual is considered to have received fair market value for funds placed in a Miller trust for any other payments made from the trust which are for the benefit of the individual and which reflect fair payments for any items or services which were purchased. For example, funds placed in the trust can be used to pay the administrative fees of the trust, income tax owed by the trust, attorney's fees which the trust is obligated to pay (in proportion to whatever part of the trust benefits the individual), food or clothing for the individual, or mortgage payments for the individual's home.

When income placed in the trust exceeds the amount paid out of the trust for medical services or other items or services which benefit the individual, the excess income is subject to penalties under the transfer of assets provisions.

It is important to note that, although an individual may not be subject to a transfer penalty if funds he or she transferred to a trust are used by the trustee to make payments

that provide fair market value to the individual, these payments from the trust may still count as income to the individual, as explained in subsection 4.

4. Treatment of Payments Made from Trust. -- While Miller trusts are exempt from treatment under the trust provisions described in §3259.6, payments made from these trusts are still subject to the usual rules under the State Medicaid plan. In most States, these are the SSI rules. Any payments made from a Miller trust directly to the individual are counted as income to the individual, provided the individual could use the payments for food, clothing, or shelter for himself or herself. This rule applies whether or not the payments actually are used for these purposes, as long as there are no legal impediments which prevent the individual from using the payments this way.

   Any payments made by the trustee to purchase something in kind for the individual also can count as income to the individual. In kind income includes actual food, clothing, or shelter, or something the individual can use to obtain one of these. For example, if the trustee makes a mortgage payment for the individual, that payment is a shelter expense and counts as income.

   However, as another example, assume that the trust provides that $500 is paid each month toward the cost of the individual's nursing facility care. Under SSI policy, medical expenses paid on behalf of an individual are not counted as income to the individual. Thus, the $500 in this instance is not considered income.

5. Post-eligibility Treatment of Income. -- All of the post-eligibility treatment of income rules in 42 CFR 435.725, 733, 735, and 832, as well as §1924 of the Act, apply in cases involving Miller trusts, as follows.

   a. Income Not Placed in a Miller Trust. -- Income retained by the individual (i.e., not placed in a Miller trust) is income to the individual, according to SSI policy. Thus, such income is subject to the post-eligibility rules.

   b. Income Placed in a Miller Trust. -- Income placed in a Miller trust is income for SSI purposes although it is not counted as available in determining Medicaid eligibility. Thus, such income is also subject to the post-eligibility rules.

      Because income placed in a Miller trust is income as defined by SSI (although it is not counted for Medicaid eligibility purposes), all income placed in a Miller trust is combined with countable income not placed in the trust for post-eligibility purposes. For example, an individual with $2,000 a month in income retains $1,338 (the maximum currently permitted for eligibility under a special income level) and places the remaining $662 in a Miller trust. The entire $2,000 is income as defined by SSI, although only the $1,338 is counted as income for eligibility purposes. Thus, the $2,000 forms the basis for the post-eligibility computation.

Using the $2,000 as the individual's total income for post-eligibility purposes, the State deducts, as applicable:

- A personal needs allowance;
- Family maintenance allowances, including the spousal and family allowances provided for in §1924 of the Act;
- An allowance for maintenance of a home, if such allowance is included in the State plan; and
- Medical expenses not subject to third party payment.

The remainder is the amount by which the State reduces its payment to the medical institution or for home and community-based waiver services.

c. Payments Made From Miller Trust. -- Payments made from a Miller trust to the individual may count for eligibility purposes as income to the individual under SSI rules. However, such payments are not subject to treatment under the post-eligibility rules. Post-eligibility has already been applied to all income entering the trust. Thus, there is no need to consider, for purposes of post-eligibility, payments made from the trust.

6. Miller Trust and Spousal Impoverishment. -- As explained in subsection 5, funds placed in a Miller trust are subject to the post-eligibility treatment of income rules, including those applicable to spousal impoverishment in §1924 of the Act.

3259.8 Application of Trust Provisions Would Work Undue Hardship. -- When application of the trust provisions discussed in §§3259ff would work an undue hardship those provisions do not apply. Unlike the policies applying to trusts established on or before August 10, 1993, which only required that you acknowledge that the statute included an undue hardship provision, under OBRA 1993 you must implement an undue hardship provision for trusts. Further, that policy must be described in your Medicaid State Plan. You have considerable flexibility in implementing an undue hardship provision. However, your undue hardship provision must meet the requirements discussed below.

A. Undue Hardship Defined. -- Undue hardship exists when application of the trust provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the trust provisions would deprive the individual of food, clothing, shelter, or other necessities of life.

Undue hardship does not exist when application of the trust provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him or her at risk of serious deprivation.

B. Burial Trusts And Undue Hardship. -- A burial trust is a trust established by an individual for the purpose of paying, at some point in the future, for the various expenses associated with the individual's funeral and burial. At your option, you may exempt a burial trust from treatment as a trust under the State's undue hardship policies provided the total value of the trust does not exceed an amount specified by the State. For example, you may choose

to exempt from being counted as a trust under your undue hardship policies any burial trust that does not exceed $5,000 in value.

C. State Flexibility. -- You have considerable flexibility in deciding the circumstances under which you will not count funds in trusts under the trust provisions because of undue hardship. For example, you may specify the criteria to be used in determining whether the individual's life or health would be endangered, and whether application of a penalty would deprive the individual of food, clothing, or shelter. You may also specify the extent to which an individual must make an effort to recover assets placed in a trust. As a general rule, you have the flexibility to establish whatever criteria you believe are appropriate, as long as you adhere to the basic definition of undue hardship described above.

However, your undue hardship provision must, at a minimum, provide for:

- Notice to recipients that an undue hardship exception exists;
- A timely process for determining whether an undue hardship waiver will be granted;
- A process under which an adverse determination can be appealed.

Your undue hardship provision must discuss how you will meet these requirements.

The Early Cases

11.

In re Pooled Trust Advocate, 813 N.W.2d 130, 141-146 (S.D. 2012)

(S.D.1991) (failure to file a statement of issues in an administrative appeal in circuit court); *W. States,* 459 N.W.2d 429 (failure to file a statement of issues in an appeal before this Court); *Meade Educ. Ass'n v. Meade Sch. Dist. 46–1,* 399 N.W.2d 885 (S.D.1987) (failure to file a statement of issues in an administrative appeal in circuit court); *State Highway Comm'n v. Olson,* 81 S.D. 237, 132 N.W.2d 927 (1965) (failure to file assignments of error in an appeal before this Court).

[¶ 18.] *Matter of Weickum's Estate,* 317 N.W.2d 142 (S.D.1982), also cited by Finnemans and RCF, did involve failure to serve the notice of appeal on parties to the action. Although this Court held in that case that the failure to serve the notice did not affect the validity of the appeal, it also cautioned that future appellants should comply with the requirement, "or their appeal may be subject to dismissal." *Id.* at 144 n. 1. *Weickum's Estate* also failed to reconcile its resolution of the service issue with our earlier holdings requiring the dismissal of appeals where all parties are not served. *See, e.g., Morrell,* 77 S.D. 114, 86 N.W.2d 533; *Long,* 262 N.W.2d 207. Therefore, we deem the disposition of this issue in *Weickum's Estate* anomalous and unpersuasive in this matter.

Conclusion

[¶ 19.] For the foregoing reasons, Finnemans' and RCF's appeals are dismissed for failure to serve their notices of appeal on each party to the action.

[¶ 20.] Dismissed.

[¶ 21.] KONENKAMP, ZINTER, SEVERSON, and WILBUR, Justices, concur.

2012 S.D. 24

In re POOLED ADVOCATE TRUST.

Fred Matthews and Gladys Matthews, Appellants,

v.

South Dakota Department of Social Services, Appellee.

Nos. 25536, 25902.

Supreme Court of South Dakota.

Argued Jan. 10, 2012.

Decided March 28, 2012.

Background: Medicaid benefit recipients sought review of imposition, by Department of Social Services (DSS), of penalty period as to benefits, and, in separate action, Medicaid pooled trust sought declaration that DSS could not impose penalty period for transfers made by certain pooled trust beneficiaries. Declaration was granted in trust's declaratory judgment action, and the Circuit Court, Pennington County, Jeff W. Davis, J., granted further relief sought by trust. In recipients' action, the Circuit Court, Pennington County, Janine M. Kern, affirmed imposition of penalty period. Recipients appealed, and DSS appealed grant of further relief made in declaratory judgment action.

Holdings: The Supreme Court, Konenkamp, J., held that:

(1) proper standard of appellate review of circuit court's grant of further relief in declaratory judgment action was de novo;

(2) issue of whether certain Medicaid beneficiaries would be subject to penalty period as result of transfers to Medicaid pooled trust was not fully and fairly litigated in earlier proceedings on trust's declaratory judgment action,

weigh our interest in reaching the correct legal conclusion.[6]

3. Statutory Analysis

[13–17] [¶ 32.] When interpreting a statute, we "begin with the plain language and structure of the statute." *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 163.

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed.

Id. ¶ 5.

[¶ 33.] The United States Congress enacted Medicaid in 1965. *Mulder v. S.D. Dep't of Soc. Servs.*, 2004 S.D. 10, ¶ 7, 675 N.W.2d 212, 215. "Medicaid is a cooperative State and Federal program designed to provide health care to needy individuals." *Id.* If states choose to take part in the Medicaid program, "they must develop a State plan that complies with the Federal Medicaid act and its regulations." *Id.* South Dakota participates in the Medicaid program and charges the Secretary of DSS "with the responsibility of promulgating rules to determine eligibility and the extent of benefits available to applicants." *Id.* (citing SDCL 28–6–1 and 28–6–3.1). These rules can be found in the Administrative Rules of South Dakota (ARSD) Title 67, Article 46. *Id.*

[¶ 34.] Long-term care assistance is an optional category of Medicaid coverage. 42 U.S.C. § 1396a(a)(10)(A)(ii)(V). South Dakota elected to provide long-term Medicaid coverage. ARSD 67:46:01:02(6). To determine eligibility for long-term care assistance, DSS is required to review an applicant's income and resources. ARSD 67:46:02:03. DSS must also determine whether an applicant has transferred any assets within a look-back period. 42 U.S.C. § 1396p(c); ARSD 67:46:05:06. If an applicant has transferred assets for less than fair market value during that time, he or she may be ineligible for Medicaid long-term care assistance for a certain penalty period. 42 U.S.C. § 1396p(c); ARSD 67:46:05:06; ARSD 67:46:05:09. Although an applicant is ineligible for long-term care benefits during the penalty period, the applicant may be eligible for medical-only benefits during that time. ARSD 67:46:05:09.03.

[¶ 35.] Certain Medicaid eligibility rules apply to trusts. *See* 42 U.S.C. § 1396p(d). Three types of trusts are generally exempt from these Medicaid trust rules—special needs trusts, Medicaid income trusts, and pooled trusts. *See* 42 U.S.C. § 1396p(d)(4); ARSD 67:46:05:17. This case involves pooled trusts.

[¶ 36.] A pooled trust is "[a] trust containing the assets of an individual who is

6. Res judicata and the "law of the case" doctrine are supported by nearly identical policy considerations. *See Brown v. Felsen*, 442 U.S. 127, 132, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979); *see also Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 15, 720 N.W.2d 655, 660. Even if the orders here had occurred in separate actions, we would not apply res judicata for many of the same reasons we do not apply the "law of the case" doctrine, specifically because it would not serve the doctrine's policy considerations and would defeat the ends of justice.

disabled (as defined in [42 U.S.C. § 1382c(a)(3)])[.]" 42 U.S.C. § 1396p(d)(4)(C). A pooled trust must be "established and managed by a nonprofit association." 42 U.S.C. § 1396p(d)(4)(C)(i). In addition, "[a] separate account [must be] maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts." 42 U.S.C. § 1396p(d)(4)(C)(ii). Finally, the "[a]ccounts in the trust [must be] established solely for the benefit of individuals who are disabled[.]" 42 U.S.C. § 1396p(d)(4)(C)(iii). Disabled individuals of any age may establish sub-accounts within pooled trusts. *See* 42 U.S.C. § 1396p(d)(4)(C). *Cf.* 42 U.S.C. § 1396p(d)(4)(A) (providing that only disabled individuals "under age 65" may participate in Medicaid special needs trusts).

[¶ 37.] When taking into account certain transfers of assets for purposes of Medicaid eligibility and penalty periods, Medicaid provides an exception for certain transfers of assets to trusts. *See* 42 U.S.C. § 1396p(c)(2)(B)(iv). Under this exception, "[a]n individual shall not be ineligible for medical assistance [for disposing of assets for less than fair market value on or after the look-back date] to the extent that . . . the assets were transferred to a trust (including a trust described in [42 U.S.C. § 1396p(d)(4)]) established solely for the benefit of an individual *under 65 years of age* who is disabled[.]" 42 U.S.C. § 1396p(c)(2)(B)(iv) (emphasis added). Therefore, under Medicaid, pooled trusts are exempt from the general trust rules outlined in 42 U.S.C. § 1396p(d) and transfers of assets into pooled trusts by those under 65 years of age are exempt from the transfer penalty period rules outlined in 42 U.S.C. § 1396p(c)(1). 42 U.S.C. §§ 1396p(d)(4)(C) and 1396p(c)(2)(B)(iv).

[¶ 38.] Here, the parties do not dispute that PATI and the pooled trust satisfy Medicaid's requirements for a pooled trust under 42 U.S.C. § 1396p(d)(4)(C). The parties also do not dispute that individuals over the age of 65, like Fred and Gladys, may participate in and establish sub-accounts with a Medicaid pooled trust. What the parties do dispute, however, is whether a penalty period applies for Medicaid eligibility purposes when beneficiaries over age 65 transfer assets into the pooled trust. We conclude that under the unambiguous statutory language, transfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period for Medicaid eligibility purposes.

[¶ 39.] PATI repeatedly asserts that an age limitation cannot be "read into" 42 U.S.C. § 1396p(d)(4)(C), the statute that provides the requirements for a Medicaid pooled trust. PATI notes that unlike the statute regarding Medicaid special needs trusts, the pooled trust statute does not contain an "under age 65" limitation. This is accurate—as far as it goes. Under 42 U.S.C. § 1396p(d)(4)(C), a disabled individual 65 or older may participate in a pooled trust and establish a sub-account in that trust. But PATI must differentiate between participation in a pooled trust and subsequent penalty periods and delays in eligibility for transfers to the trust. While an individual age 65 or older may participate in a Medicaid pooled trust, he or she will be subject to a penalty period and a delay in Medicaid eligibility for certain benefits if he or she transfers assets to the trust for less than fair market value. 42 U.S.C. §§ 1396p(d)(4)(C) and 1396p(c)(2)(B)(iv).

[¶ 40.] PATI also argues that funds in a pooled trust are not available to an applicant for Medicaid eligibility purposes. PATI cites *Norwest Bank of N.D., N.A. v.*

Doth, 159 F.3d 328 (8th Cir.1998) to support this argument. In that case, the Eighth Circuit Court of Appeals found that under 42 U.S.C. § 1396p(d)(4), funds in a Medicaid special needs trust "are not deemed to be available to [a Medicaid] application or recipient for the purpose of determining [Medicaid] eligibility or the amount of benefits." *Id.* at 332. We agree that 42 U.S.C. § 1396p(d)(4) exempts special needs trusts, pooled trusts, and Medicaid income trusts from the general trust rules found in 42 U.S.C. § 1396p(d). Yet the Eighth Circuit did not hold that these three types of trusts are wholly exempt from the transfer penalty rules found in 42 U.S.C. § 1396p(c). And while 42 U.S.C. § 1396p(c)(2)(B)(iv) creates an exception for trust transfers from the transfer penalty rules, the statute limits the exception to trusts established for an individual under age 65. Therefore, we find PATI's argument and reliance on the Eighth Circuit case unpersuasive.

[¶ 41.] PATI further contends that penalizing beneficiaries age 65 or older who transfer assets to a Medicaid pooled trust makes their participation in a pooled trust a nullity, rendering the pooled trust exception meaningless. Essentially, PATI asks "Why would Congress allow individuals 65 or older to participate in pooled trusts if they will nevertheless be subject to a transfer penalty under another statute?" PATI argues that these beneficiaries should not be denied benefits and often cannot wait out the penalty period. First, we must differentiate between being *denied* Medicaid long-term care assistance and being subject to a *delay in eligibility* for Medicaid long-term care assistance via a penalty period. DSS's policy does not deny a pooled trust beneficiary Medicaid assistance. The policy merely imposes a mandatory penalty period during which time the applicant is not eligible for long-term care assistance. The applicant may nevertheless qualify for medical-only coverage during the penalty period (as Gladys did), and after the penalty period expires, the applicant may thereafter be eligible for long-term care assistance. Moreover, even if PATI were correct in claiming that our interpretation of the statutory language leads to a problematic result, we must confine our decision to the plain language of the statutes. *See People ex rel. J.L.*, 2011 S.D. 36, ¶ 4, 800 N.W.2d 720, 722. For whatever reason, the penalty period exception for trust transfers is limited to transfers made to trusts established for individuals under age 65, and we confine our decision to this language.

[¶ 42.] In addition, we cannot accept PATI's claim that "subjecting [the pooled trust statute] to divestment penalties under [the penalty period statute] would read an age limit into [the pooled trust statute], nullifying it for people with disabilities who have passed age 64 because they typically cannot afford to wait out the five-year 'look-back' period." "*The Medicaid program is not to be used as an estate planning tool.*" *Striegel v. S.D. Dep't of Soc. Servs.*, 515 N.W.2d 245, 247 (S.D.1994) (emphasis in original). Medicaid provisions are "designed to assure that individuals receiving nursing home and other long-term care services under Medicaid are in fact poor and have not transferred assets that should be used to purchase the needed services before Medicaid benefits are made available." *Id.* Therefore, while we acknowledge the impact of a five-year delay in long-term care assistance, this provision was designed to preserve Medicaid benefits for those who truly lack the assets or resources to financially secure long-term care.

4. Agency Interpretation

[18] [¶ 43.] "Congress conferred on the Secretary [of Health and Human Ser-

vices] exceptionally broad authority to prescribe standards for applying certain sections of the [Medicaid] Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981). CMS, a branch of the Department of Health and Human Services, focuses on Medicare and Medicaid services. "As the [United States] Supreme Court recently noted, even relatively informal HCFA (now CMS) interpretations, such as letters from regional administrators, 'warrant[ ] respectful consideration' due to the complexity of the [Medicaid] statute and the considerable expertise of the administering agency." *Cmty. Health Ctr. v. Wilson–Coker*, 311 F.3d 132, 138 (2d Cir.2002) (quoting *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 497, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002)).[7] The South Dakota Medicaid Program and administrative rules must comply with federal Medicaid law and any CMS regulations. *See Mulder*, 2004 S.D. 10, ¶ 7, 675 N.W.2d at 215.

[¶ 44.] In a CMS memorandum from Gale P. Arden, Director of Disabled and Elderly Health Programs Group at the Center for Medicaid and State Operations in Baltimore, the transfer penalty and pooled trust statutes at issue in this case were clarified. *See* Memorandum from Gale P. Arden to Jay Gavens, Acting Assoc. Regional Adm'r, Div. of Medicaid and Children's Health (Apr. 14, 2008). In part, the memorandum stated:

> 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 the 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 64 or younger are exempt from application of the transfer of assets penalty provisions*....

Id. (emphasis added). CMS issued this memorandum because "it was brought to [its] attention that in many States ... individuals age 65 or older are establishing pooled trusts, but the States may not be applying the transfer of assets penalty provisions as required by statute." *Id.* The memorandum explained that "[i]f 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. [F]ederal statute requires the application of the transfer rules in this situation; it [is] not a decision for each State to make."[8] *Id.* One month later, the Boston Regional Office of CMS issued a memorandum to all state Medicaid agencies in its region, reciting identical language and ask-

7. Even more recently, the Supreme Court wrote: "The Medicaid Act commits to the federal agency the power to administer a federal program. And here the agency has acted under this grant of authority. That decision carries weight. After all, the agency is comparatively expert in the statute's subject matter. And the language of the particular provision at issue here is broad and general, suggesting that the agency's expertise is relevant in determining its application." *Douglas v. Indep. Living Ctr. of S. Cal., Inc., et al.*, — U.S. ——, ——, 132 S.Ct. 1204, 1210, 182 L.Ed.2d 101 (2012).

8. In 2010, DSS amended its administrative rules to directly reflect CMS's interpretation of the transfer penalty statutes. *See* ARSD 67:46:05:32.03(3)(e). The amendment became effective July 1, 2010.

ing all states to review their pooled trust provisions and ensure that the state provisions comply with federal standards.[9] *See* Memorandum from Richard R. McGreal, Assoc. Regional Adm'r, Ctrs. for Medicare and Medicaid Servs., to All Medicaid State Agencies (May 12, 2008).

[¶ 45.] CMS also discussed pooled trusts and transfer penalties in its State Medicaid Manual (SMM).[10] The SMM provides information regarding policies and procedures to state Medicaid agencies. *SMM,* Foreword § A. The contents of the SMM are binding on state Medicaid agencies. *SMM,* Foreword § B. In the eligibility requirements section, CMS notes under the pooled trusts sub-section that:

> Establishing an account in [a pooled trust] may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. *As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty.*[11]

SMM, Chapter 3: General and Categorical Eligibility Requirements, § 3259.7(B) (emphasis added).

[¶ 46.] In addition, the Social Security Administration reached the same conclusion in its Program Operations Manual System (POMS), "the publicly available operating instructions for processing Social Security claims[.]" *Wash. State Dep't of Soc. and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 385, 123 S.Ct. 1017, 1025, 154 L.Ed.2d 972 (2003). "While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect[.]" *Id.* Under a section reviewing the requirements for pooled trusts, POMS states that "[t]here is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty." [12]

[¶ 47.] We find these agency interpretations of the relevant Medicaid statutes to be reasonable, and thus, we give them credence. These interpretations of the pooled trust and penalty period statutes bolster our reading of the unambiguous statutory language requiring penalty periods for transfers of assets for less than fair

9. At oral argument, PATI's counsel said that South Dakota was in the Denver CMS region, and thus the CMS memo from the Boston region was not binding on DSS in South Dakota. Nevertheless, the memo from Gale P. Arden at CMS headquarters in Baltimore specifically stated that the memo would be provided to all the other CMS Regional Offices to refresh the understanding of their staffs.

10. Centers for Medicare & Medicaid Services, *The State Medicaid Manual,* http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10 (last modified Sept. 8, 2005). For simplicity purposes, citations will be to the sections of the manual only without full URL citations.

11. Some authorities often use the term "special needs trusts" to generally describe the three types of trusts created for the benefit of disabled individuals under 42 U.S.C. § 1396p(d)(4)(A) through (C). However, as both the statutes and the SMM indicate, a special needs trust (42 U.S.C. § 1396p(d)(4)(A)) is different from a pooled trust (42 U.S.C. § 1396p(d)(4)(C)). In this note, CMS is likely using the term "special needs trust" generally to describe a pooled trust because this note follows the pooled trust section and a similar note follows the preceding special needs trust section.

12. *Program Operations Manual System,* § SI 01120.203, https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203 (last updated Oct. 27, 2011).

market value into pooled trusts by beneficiaries age 65 or older.[13]

5. Legislative History

[19] [¶ 48.] PATI argues that the legislative history demonstrates that pooled trusts are not only exempt as a resource for Medicaid eligibility purposes but the trusts are also exempt from transfer penalty periods. "This Court does not, however, review legislative history when the language of the statute is clear." *Bertelsen v. Allstate Ins. Co.*, 2009 S.D. 21, ¶ 15, 764 N.W.2d 495, 500. Because we conclude that the statutory language is unambiguous and the agency interpretations of the statutes are reasonable, we do not explore this argument.

Decision on Administrative Appeal

[20–23] [¶ 49.] In the administrative appeal, Fred and Gladys challenge the circuit court's affirmance of the ALJ's ruling on DSS's imposition of a Medicaid transfer penalty period. We review an administrative appeal in accord with SDCL 1–26–37. "A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact." *Snelling v. S.D. Dep't of Soc. Servs.*, 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. We will reverse an agency's decision only if it is "clearly erroneous in light of the entire evidence in the record." *Id.* However, statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review. *Id.* Therefore, in light of the foregoing authority and because the parties do not dispute the facts in these cases, we apply the de novo standard of review to this administrative appeal.

[¶ 50.] Fred and Gladys argue that the circuit court erred in affirming the ALJ's decision. Given our holding that penalty periods can be applied to transfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older, the only relevant issue remaining is whether Fred's and Gladys's transfers to the trust were transfers for "less than fair market value." Fred and Gladys contend that a transfer of assets by one individual to a pooled trust established for another person age 65 or older, or a third-party trust transfer, is a divestment. But they contend that a transfer made by a pooled trust beneficiary for the sole benefit of the beneficiary is not a divestment under Medicaid. Fred and Gladys believe that an individual who transfers assets to a pooled trust receives value in return because he or she retains equitable ownership of the trust funds. They claim that in transferring their assets to the pooled trust, they "merely exchanged legal ownership for equitable ownership" and that the value they received for their transfers was the benefit of the goods and services purchased by the trust.

[¶ 51.] We disagree that only third-party transfers to pooled trusts constitute divestments under Medicaid or that the transfer penalties only apply when a third party transfers assets to a pooled trust for the benefit of a pooled trust beneficiary. Under 42 U.S.C. § 1396p(d)(4)(C), a pooled trust is "[a] trust *containing the assets of an individual who is disabled*...." (Emphasis added.) While parents, grandparents, legal guardians, or courts may *establish* a pooled trust for a disabled beneficiary, these third parties may not *fund* the pooled trust with third-party assets. *See* 42 U.S.C. § 1396p(d)(4)(C)(iii). Thus, when a third party places his or her own assets into a

13. At least one court agrees with our holding. *See Ctr. for Special Needs Trust Admin., Inc. v. Olson*, No. 1:09–CV–072, 2011 WL 1562516, at *8 (D.N.D. Apr. 25, 2011).

12.

Center for Special Needs Trust Administration v. Olson, 676 F.3d 688, 700-703 (8th Cir. 2012)

ments: that (1) but for the negligence, the injury would not have occurred, (2) the injury is the natural and probable result of the negligence, and (3) there is no efficient intervening cause." *Heatherly v. Alexander*, 421 F.3d 638, 641–42 (8th Cir.2005). "The test of causation is not that the particular injury could be anticipated but whether after the occurrence, the injury appears to be the reasonable and probable consequence of the acts or omissions." *Meyer v. Nebraska*, 264 Neb. 545, 650 N.W.2d 459, 466 (2002) (per curiam).

[15] The district court found that Grade's claim failed because Grade could not demonstrate the first two elements of proximate cause. We agree that Grade cannot show that his injuries were the natural and probable result of BNSF's negligence in blocking the crossing in excess of the ten minutes of permitted blocking time. Under Nebraska law, certain injuries are so attenuated from a defendant's breach of duty that they cannot be said to be caused by the defendant's actions. *See, e.g., Wilken v. City of Lexington*, 16 Neb.App. 817, 754 N.W.2d 616, 624 (2008) (finding it was not a foreseeable consequence of leaving a police car with the keys in the ignition within access of a suspected juvenile delinquent that the juvenile would steal the car and use the weapons inside). We fail to see how the natural and probable consequence of a railroad's permitting a railcar to remain on a crossing longer than the allotted ten minutes is that an automobile will collide with that railcar. As a matter of law, Grade has failed to demonstrate causation and his claim fails. The district court appropriately granted summary judgment based on lack of causation, and we need not reach the issue of whether Grade's claim is preempted by federal law.

D. Failure to Keep Rolling Stock Under Control Claim

[16] In claim (b) of his complaint, Grade claims BNSF was negligent in failing to keep its rolling stock under reasonable and proper control and supervision. However, BNSF's cars were stopped and were located on a BNSF track, exactly where BNSF intended for them to be. Grade has failed to demonstrate that the cars were not under BNSF's control. Therefore, the district court properly granted summary judgment as to this claim.

III.

For the foregoing reasons, we affirm the grant of summary judgment as to all of Grade's claims.

CENTER FOR SPECIAL NEEDS TRUST ADMINISTRATION, INC., Appellant,

v.

Carol K. OLSON, in her official capacity as Executive Director of North Dakota Department of Human Services, Appellee.

No. 11–2158.

United States Court of Appeals, Eighth Circuit.

Submitted: Nov. 16, 2011.

Filed: April 16, 2012.

Background: Trustee of pooled special-needs trust, created by over-65-year-old disabled beneficiary of Medicaid benefits, sued North Dakota Department of Human

broad, general goals, which the states have broad discretion to implement." *Id.* Unlike the provision in *Lankford*, the language of paragraph 1396p(d)(4)(C) describes the trusts that the Center can market. By describing a specific type "C" trust, the statute sets forth more than broad, general goals. 42 U.S.C. § 1396p(d)(4)(C). Determining which assets qualify under 1396p(d)(4)(C) is not too vague and amorphous, and does not strain the judicial competence.

[25] The third prong of the *Blessing* test is whether the statute unambiguously imposes a binding obligation on the states. "In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341, 117 S.Ct. 1353. The provision here is couched in mandatory terms: "This subsection *shall not* apply to any of the following trusts...." 42 U.S.C. § 1396p(d)(4) (emphasis added). The use of the word "shall" in section 1396p(d)(4) is mandatory, not precatory. Statutory language such as "must" and "shall" is mandatory under the *Blessing* test. *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Servs.*, 293 F.3d 472, 478 (8th Cir.2002) ("must"); *Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 526 (8th Cir.1993) ("shall" and "must,"); *see also Bernard v. Kan. Health Policy Auth.*, No. 09–1247–JTM, 2011 WL 768145, at *10–11 (D.Kan. Feb. 28, 2011) (finding the words "shall" and "shall not" in a statute satisfy the mandatory-term requirement of *Blessing*). This court finds the statutory language sufficient "to evince a congressional intent to create individually-enforceable federal rights." *Lankford*, 451 F.3d at 509.[2]

[26] Because paragraph 1396p(d)(4)(C) meets the three prongs of the *Blessing* test, it is presumed enforceable under section 1983. *Lankford*, 451 F.3d at 508, *quoting Blessing*, 520 U.S. at 340–41, 117 S.Ct. 1353. This presumption is rebutted if Congress explicitly or implicitly forecloses section 1983 enforcement. *Id.*, *citing Blessing*, 520 U.S. at 347, 117 S.Ct. 1353. Congress has not foreclosed section 1983 enforcement of the Medicaid Act. *Arkansas Med. Soc'y*, 6 F.3d at 528, *citing Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520–23, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) ("The *Wilder* Court found that Congress had not foreclosed § 1983 enforcement in the Medicaid statute, *Wilder*, 496 U.S. at 520–23, 110 S.Ct. at 2523–24, and we are bound by that judgment."). Because the *Blessing* test is met and Congress has not foreclosed section 1983 enforcement of the Medicaid Act, the Center has a cause of action under section 1983.

C.

[27] The Centers for Medicare & Medicaid Services (CMS)—the federal agency that provides guidance on Medicaid—has not issued regulations on section 1396p(d). North Dakota asserts that a 2008 letter from CMS is consistent with its interpretation of paragraph 1396p(d)(4)(C). The 2008 letter says that a "C" trust for people

2. The only other appeals court to address whether 1396p(d)(4) imposes a binding obligation on the states held that one paragraph, 1396p(d)(4)(A), did *not* unambiguously impose a binding obligation on the state. *Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009). It found that "Congress left the States free to decide whether and under what conditions to recognize such [§ 1396p(d)(4)] trusts" and that "States *'need not* count [§ 1396p(d)(4)] trusts for eligibility purposes, but nevertheless *may* ... opt to do so.'" *Id.* at 1180, *quoting Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir.2000) (emphases and alterations in original). This court declines to apply this reasoning to paragraph 1396p(d)(4)(C), due to mandatory language "shall not" introducing the paragraph.

over 65 would contravene the statute.[3] The district court cited the CMS letter at length, and deferred to it.[4]

[28–30] A district court's interpretation of a federal statute is reviewed de novo. *Norwest Bank of N.D. v. Doth*, 159 F.3d 328, 332 (8th Cir.1998). "The starting point in interpreting a statute is always the language of the statute itself." *United States v. Talley*, 16 F.3d 972, 975 (8th Cir.1994). The ordinary meaning of the statutory language accurately expresses the legislative purpose. *United States v. I.L.*, 614 F.3d 817, 820 (8th Cir.2010), *citing Hardt v. Reliance Standard Life Ins. Co.*, —— U.S. ——, 130 S.Ct. 2149, 2156, 176 L.Ed.2d 998 (2010).

[31] This court turns first to the plain language of subsection (d), by itself. In one paragraph of subsection (d), Congress omitted any age requirement for pooled special-needs "C" trusts. **42 U.S.C. § 1396p(d)(4)(C).** At first blush, by the language of paragraph 1396p(d)(4)(C), there is no age limit for disabled beneficiaries of type "C" pooled special-needs trusts. *See Lewis v. Alexander*, 276 F.R.D. 421, 442–44 (E.D.Pa.2011) (ruling that Pennsylvania's Medicaid statute was preempted because it disqualified over–65 recipients of pooled special needs trust accounts; emphasizing the lack of an age restriction in paragraph 1396p(d)(4)(C); and noting that "Congress has amended Section 1396p four times since its passage in 1993").

[32] In a second paragraph of subsection (d), however, Congress specifically limited "A" trusts to individuals "under age 65." *See* 42 U.S.C. § 1396p(d)(4)(A). "Where Congress includes particular lan-

3. "[O]nly trusts established for disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions (see section [1396p](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." Letter from Verlon Johnson, CMS Associate Regional Administrator, U.S. Dep't of Health & Human Servs. Letter 08–03 (July 2008), *available at* http://lawyersusaonline.com/wp–files/pdfs/08–03–cms–pool–trusts.pdf. Seven years earlier, another official of CMS's predecessor wrote an opinion letter flatly stating that "the statute does not impose an age limit on the trust cited at 42 U.S.C. § 1396p(d)(4)(C)." *See* Letter from Thomas E. Hamilton, Director of the Disabled and Elderly Health Programs Group, CMS (Aug. 9, 2001), *in* Clifton B. Kruse, Jr., *Third–Party and Self–Created Trusts—Planning for the Elderly and Disabled Client* 328 (ABA 3d ed. 2002).

4. The district court should not have deferred to the CMS letter. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (an agency's interpretation of a statute contained in an opinion letter, not promulgated through formal adjudication or rulemaking, does not have the force of law and does not deserve *Chevron* deference), *citing Chevron USA, Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute). "[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655, *citing EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256–58, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991); *see also Kai v. Ross*, 336 F.3d 650, 655 (8th Cir.2003) (holding that a CMS opinion letter stating eligibility requirements not contained in the Medicaid Act was not entitled to *Chevron* deference); *St. Mary's Hosp. v. Leavitt*, 416 F.3d 906, 914 (8th Cir. 2005) (finding a letter from a Medicare official interpreting the Medicare statute "entitled to respect," but "not entitled to *Chevron*-type deference because it does not appear to have 'the force of law.'"). The issue is whether the CMS letter has persuasive power.

guage in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). *See Lutheran Social Serv. of Minn. v. United States,* 758 F.2d 1283, 1289 (8th Cir.1985). This presumption is much stronger when, as here, the comparison is between two paragraphs of the same subsection of a statute. *See Chesnut v. Montgomery,* 307 F.3d 698, 702 (8th Cir.2002). By the omission of an age limit in the "C" paragraph of subsection (d), Congress's intent was to permit disabled persons over age 65 to *participate* in "C" pooled trusts. In fact, the parties agree that disabled individuals over age 65, like Kemmet, can participate in a type "C" pooled trust. North Dakota, however, insists on a penalty period when an over–65 beneficiary transfers assets into a "C" pooled trust, distinguishing a temporary disqualification from *participation* in a pooled trust.

[33] Decisive is a third paragraph, 1396p(c)(2)(B)(iv). "In determining whether statutory language is plain and unambiguous, the court must read all parts of the statute together and give full effect to each part." *Estate of Farnam v. C.I.R.,* 583 F.3d 581, 584 (8th Cir.2009). Applying "the admonition that all parts of a statute are to be read together, the plain meaning becomes clear." *Id.* This third paragraph, 1396p(c)(2)(B)(iv), provides:

> (c) **Taking into account certain transfers of assets**
>
> . . . .
>
> (2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—
>
> . . . .
>
> (B) the assets—
>
> . . . .
>
> (iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual *under 65 years of age* who is disabled (as defined in section 1382c(a)(3) of this title);

42 U.S.C. § 1396p(c)(2)(B)(iv) (emphasis added). The Center claims that this paragraph does not apply to a trust like Kemmet's, established by the beneficiary. The Center relies on a Tennessee state-court case that found this third paragraph, (c)(2)(B)(iv), to apply only to trusts "created for the benefit of another person," which would make its age limit inapplicable to "C" trusts created by the beneficiary. *Ruby Beach v. State of Tenn. Dep't of Human Servs.,* No. 09–2120–III, at 28 (Tenn. Ch. Ct. 20th Jud. Dist. of Davidson County Sept. 8, 2010) (unpublished) (ruling that imposing a transfer penalty on pooled trusts for those over 65 violates paragraph 1396p(d)(4)(C)). To the contrary, the plain language of this paragraph does not address, let alone restrict, the creator of the trust. By referencing "subsection (d)(4)," paragraph 1396p(c)(2)(B)(iv) necessarily includes trusts created by the beneficiary, because subsection (d)(4)(C) includes trusts created by the beneficiary. This third paragraph's age limit controls.

When all paragraphs of the statute are read together, a disabled individual over 65 may establish a type "C" pooled trust, but may be subject to a delay in Medicaid benefits. Despite the lack of an age limit within paragraph 1396p(d)(4)(C) for purposes of counting resources, Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65. 42 U.S.C. § 1396p(c)(2)(B)(iv).

The South Dakota Supreme Court has also held that transfers by beneficiaries

over age 65 to "C" pooled trusts *are* subject to the Medicaid Act's disqualifying penalties. *In re Pooled Advocate Trust*, 813 N.W.2d 130, 141–42, 2012 WL 1038644, at *9 (S.D. Mar. 28, 2012). "[U]nder the unambiguous statutory language, transfers of assets for less than fair market value into ["C"] pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period for Medicaid eligibility purposes." *Id.*, 813 N.W.2d at 142, 2012 WL 1038644, at *10. The court rejected the trust's argument that penalizing beneficiaries age 65 or older who transfer assets to a "C" pooled trust makes their participation a nullity, rendering the paragraph 1396p(d)(4)(C) exception meaningless. "For whatever reason, the penalty period exception for trust transfers is limited to transfers made to trusts established for individuals under age 65 . . ." *Id.* The court went on to "acknowledge the impact of a five-year delay in long-term care assistance," but concluded that subsection 1396p "was designed to preserve Medicaid benefits for those who truly lack the assets or resources to financially secure long-term care." *Id.*, 813 N.W.2d at 143, 2012 WL 1038644, at *11.

IV.

[34–36] The Center contends that North Dakota's regulations conflict with the federal Medicaid Act and are preempted. *See* U.S. Const. Art. VI, cl. 2. Where Congress has not expressly preempted or entirely displaced state regulation in a specific field, as with the Medicaid Act, "state law is preempted to the extent that it actually conflicts with federal law." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). An actual conflict arises where compliance with both state and federal law is a "physical impossibility," or where the state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id., quoting Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) *and Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Because Congress intended for transfers of assets into "C" pooled trusts by beneficiaries age 65 or older to be subject to a transfer penalty period, this case does not present a conflict between the North Dakota regulations and paragraphs 1396p(c)(2)(B)(iv) and (d)(4)(C) of the Medicaid Act, and thus there is no preemption here.

V.

The district court properly determined that section 1396p(d)(4)(C) affords the Center a right of action under section 1983; that North Dakota did not waive its claim for reimbursement and should not be estopped from making that claim; that the Center's claim was without merit; and that preemption does not apply.

* * * * * *

The judgment of the district court is affirmed.

UNITED STATES of America, Appellee,

v.

James Edward THORNBERG, Appellant.

No. 11–2692.

United States Court of Appeals, Eighth Circuit.

Submitted: March 16, 2012.

Filed: April 16, 2012.

Background: Following his apprehension more than six years after escaping from

The later cases

13.

Hutson v. Mosier, 54 Kan. App. 2d 679, 401 P.3d 673, 678-682 (2017)

not indicate a test refusal under Paragraph 4 of the DC–27 form. Even if Wall had failed a breath test, the officer failed to certify: (1) The testing equipment used was certified by the Kansas Department of Health and Environment; (2) the testing procedures used were in accordance with the requirements set out by the Kansas Department of Health and Environment; and (3) the person who operated the testing equipment was certified by the Kansas Department of Health and Environment to operate such equipment (Paragraphs 9–11 of the DC–27 form). Therefore, the officer's certification did not comply with K.S.A. 2016 Supp. 8-1002(a)(3). Thus, under either ground for suspension—refusal or failure—the officer's certification did not comply with the requirements of K.S.A. 2016 Supp. 8-1002(a).

[10] KDOR should have dismissed the suspension and returned Wall's driver's license even if he had not requested an administrative hearing. The fact he did not raise the issue at the administrative hearing does not bar review because KDOR should never have proceeded with the suspension action and the hearing should not have occurred in the first place. KDOR lacked subject matter jurisdiction as it was statutorily required to dismiss the administrative proceeding because the officer's certification did not comply with K.S.A. 2016 Supp. 8-1002(a). It had no power to hear and decide the action. See K.S.A. 2016 Supp. 8-1002(f); *Dunn*, 304 Kan. at 784, 375 P.3d 332.

Affirmed.

1

In the MATTER OF the ESTATE OF William G. COURTER.

No. 116,297

Court of Appeals of Kansas.

Opinion filed August 18, 2017

Appeal from Greenwood District Court; DAVID A. RICKE, judge.

Affirmed in part. Reversed in part. Remanded.

2

STATE of Kansas, Appellee,

v.

Tommie LITTLIES, Appellant.

No. 116,003

Court of Appeals of Kansas.

Opinion filed August 18, 2017

Appeal from Lyon District Court; W. LEE FOWLER, judge.

Affirmed.

3

Marcia HUTSON, Appellant,

v.

Susan MOSIER, M.D., in her Official Capacity as Secretary of Kansas Department of Health and Environment, Appellee.

No. 117,020

Court of Appeals of Kansas.

Opinion filed September 8, 2017

Background: Medicaid applicant appealed from order of the District Court, Douglas County, Paula B. Martin, J., affirming order issued by the Division of Health Care Finance State Appeals Committee imposing transfer penalty on applicant.

On November 8, 2016, the district court entered a memorandum decision affirming the agency action. In reaching this decision, the district court concluded:

> "While the court sympathizes with [Hutson's] circumstances and concerns, the federal statutory language [found in 42 U.S.C. § 1396p(d)(4) (2012) and incorporated into K.A.R. 129–6–109(c)(2)(G)] is clear. [Hutson] was over 65 at the time of the transfer and did not receive fair market value for her transfer. Accordingly, [the agency] correctly determined that the transfer was an uncompensated transfer subjecting [Hutson] to a period of ineligibility."

On December 2, 2016, Hutson filed a notice of appeal. We subsequently granted the National Academy of Elder Law Attorneys, Inc. and the Special Needs Alliance, Inc. leave to file amicus briefs in this case. In addition, we granted leave to the National Academy of Elder Law Attorneys, Inc. to participate in the oral arguments.

Analysis

Issues Presented

On appeal, Hutson contends that the district court erred in interpreting the applicable federal law and state administrative regulations relating to Medicaid eligibility. Moreover, Hutson argues that she received fair market value for her transfer of assets to the pooled supplemental needs trust, and as such, she should not be subject to a transfer penalty. In response, KDHE contends that DCF appropriately imposed a transfer penalty against Hutson because she did not receive fair market value for the transfer of her assets to the pooled supplemental needs trust.

Standard of Review

[1–3] This appeal arises out of a judicial review action commenced by Hutson in district court. The scope of judicial review of a state administrative agency action is defined by the Kansas Judicial Review Act (KJRA), K.S.A. 77–601 et seq. See *Ryser v. State*, 295 Kan. 452, 458, 284 P.3d 337 (2012); *Muir v. Kansas Health Policy Authority*, 50 Kan. App. 2d 854, 856, 334 P.3d 876 (2014). Under the KJRA, we exercise the same statutorily limited review of an agency's action as does the district court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010). The party asserting the invalidity of an agency's action—in this case Hutson—bears the burden of proving invalidity. K.S.A. 2016 Supp. 77–621(a)(1); see *Golden Rule Ins. Co. v. Tomlinson*, 300 Kan. 944, 953, 335 P.3d 1178 (2014).

[4–6] Interpretation of a statute or an administrative regulation is a question of law over which we have unlimited review. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1043, 271 P.3d 732 (2012). When a statute or regulation is plain and unambiguous, we are to give effect to the intent expressed through the words used—giving common words their ordinary meaning—instead of attempting to determine what the law should or should not be. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). Where there is no ambiguity, we are not to resort to statutory construction. Rather, only if the language or text is unclear or ambiguous are we to look at the canons of construction or legislative history. 304 Kan. at 409, 372 P.3d 1135.

Federal Medicaid Law

[7, 8] The United States Congress created the Medicaid program in 1965 to provide federal financial assistance to states that reimburse the costs of medical treatment for the needy. *Schweiker v. Hogan*, 457 U.S. 569, 571, 102 S.Ct. 2597, 73 L.Ed.2d 227 (1982). The purpose of Medicaid is to provide medical and rehabilitation assistance to those who qualify as poor, aged, blind, or disabled. *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 317, 291 P.3d 1056 (2013). As a cooperative federal and state program, both federal and state laws govern Medicaid. *Schweiker v. Gray Panthers*, 453 U.S. 34, 36–37, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981); see *Muir*, 50 Kan. App. 2d at 859, 334 P.3d 876. Although it is not required to do so, Kansas has elected to participate in the Medicaid program. See *Village Villa*, 296 Kan. at 317, 291 P.3d 1056.

[9, 10] Once a state chooses to participate in the Medicaid program, it must comply with various federal statutes and regulations governing its administration. *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1164–65 (10th Cir. 2004). A participating state is also required to submit a plan to the United States Secretary of Health and Human Services under 42 U.S.C. § 1396a(a) (2012). Once the plan is approved, the federal government subsidizes the participating state's medical-assistance services. In addition, the participating state must comply with "certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program." *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 164 L.Ed. 2d 459 (2006).

[11] Participating states are given "substantial discretion to choose the proper mix of amount, scope, and duration limitations" of their respective Medicaid programs. *Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985). Nevertheless, the failure of a participating state to comply with federal law places the state's receipt of federal funding at risk. See 42 U.S.C. § 1396a(a); see also 42 U.S.C. § 1396c (2012). Of particular relevance to the present case, participating states must "comply with the provisions of section 1396p ... with respect to ... treatment of certain trusts." 42 U.S.C. § 1396a(a)(18).

[12] To be eligible for Medicaid, a person must have income and assets less than the thresholds set by the United States Secretary of Health and Human Services. See 42 U.S.C. § 1396a(a)(17). For many years, individuals could transfer funds to a trust in order to reduce the amount of assets considered for Medicaid eligibility. *Lewis v. Alexander*, 685 F.3d 325, 332 (3d Cir. 2012). However, the Omnibus Budget Reconciliation Act of 1993 amended 42 U.S.C. § 1396p (2012) to provide that trust funds would—as a general rule—be counted as assets for the purpose of determining Medicaid eligibility. Today, subject to certain exceptions, funds held in trust are generally counted as resources for determining Medicaid eligibility. 42 U.S.C. § 1396p(d)(3).

[13, 14] Three types of trusts are not subject to the general rule if certain statutory requirements have been met. See 42 U.S.C. § 1396p(d)(4)(A), (B), and (C). Here, Hutson placed assets into a pooled supplemental needs trust created pursuant to 42 U.S.C. § 1396p(d)(4)(C). A "pooled trust" is " 'a special arrangement with a non-profit organization that serves as trustee to manage assets belonging to many disabled individuals, with investments being pooled, but with separate trust "accounts" being maintained for each disabled individual.' " *Lewis*, 685 F.3d at 333 (quoting Myskowski, *Special Needs Trusts in the Era of the Uniform Trust Code*, 46 N.H. Bar J., Spring 2005, at 16). "The pooled special needs trust was intended for individuals with a relatively small amount of money. By pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary." *Lewis*, 685 F.3d at 333.

Regarding pooled supplemental or special needs trusts, which are also referred to as charitable pooled trusts, the Medicaid statute states:

> "(4) [The statutory provisions counting trust funds as assets for purposes of determining Medicaid eligibility] shall not apply to any of the following trusts:
>
> ....
>
> (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
>
> (i) The trust is established and managed by a nonprofit association.
>
> (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
>
> (iv) To the extent that amounts remaining in the beneficiary's account upon the

death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter." 42 U.S.C. § 1396p(d)(4)(C).

[15] Furthermore, under 42 U.S.C. § 1396p(c)(1), an applicant for Medicaid long term care assistance may be subject to a transfer penalty period if he or she transfers assets for less than fair market value. However, 42 U.S.C. § 1396p(c)(2)(B)(iv) provides that a person will not be subject to a transfer penalty if the assets "were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an *individual under 65 years of age who is disabled* ...." (Emphasis added.)

Kansas Medicaid Regulations

[16] In addition to federal Medicaid law, Kansas has promulgated administrative regulations—under the auspices of the Secretary of KDHE or her predecessors—to assist with determining Medicaid eligibility. These regulations have the force and effect of law. K.S.A. 77–425; see *Village Villa*, 296 Kan. at 320, 291 P.3d 1056. Regarding pooled supplemental or special needs trusts, K.A.R. 129–6–109(c)(2)(G) states:

"(G) [The regulatory provisions counting trusts as available assets for purposes of determining Medicaid eligibility] shall not apply to a trust that contains the assets of an individual who meets the ... disability criteria of K.A.R. 129–6–85 if the trust meets all the following conditions:

(i) The trust is established by a nonprofit association.

(ii) A separate account is maintained for each beneficiary of the trust.

(iii) Accounts in the trust are established solely for the benefit of individuals who meet the ... disability criteria of K.A.R. 129–6–85.

(iv) Each account in the trust is established by that individual; the parent, grandparent, or legal guardian of the individual; or a court. The state shall receive all amounts remaining in the individual's account upon the death of the individual, up to an amount equal to the total medical assistance paid on behalf of the individual.

Establishment of a trust under paragraph (c)(2)(G) for an individual who is at least 65 shall be subject to the transfer of assets provisions of K.A.R. 129–6–57." (Emphasis added.)

The Kansas regulations also address the transfer of assets by Medicaid applicants. In particular, K.A.R. 129–6–57(b) provides that "[i]f an individual or spouse has transferred or disposed of assets for less than fair market value on or after the specified look-back date as determined by the date of transfer, the individual shall not be eligible for payment of services for any institutionalized individual ...." However, K.A.R. 129–6–57(c)(1) states that "[a]n individual shall not be ineligible for payment of services due to a transfer of assets [if] [t]he fair market value of the assets transferred has been received." Furthermore, K.A.R. 129–6–57(c)(5)(C) states that "[an] individual shall not be ineligible for payment of services due to a transfer of assets [to] a trust established solely for the benefit of an individual under 65 years of age who meets the ... disability criteria of K.A.R. 129–6–85."

"Fair market value" is defined in K.A.R. 129–6–57(a)(3) to mean "the market value of an asset at the earlier of the time of the transfer or the contract of sale." Moreover, pursuant to K.A.R. 129–6–57(a)(2), "compensation" includes "all money, real or personal property ... or service received by the individual ... at or after the time of transfer in exchange for the asset in question." The regulation also defines "uncompensated value" to mean "the fair market value of an asset less the amount of any compensation received by the individual ... in exchange for the asset." K.A.R. 129–6–57(a)(6).

Application of Medical Statute and Kansas Medicaid Regulations

[17, 18] Based on our review of the federal law and state administrative regulations, we have no difficulty in concluding that individuals 65 or older may participate in a pooled supplemental or special needs trust

under the provisions of 42 U.S.C. § 1396p(d)(4)(C). Likewise, we have no difficulty concluding that the terms of the AR-Care Trust II satisfy the Medicaid requirements for a pooled supplemental or special needs trust. The more difficult issue, however, is whether a transfer penalty should be imposed on a Medicaid applicant—like Hutson—who is 65 or older because he or she does not receive fair market value by transferring his or her assets to a pooled trust.

[19] We must answer this question by considering all of the provisions of 42 U.S.C. § 1396p together rather than in isolation. See *Herrell v. National Beef Packing Co.*, 292 Kan. 730, 745, 259 P.3d 663 (2011). In doing so, we find the plain language of the statute to mean that a person age 65 or older who transfers assets to a pooled supplemental or special needs trust is subject to the imposition of a transfer penalty under the rules of subsection 42 U.S.C. § 1396p(c)(1) if the transfer is for less than fair market value. Trusts established for disabled persons are exempt from application of the transfer of assets penalty provisions only when the disabled person is under the age of 65. See 42 U.S.C. § 1396p(c)(2)(B)(iv). Moreover, we find that the Medicaid regulations promulgated by the State of Kansas are consistent with this interpretation. See K.A.R. 129–6–57(b), (c)(1), and (c)(5)(C); K.A.R. 129–6–109(c)(2)(G).

We note that our interpretation of 42 U.S.C. § 1396p is consistent with the opinion handed down by the United States Court of Appeals for the Eighth Circuit in *Center for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 702 (8th Cir. 2012). It is also consistent with the opinion of the South Dakota Supreme Court in the case of *In re Pooled Advocate Trust*, 813 N.W.2d 130, 142 (S.D. 2012). In addition, we note that the United States Court of Appeals for the Third Circuit reached the same conclusion in dicta in the case of *Lewis*, 685 F.3d at 351.

In *Olson*, 676 F.3d at 702, the Eighth Circuit held:

> "When all paragraphs of [42 U.S.C. § 1396p] are read together, a disabled individual over 65 may establish a type 'C' trust, but may be subject to a delay in Medicaid benefits. Despite the lack of an age limit within paragraph 1396p(d)(4)(C) for purposes of counting resources, Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65. 42 U.S.C. § 1396p(c)(2)(B)(iv)."

The Eighth Circuit also concluded that a North Dakota regulation subjecting those who are 65 and over to the penalty of delayed eligibility for Medicaid benefits did not conflict with federal law "[b]ecause Congress intended for transfers of assets into 'C' pooled trusts by beneficiaries age 65 or older to be subject to a transfer penalty period" if the transfer was for less than fair market value. 676 F.3d at 703.

Similarly, in the case of *In re Pooled Advocate Trust*, 813 N.W.2d at 142, the South Dakota Supreme Court held that "under the unambiguous [federal] statutory language, transfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period for Medicaid eligibility purposes." In reaching this conclusion, the court found that a transfer penalty does not deny the applicant the ability to obtain long-term care assistance. Instead, the transfer penalty simply delays an applicant's eligibility to start receiving Medicaid assistance. Although the South Dakota Supreme Court recognized that such a delay may have a significant impact on an applicant, it found that transfer penalties are "designed to preserve Medicaid benefits for those who truly lack the assets or resources to financially secure long-term care." 813 N.W.2d at 143.

[20] Here, it is uncontroverted that Hutson was in her 70s at the time she transferred $59,528.42 in assets to the pooled supplemental needs trust established pursuant to 42 U.S.C. § 1396p(d)(4)(C). Accordingly, we conclude that, if she transferred assets for less than fair market value, the State of Kansas has the authority to impose a transfer penalty on Hutson under the rules set forth in 42 U.S.C. § 1396p(c)(1) and the related Kansas regulations. As indicated above, pooled trusts are intended to assist individu-

als with a relatively small amount of money who lack the financial resources to secure long-term care. They are not intended to be vehicles for affluent individuals to use in order to divert scarce Medicaid resources from those truly in need. See *Ramey v. Reinertson*, 268 F.3d 955, 961 (10th Cir. 2001); see also *Miller v. State Dept. of S.R.S.*, 275 Kan. 349, 356–57, 64 P.3d 395 (2003) ("Medicaid was designed to provide basic medical care for those without sufficient income or resources to provide for themselves."). Therefore, while we recognize that in some cases the impact of a transfer penalty may seem harsh, the imposition of such penalties are specifically authorized by federal law as well as state regulation, and they serve a legitimate purpose.

Determination of Fair Market Value

[21–23] Finally, Hutson contends that KDHE has failed to show that her transfer of assets to the pooled supplemental needs trust was for less than fair market value. In response, KDHE contends that Hutson has the burden of proof and cannot show that she received fair market value of the transfer of her assets to the pooled supplemental needs trust. Evidently, both parties believe they should prevail on this issue as a matter of law. However, unlike the interpretation of a statute or regulation, the determination of the value of property—whether real or personal—is generally a question of fact and not a question of law. See *In re Estate of Hjersted*, 285 Kan. 559, Syl. ¶ 1, 175 P.3d 810 (2008). Moreover, neither party included in their statements of uncontroverted fact, submitted to the administrative law judge, any suggestion as to what the fair market value of the transfer of assets to the pooled trust might have been at the time of the transfer.

In her initial brief, Hutson suggests that she simply exchanged legal title for equitable title. However, she glosses over the plain language of the Transfer–Joinder Agreement in which she gave the trustee absolute discretion over her assets placed into the pooled trust. Although ARCare, Inc.—like any trustee—has a general duty to act in good faith and is contractually obligated to use the funds for Hutson's benefit, we do not find this is sufficient to determine as a matter of law that the transfer of assets was for fair market value.

Hutson also argues that the "evidence [shows] that she received a benefit exceeding zero." Perhaps this is true, but that does not equate to the evidence showing that she received fair market value for the transfer. In addition, she argues in her reply brief that "[a] future benefit has a quantifiable present value." Perhaps this is also true, but we find nothing in the record on appeal that would allow us to determine what that present value was at the time she entered into the Transfer–Joinder Agreement with ARCare, Inc. In fact, we find nothing in the record that would allow us to conclude, as a matter of law, that Hutson received fair market value for the transfer of nearly $60,000 to the pooled supplemental needs trust.

On the other hand, we also find nothing in the record that would allow us to conclude as a matter of law that Hutson received less than fair market value for the transfer of her assets to the pooled supplemental needs trust. As the United States Court of Appeals for the Third Circuit noted, "[b]y pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary." *Lewis*, 685 F.3d at 333. Although we cannot say as a matter of law what the fair market value of the investment and management services provided by ARCare, Inc. to Hutson was at the time of the transfer of assets, it seems clear that these types of services have a value, which could be considered to be compensation to Hutson under K.A.R. 129–6–57(a)(2).

Under the circumstances presented, we believe that the interests of justice require that we vacate that portion of the district court's decision finding as a matter of law that Hutson "did not receive fair market value for her transfer" of assets to the pooled supplemental needs trust because we do not find substantial evidence in the record to support this conclusion. Accordingly, pursuant to K.S.A. 77–622(b), we remand this matter for an administrative hearing to determine the factual question of whether Hutson transferred assets to the pooled supplemen-

14.

Cox v. Iowa Department of Human Services, 920 N.W.2d 545, 530-555, 559-563 (Iowa 2018) and its dissent

strate a legislative intent to *limit* at $500 what might otherwise be a more expansive restitution? In this case, the restitution sought by the City of Davenport far exceeds the $500 authorized for emergency responses for drunk driving.

We think the facts of this situation and the emergency response scenarios contemplated by Iowa Code section 910.1(4) are apples and oranges. Here, the crime of eluding generates a police chase that results in a crash involving the offender and police vehicles that is within the scope of liability under the Restatement (Third) of Torts and under our prior tort law. In the emergency response context, the public agency is responding to the results of the crime of drunk driving in the ordinary course of business. The causation element in the latter situation is one-step removed from the former. If the drunk driver bashed into an emergency response vehicle, we do not think the limitations of restitution in 910.1(4) would apply. As a result, we conclude that the provision of Iowa Code section 910.1(4) does not prevent a restitution to the City of Davenport under the different factual scenario posed in this case.

IV. Conclusion.

For the above reasons, the decision of the district court is affirmed.

DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.

Susan E. COX and Edward A. Cox, Appellants,

v.

IOWA DEPARTMENT OF HUMAN SERVICES, Appellee.

No. 18-0026

Supreme Court of Iowa.

Filed November 30, 2018

Background: Medicaid applicants sought judicial review of decision of Department of Human Services (DHS) requiring delay in their eligibility for institutional long-term care benefits. The District Court, Polk County, Scott D. Rosenberg, J., affirmed. Applicants appealed.

Holding: The Supreme Court, Waterman, J., held that applicants' transfer of funds into pooled special needs trusts did not constitute a transfer for "fair market value."

Affirmed.

Appel, J., filed dissenting opinion.

1. Health ⇐512(1)

Interpretation of Medicaid Act by Department of Human Services (DHS) was not entitled to deference by Supreme Court. Social Security Act § 1902, 42 U.S.C.A. § 1396a.

2. Administrative Law and Procedure ⇐433, 434

The weight accorded to an agency's regulation concerning a reasonable interpretation of an ambiguous statute in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

of the relevant statutory provisions. We will review the rulings on statutory interpretation by the DHS and district court for correction of errors at law. *Iowa Dental Ass'n*, 831 N.W.2d at 142–43.

[3, 4] We will apply substantial evidence review to the factual findings of the DHS, which has the authority to determine whether an individual is eligible for Medicaid. *See generally* 42 U.S.C. § 1396a (2012) (establishing requirements for state plans for medical assistance); Iowa Code § 249A.3(11)(*a*) ("In determining the eligibility of an individual for medical assistance, the department shall consider transfers of assets made on or after August 11, 1993, as provided by the federal Social Security Act, section 1917(c), as codified in 42 U.S.C. § 1396p(c)."); *id.* § 249A.4 (enumerating the duties of the DHS director with regard to medical assistance).

> If an agency has been clearly vested with the authority to make factual findings on a particular issue, then a reviewing court can only disturb those factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole."

Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(*f*)). "In other words, the question on appeal is not whether the evidence supports a different finding than the finding made . . . , but whether the evidence 'supports the findings actually made.' " *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006) (quoting *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000)).

> On the other hand, the application of the law to the facts . . . takes a different approach and can be affected by other grounds of error such as erroneous interpretation of law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts.

Id.

III. Analysis.

We must decide whether the DHS correctly imposed Medicaid eligibility penalties for long-term institutional care after the petitioners, at age sixty-five, transferred assets to a pooled special needs trust. This is a question of federal statutory law. We are not writing on a blank slate—the same legal issue has been adjudicated by the United States Court of Appeals for the Eighth Circuit, the South Dakota Supreme Court, and other courts. We join those courts in holding that the plain meaning of the controlling statutory provision mandates the delay in eligibility.

We begin our analysis with an overview of Medicaid. We then focus on the text of the dispositive statutory provision and the caselaw applying that provision. Finally, we address the remaining arguments for reversal by the counsel for Mr. and Mrs. Cox and amici curiae National Academy of Elder Law Attorneys, Inc. and Special Needs Alliance, Inc.

A. Overview of Medicaid. The Medicaid program, established in 1965 and codified at 42 U.S.C. §§ 1396–1396w-5 (the Medicaid Act), "was designed to serve individuals and families lacking adequate funds for basic health services, and it was designed to be a payer of last resort." *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014); *see also Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275, 126 S.Ct. 1752, 1758, 164 L.Ed.2d 459 (2006) (stating that Medicaid "provides joint federal and state funding of medical care for individuals who cannot afford to pay their own medical costs"). "To be eligible for Medicaid, a person must have income and resources less than thresholds set by the Secretary." *Ctr. for Special Needs Tr. Ad-*

min., Inc. v. Olson, 676 F.3d 688, 695 (8th Cir. 2012); *see also* 42 U.S.C. § 1396a(a)(17). "[T]he program contemplates that families will spend available resources first, and when those resources are completely depleted, Medicaid may provide payment." *In re Estate of Melby*, 841 N.W.2d at 875.

The Secretary of Health and Human Services administers the Medicaid program and "exercises his authority through the Centers for Medicare and Medicaid Services (CMS)." *Ahlborn*, 547 U.S. at 275, 126 S.Ct. at 1758. State participation in the Medicaid program is voluntary, but states choosing to participate "must comply with all federal statutory and regulatory requirements." *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006). "Among these requirements, states must 'comply with the provisions of section 1396p ... with respect to ... treatment of certain trusts.' " *Olson*, 676 F.3d at 694–95 (quoting 42 U.S.C. § 1396a(a)(18)).

B. Pooled Special Needs Trust Provisions. This case requires us to interpret provisions relating to pooled special needs trusts. Eligibility determinations for Medicaid benefits are complex, with certain requirements for eligibility for general benefits such as medical treatment and additional limitations on eligibility for long-term care in nursing homes. A two-tiered analysis is required. We begin with the general provisions and then address the controlling long-term care provisions.

1. *General Medicaid eligibility determinations.* Medicaid administrators will consider assets held in most types of trusts as available resources for Medicaid general eligibility determinations. 42 U.S.C. § 1396p(d). There are three types of trusts exempted from this general rule. *Id.* § 1396p(d)(4)(A), (B), (C); *see also* Iowa Admin. Code r. 441—75.24(3)(*a*), (*b*), (*c*) (providing the same exemptions). At issue here is the pooled special needs trust. 42 U.S.C. § 1396p(d)(4)(C); Iowa Admin. Code r. 441—75.24(3)(*c*).

"[A] pooled special-needs trust ... pays for a disabled person's Medicaid-ineligible expenses, such as clothing, phone service, vehicle maintenance, and taxes." *Olson*, 676 F.3d at 695. Pooled special needs trusts are "special arrangement[s] with a non-profit organization that serves as trustee to manage assets belonging to many disabled individuals, with investments being pooled, but with separate trust 'accounts' being maintained for each disabled individual." *Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir. 2012) (quoting Jan P. Myskowski, *Special Needs Trusts in the Era of the Uniform Trust Code*, 46 N.H. Bar J., Spring 2005, at 16, 16). These trusts are "intended for individuals with a relatively small amount of money. By pooling these small accounts for investment and management purposes, overhead and expenses are reduced and more money is available to the beneficiary." *Id.*

Because pooled special needs trusts are not countable as assets for *general* Medicaid benefit eligibility purposes, an individual of any age may place his or her assets into a pooled special needs trust without incurring penalties delaying his or her eligibility for general Medicaid benefits. The statute provides,

> **(d) Treatment of trust amounts**
>
> ....
>
> (4) This subsection shall not apply to any of the following trusts:
>
> ....
>
> (C) A trust containing the assets of an individual who is disabled (as defined in section 1382c(a)(3) of this title) that meets the following conditions:
>
> (i) The trust is established and managed by a nonprofit association.

> (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
>
> (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
>
> (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

42 U.S.C. § 1396p(d)(4)(C).[2] The Coxes and amici argue the lack of an age limit in this provision is dispositive and the DHS erred by counting their funds in the pooled special needs trust to delay their eligibility for Medicaid *long-term care* benefits. We disagree because the Medicaid Act requires additional steps to determine eligibility for long-term care benefits. That is where we confront the dispositive age-cutoff.

2. *Medicaid long-term care benefit eligibility.* "Long-term care assistance is an optional category of Medicaid coverage." *In re Pooled Advocate Tr.*, 813 N.W.2d 130, 141 (S.D. 2012). Long-term care benefits include nursing facility services. 42 U.S.C. § 1396p(c)(1)(C)(i)(I).

When an individual applies for long-term care benefits, the state must conduct additional analysis regarding the individual's transfers of assets. *Id.* § 1396p(c). Unlike general Medicaid eligibility determinations, states are specifically required to determine whether an applicant for long-term care benefits transferred assets for less than fair market value within the relevant look-back period. *Id.* § 1396p(c)(1)(A). If so, the applicant will be ineligible for long-term care benefits for a penalty period. *Id.* "Although an applicant is ineligible for long-term care benefits during the penalty period, the applicant may be eligible for medical-only benefits during that time." *In re Pooled Advocate Tr.*, 813 N.W.2d at 141.

There are certain transfers of assets, set out in § 1396p(c)(2), that will not qualify as transfers for less than fair market value. These transfers are exempt from the ineligibility and penalty period requirements. One exception to the ineligibility requirement for long-term care benefits is a transfer to a pooled special needs trust by an individual under the age of sixty-five.

> **(c) Taking into account certain transfers of assets**
>
> . . . .
>
> (2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—
>
> . . . .
>
> (B) the assets—
>
> the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

42 U.S.C. § 1396p(d)(4)(A) (emphasis added); *see also Olson*, 676 F.3d at 701–02 (discussing the differences between § 1396p(d)(4)(A) and (C)).

2. There is, however, an age limit with regard to one of the other exceptions in subsection (d):

> A trust containing the assets of an individual *under age 65* who is disabled . . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in

> ....
>
> **(iv)** were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title)[.]

42 U.S.C. § 1396p(c)(2)(B)(iv); *see also* Iowa Admin. Code r. 441—75.23(5)(b)(4). This case turns on this age limit for determining countable assets for eligibility for long-term care benefits. The Coxes transferred over one-half million dollars into their pooled special needs trusts after they reached age sixty-five. They therefore missed the safe harbor this statute, by its plain meaning, expressly limits to those under age sixty-five.

[5–7] When interpreting a statute, we look first to the statute's plain meaning. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017). "When the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute ...." *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005) (quoting *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999)). If unambiguous, we will apply the statute as written. *Nall*, 894 N.W.2d at 518. We do so here.

[8, 9] Congress placed age limits in certain provisions for Medicaid eligibility, and not others. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Chesnut v. Montgomery*, 307 F.3d 698, 701–02 (8th Cir. 2002) (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983)); *accord Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011). "When interpreting the meaning of the statute, we give effect to all the words in the statute unless no other construction is reasonably possible." *Oyens*, 808 N.W.2d at 193 (quoting *State v. Osmundson*, 546 N.W.2d 907, 910 (Iowa 1996)).

"By the omission of an age limit in the [pooled special needs trust] paragraph of subsection (d), Congress's intent was to permit disabled persons over age 65 to *participate* in [pooled special needs] trusts." *Olson*, 676 F.3d at 702. The court in *Olson* distinguished between an individual's participation in a pooled special needs trust and the individual's temporary disqualification from Medicaid long-term care benefits based on that participation. *Id.*

Edward and Susan argue that the DHS incorrectly interpreted the statutes relating to Medicaid eligibility and pooled special needs trusts and improperly treated the pooled special needs trusts as countable assets for purposes of their Medicaid long-term care eligibility determinations. The amici argue that the trust provision in § 1396p(d) applies to all trust transactions while the transfer provision of § 1396p(c) applies to all transfers to others. For that reason, the amici contend that § 1396p(c), which penalizes transfers of assets to pooled special needs trusts by individuals over the age of sixty-five, would be inapplicable here.

The Eighth Circuit, the South Dakota Supreme Court, and the Kansas Court of Appeals have already addressed the issue we face today. We find their reasoning persuasive.

The Eighth Circuit, considering both § 1396p(c) and (d), concluded,

> When all paragraphs of the statute are read together, a disabled individual over 65 may establish a [pooled special needs] trust, but may be subject to a delay in Medicaid benefits. Despite the

> lack of an age limit within paragraph 1396p(d)(4)(C) for purposes of counting resources, Congress intended to exempt transfers of assets into pooled [special needs] trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65.

Id.

The South Dakota Supreme Court reached the same conclusion. *In re Pooled Advocate Tr.*, 813 N.W.2d at 142. The court considered CMS's and the Social Security Administration's interpretations of § 1396p(c) and (d), finding these interpretations reasonable and that they "bolster[ed] [the court's] reading of the unambiguous statutory language requiring penalty periods for transfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older." *Id.* at 145–46. The court looked specifically to a CMS memorandum, which stated,

> 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 the 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 64 or younger are exempt from application of the transfer of assets penalty provisions* . . . .

Id. at 144 (quoting Memorandum from Gale P. Arden, Dir. of Disabled & Elderly Health Programs Grp., Ctr. for Medicaid & State Operations, Balt. to Jay Gavens, Acting Assoc. Reg'l Adm'r, Div. of Medicaid & Children's Health (Apr. 14, 2008)). CMS's State Medicaid Manual also provides,

> Establishing an account in [a pooled trust] may or may not constitute a transfer of assets for less than fair market value. For example, the transfer provisions exempt from a penalty trusts established solely for disabled individuals who are under age 65 or for an individual's disabled child. *As a result, a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty.*

Id. at 145 (quoting Ctrs. for Medicare & Medicaid Servs., *The State Medicaid Manual*, § 3259.7(B) [hereinafter State Medicaid Manual]). The court concluded,

> Considering the unambiguous language of the statutes, coupled with the reasonable agency interpretations, we conclude that transfers of assets into pooled trusts by beneficiaries age 65 or older may be subject to a transfer penalty period for Medicaid eligibility purposes.

Id. at 147. We give the CMS interpretation *Skidmore* deference under federal law. *Skidmore*, 323 U.S. at 140, 65 S.Ct. at 164.

In *Hutson v. Mosier*, 54 Kan.App.2d 679, 401 P.3d 673 (2017), the Kansas Court of Appeals reached the same conclusion and, after "considering all of the provisions of 42 U.S.C. § 1396p together rather than in isolation," held,

> [W]e find the plain language of the statute to mean that a person age 65 or older who transfers assets to a pooled supplemental or special needs trust is subject to the imposition of a transfer penalty under the rules of subsection 42 U.S.C. § 1396p(c)(1) if the transfer is for less than fair market value.

Id. at 681. The court "recognize[d] that in some cases the impact of a transfer penalty may seem harsh, [but] the imposition of such penalties are specifically authorized by federal law as well as state regulation, and they serve a legitimate purpose." *Id.* at 682. "[P]ooled trusts are intended to assist individuals with a relatively small amount of money who lack the financial resources to secure long-term care." *Id.* at 681–82. "They are not intended to be vehicles for affluent individuals to use in order to divert scarce Medicaid resources from those truly in need." *Id.* at 682.

A United States District Court recently reached the same conclusion, stating, "The text of (c)(2)(B)(iv) explicitly limits its reach to trusts 'established solely for the benefit of an individual under 65 years of age.' " *Richardson ex rel. Carlin v. Hamilton*, No. 2:17-CV-00134-JAW, 2018 WL 1077275, at *16 (D. Maine Feb. 27, 2018) (quoting 42 U.S.C. § 1396p(c)(2)(B)(iv)), *appeal docketed*, No. 18–1223 (1st Cir. Mar. 22, 2018). "As such, § 1396p(c)(2)(B)(iv) does not immunize transfers of assets into pooled special needs trusts for beneficiaries age sixty-five and older from subsection (c)'s provisions that penalize transfers of assets for less than market value." *Id.* at *17.

[10] We agree with the foregoing authorities. Sections 1396p(c)(2)(B)(iv) and (d)(4)(C) are unambiguous. While an individual age sixty-five and older may establish a pooled special needs trust, the individual may be subject to a delay in Medicaid long-term care benefits if transfers to the trust after the individual reached the age of sixty-five were for less than fair market value.

Congress may have had policy reasons for penalizing such transfers by those age sixty-five or older. Medicaid is "a payer of last resort," and benefits are intended for those who are truly unable to afford medical care. *In re Estate of Melby*, 841 N.W.2d at 875. Congress could reasonably choose to help younger disabled individuals with longer life expectancies conserve their resources. Conversely, "Congress could have rationally concluded that the benefits of making special needs trusts available to elderly individuals outweighed the burden of the penalty. As it stands, congressional intent—as exemplified by the text of the statute—is clear." *Lewis*, 685 F.3d at 352.

The DHS and the district court properly interpreted the relevant statutory provisions with regard to pooled special needs trusts. We turn next to the Coxes' argument that the DHS erred when it determined the transfers were for less than fair market value.

C. The Transfer for Less Than Fair Market Value. The Coxes argue the DHS erred when it determined that the transfers to the pooled special needs trusts were a disposal of assets for less than fair market value. Specifically, they contend the DHS did not conduct an individualized factual analysis to determine whether the deposits were (1) a "transfer or disposal of assets" and (2) for fair market value. Iowa Admin. Code r. 441—75.23(8). We begin with the transfer argument.

[11] 1. *Transfer or disposal of assets.* The Coxes argue that their deposits into the pooled special needs trusts were not a "transfer or disposal of assets" under Iowa Administrative Code section 441—75.23(8) because a pooled special needs trust is not listed among the six examples enumerated in that rule.

> "*Transfer or disposal of assets*" means any transfer or assignment of any legal or equitable interest in any asset as defined above, including:
>
> 1. Giving away or selling an interest in an asset;

transfers for less than fair market value. The DHS relies on CMS interpretations to support its argument. With regard to fair market value, CMS has stated,

> 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.

Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs., State Agency Regional Bulletin No. 2008-05 (May 12, 2008), *available at* http://www.sharinglaw.net/elder/CMS-d4c.pdf.

> Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

State Medicaid Manual § 3258.1(A)(2). Again, we give the CMS interpretation *Skidmore* deference. *Skidmore*, 323 U.S. at 140, 65 S.Ct. at 164.

The DHS argues that, in considering the facts of this case, the transfers were for less than fair market value. The DHS argues the trustee controls how the funds are spent and the Coxes have to pay the trustee for trust maintenance. The DHS also argues the transfers were not made for valuable consideration because the Coxes received nothing in return for their transfers. Finally, from a policy perspective, the DHS argues it should be able to evaluate fair market value at the time the assets are transferred to the trust rather than after the trust funds have been spent.

After reviewing the DHS findings in light of all of the evidence in the record, we conclude that substantial evidence supports the DHS finding that the transfers were made for less than fair market value. The value of readily available assets is greater than the value of assets that are restricted in a trust for future use. Even if the trustee were obligated to pay out trust funds over a period of time, these funds are still worth less than unrestricted cash. The trustee may only use the funds in the pooled trusts for Edward and Susan's care. Edward and Susan cannot later decide to use some of the funds for other purposes such as paying for the college tuition of their grandchildren. Also, if there are funds left in the trust when Edward and Susan die, the trustee will keep the funds or use the funds to reimburse the State for Medicaid expenses. The funds will not go to the estate to pay estate debt nor will the funds go to beneficiaries of the estate. We conclude the DHS conducted an adequate individualized factual analysis with regard to both Edward and Susan to determine the length of the penalty period.

IV. Disposition.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

All justices concur except Appel, J., who dissents.

APPEL, Justice (dissenting).

I respectfully dissent.

I acknowledge, at the beginning, that the undertaking of making sense of the Medicaid statute is no easy feat. The Act has been called "an aggravated assault on the English language." *Friedman v. Berger*, 409 F.Supp. 1225, 1226 (S.D.N.Y. 1976). And, it has been said that the Act is the equivalent of a "Serbonian bog ... Where armies whole have been sunk." *Cherry ex rel. Cherry v. Magnant*, 832 F.Supp. 1271, 1273 n.4 (S.D. Ind. 1993)

(quoting John Milton, *Paradise Lost*, bk. 2, ll.592–94 (1667)).

While I will not add to the colorful language, I will simply state that I do not find this statute nearly as easy to penetrate as does the majority. I take on our assignment in this case with caution. Based on my review of the entire statutory section in context, however, I come to a different conclusion than the majority. In any event, it is clear to me that the questions posed in this appeal have repeatedly surfaced in administrative appeals in a number of states with mixed results. Authoritative clarification of the dispute would require congressional action or a definitive interpretation from the United States Supreme Court.

I. Relationship Between Subsections d and c in 42 U.S.C. § 1396p.

The first interpretive question in this case is the relationship between 42 U.S.C. § 1396p(d) (2012), entitled "Treatment of trust amounts," and § 1396p(c), entitled "Taking into account certain transfers of assets." In order to understand the relationship between these two provisions, a close reading of the statutory language is a prerequisite.

The "Treatment of trust amounts" provision, § 1396p(d), is a comprehensive provision designed to address the question of how trusts will be treated for purposes of Medicaid eligibility. Subsection d begins with a very broad definition indicating that an individual is considered to have established a trust by putting any assets into the corpus. *Id.* § 1396p(d)(2)(A). The subsection then addresses two general categories of trusts, revocable and irrevocable trusts. *Id.* § 1396p(3)(A)–(B).

Assets in a *revocable* trust are considered resources available to the individual in determining Medicaid eligibility. *Id.* § 1396p(d)(3)(A)(i). And, payments from the trust to the individual are considered income of the individual. *Id.* § 1396p(d)(3)(A)(ii). In short, these provisions prohibit the use of revocable trusts to shield assets for the purpose of Medicaid eligibility determinations.

Assets held in an *irrevocable* trust are next considered in subsection d. *Id.* § 1396p(d)(3)(B). To the extent that payments from the assets in an irrevocable trust could be made for the benefit of the individual, that portion of the corpus is considered as resources available to the individual in making Medicaid eligibility determinations. *Id.* § 1396p(d)(3)(B)(i). Further, to the extent payments are made from an irrevocable trust for the benefit of an individual, it is considered income of that individual. *Id.* § 1396p(d)(3)(B)(i)(I). Conversely, if payments are made from an irrevocable trust for any other purpose, it is considered to be an asset transferred by the individual for purposes of subsection c. *Id.* § 1396p(d)(3)(B)(i)(II). Similarly, to the extent there are portions of an irrevocable trust that cannot be used under any circumstances to pay the individual, those portions are considered assets disposed by the individual for purposes of subsection c. *Id.* § 1396p(d)(3)(B)(ii).

Subsection d thus generally eliminates the possibility of using creative estate planning devices to achieve eligibility for Medicaid. In particular, establishing a trust with a residual benefit for heirs, or a trust that only conditionally removes assets from the individual's control, will not work as a tool to avoid restrictions on Medicaid eligibility. But there are three exceptions to the general rule: trusts related to providing benefits to disabled persons; trusts related to certain pension, Social Security, or other income (commonly known as *Miller* trusts); and pooled trusts established for a disabled individual. *Id.*

§ 1396p(d)(4)(A)–(C). The latter category is germane to this litigation.

Certain pooled trusts are not subject to the unfavorable treatment for Medicaid eligibility purposes under a number of conditions. *Id.* § 1396p(d)(4)(C). These pooled trusts must contain the assets of an individual who is disabled; be established and managed by a nonprofit association; maintain a system of separate accounts; be maintained for the sole benefit of individuals who are disabled; and to the extent that amounts remaining in the beneficiary's account upon death are not retained by the trust, pay to the state an amount equal to the total amount of medical assistance paid on behalf of the beneficiary. *Id.*

In this case, there is no dispute that the trusts qualify under § 1396p(d)(4)(C). So, funds in the trust that could in the future be made payable to the benefit of the individual are not considered available for purposes of Medicaid eligibility, and the payment of funds from the trusts are not considered income for purposes of Medicaid eligibility.

I now turn to subsection c. It generally provides that if an institutionalized individual disposes of assets for less than fair market value, the individual is ineligible for medical assistance for long-term care services during a penalty period. *Id.* § 1396p(c)(1)(A). The subsection further provides that an individual is not ineligible for medical assistance for long-term care under certain exceptions. One set of exceptions relates to transfer of a home to certain family members. *Id.* § 1396p(c)(2)(A). Other exceptions involve a situation where the assets were transferred to a trust described under subsection d solely for the benefit of the individual's disabled child or where funds were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled. *Id.* § 1396p(c)(2)(B)(iii)–(iv).

It seems to me that the best reading of the statutory provisions in tandem is that, generally, the establishment of a pooled trust itself is not a transfer of assets under the statute. Subsection d clearly outlines the situations under which funds placed in trust are to be considered (1) available to the individual for Medicaid purposes, (2) regarded as income, or (3) considered to have been disposed of and thus subject to the benefit-limiting provisions of subsection c. While the Medicaid statute does not define "transfer," I conclude that if you establish a qualifying pooled trust, no transfer occurs. In short, I think subsection d addresses the question of when and under what circumstances transactions involving a pooled trust established for the benefit of the individual are considered transfers subject to unfavorable treatment for purposes of Medicaid eligibility.

I think this interpretation makes sense. The purpose of subsection d is to lay out the general rules regarding the establishment of trusts for Medicaid eligibility. In contrast, I view subsection c as designed to handle situations where individuals seek to divest themselves of assets for the benefit of third parties while at the same time seeking to qualify for Medicaid long-term care benefits.

I understand there are contrary interpretations. In particular, *Center for Special Needs Trust Administration, Inc. v. Olson*, 676 F.3d 688 (8th Cir. 2012), and *In re Pooled Advocate Trust*, 813 N.W.2d 130 (S.D. 2012), are consistent with the majority opinion and contrary to my approach. These cases, however, do not seem to address the interpretation presented here. By way of example, these courts do not consider that, because their approach implicitly assumes that subsection c applies to all transactions funding a trust, the

treatment of assets in § 1396p(d)(3)(B)(ii) would be redundant under their approach. In addition, because they assume that subsection c applies to all transactions funding a trust, a person could simultaneously be penalized for having an available asset and penalized under subsection c for a transfer. For instance, a person who places money into an irrevocable trust in which the trustee can use the money to purchase benefits for the person, *i.e.*, a transaction covered under § 1396p(d)(3)(B)(i), would be penalized for having an available asset and penalized for a transfer. I read § 1396p(d)(3) as providing for *either* an availability penalty or a transfer penalty, but not both.

Finally, I do not think that those courts adequately considered the reasons why § 1396p(c)(2)(B)(iv) may apply to transactions benefitting others but not transactions in which an individual funds her own pooled trust. That provision mentions "subsection (d)(4)" trusts, but the reference, it seems to me, is included because an individual ordinarily could not deposit resources into the pooled trust of another person without incurring a transfer penalty under subsection c. *See id.* § 1396p(d)(3)(B)(ii). The exemption in § 1396p(c)(2)(B)(iv) allows the individual to make such a deposit when the other person is disabled and under age sixty-five. *Olson* did not evaluate that argument. *In re Pooled Advocate Trust*, on the other hand, seems to have missed the import of the argument in stating that third parties could never fund a pooled trust since "a pooled trust is '[a] trust containing the assets of an individual who is disabled.'" 813 N.W.2d at 146–47 (alteration in original) (quoting 42 U.S.C. § 1396p(d)(4)(C)). But if an individual places assets in a trust and names another person as the beneficiary, that person ordinarily has equitable title to the assets. Thus, an individual can fund another person's pooled trust and the assets in the trust can still "contain[ ] the assets of an individual who is disabled." 42 U.S.C. § 1396p(d)(4)(C).

There is one case, however, where the issues raised here have been addressed, at least in part, and that is *Richardson ex rel. Carlin v. Hamilton*, No. 2:17-CV-00134-JAW, 2018 WL 1077275, at *16 (D. Me. Feb. 27, 2018), *appeal docketed*, No. 18–1223 (1st Cir. Mar. 22, 2018). The district court in *Richardson* decided the case adverse to the individual establishing the trust. This case, however, is on appeal to the United States Court of Appeals for the First Circuit.

Although it is not completely clear, it appears that the majority opinion turns on federal rather than state law. In relying on federal law, the majority cites *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). None of the parties in this litigation claimed that *Skidmore* deference should be afforded to interpretations of the statute by Centers for Medicare & Medicaid Services (CMS). In any event, *Skidmore* deference is a weak rather than robust doctrine. It turns on the ability of the agency to persuade. *United States v. Mead Corp.*, 533 U.S. 218, 227–28, 121 S.Ct. 2164, 2171–72, 150 L.Ed.2d 292 (2001). I am not persuaded by the CMS analysis in this case and do not find that any *Skidmore* deference saves the day for the State.

I also want to mention briefly the practical effect of the approach adopted here. If an individual places funds in a qualified pooled trust, the funds will be used during the lifetime of the individual only for supplemental benefits that Medicaid authorizes to be provided without affecting Medicaid eligibility. Upon death, if there are funds remaining in the trust corpus not retained by the nonprofit managing the

trust, the funds are used to reimburse Medicaid for benefits provided to the recipient. As a result, the qualified pooled trust does not put Medicaid in an inferior position with respect to the assets, but ensures that Medicaid is in the first position to be reimbursed for expenses in the pooled trust that have not been expended on approved supplemental expenses.

As such, I believe that the decision of the director of the department of human services is based upon an erroneous interpretation of 42 U.S.C. § 1396p(c)–(d) and that interpretation of those provisions is not clearly vested in the agency's discretion. Therefore, I would reverse that decision. *See* Iowa Code § 17A.19(10)(*c*) (2016).

II. Transfer for Fair Market Value.

Even assuming the establishment of the trust in this case amounted to a transfer under subsection c, there is a question whether the individual establishing the trust received fair market value for the assets placed in the trust.

It seems to me that the Coxes received fair market value for their assets. As a result of their establishment and funding of the trust, they received the investment and management services of a trustee and a method for financing the provision of supplemental services that Medicaid does not provide but does not regard payment for as income affecting Medicaid eligibility. There is no reason to think the Coxes took a haircut on their assets, and nothing that they have done is designed to move assets to the benefit of third parties such as heirs while maintaining Medicaid eligibility.

The Coxes provide a number of unappealed decisions in other states where fact finders adopt a version of the position they advocate here. For instance, in *Peittersen v. Minnesota Department of Human Services*, No. 19HA-CV-11-5630 (Minn. Dist. Ct. Oct. 2, 2012), the district court held that whether an individual received fair market value for assets placed in a pooled trust could not be determined by a per se rule. *Id.* at 6–7. Thus, it rejected the approach of the majority here, namely, that the transfer of assets into a pooled trust is per se not a transfer for fair market value because the use of the assets is restricted. *See id.* To the Minnesota court, an individualized showing is required. *Id.*; *see also Dziuk v. Minn. Dep't of Human Servs.*, No. 21-CV-09-1074, at 2 (Minn. Dist. Ct. Feb. 7, 2012) (holding that state offered insufficient evidence showing assets were transferred for less than fair market value).

A different approach to fair market value was taken by the Minnesota Department of Social Services. In *Doe (Redacted) v. Winona County Department of Human Services*, No. 186029 (Minn. Dep't Soc. Servs. Mar. 10, 2017), a human services judge held that the time for determining fair market value of assets deposited by a seventy-seven-year-old individual in a pooled trust was the time the funds were deposited in the trust. *Id.* at 9. The judge determined that the individual placing the funds in the trust "gained an immediate vested equitable interest in the trust assets, the value of which roughly equaled the value of appellant's interest." *Id.* A similar approach was embraced by the Minnesota district court in *Beinke v. Minnesota Department of Human Services*, No. CV-14-271 (Minn. Dist. Ct. June 24, 2014). The *Beinke* court observed that a seventy-two-year-old individual who placed funds in a pooled trust received "the value of an equitable interest in the remaining trust assets," as well as the value of the managing and investing services of the trustee and fiduciary. *Id.* at 8. And, in *Doe v. El Paso County Department of Human Services*, Appeal No. SHP 2014-0929 (Colo. Office of Admin. Cts. Jan.

15.

Richardson v. Hamilton, No. 2:17-cv-00134-JAW, 2018 WL 1077275 (D. Me. 2018), pp 1, 32-39.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

YVONNE R. RICHARDSON, by her Conservator Barbara Carlin, and the MAINE POOLED DISABILITY TRUST, on its own behalf and on behalf of its current and future participating beneficiaries over age 64, and on behalf of all other similarly situated individuals,	)	
Plaintiffs,	)	
v.	)	2:17-cv-00134-JAW
RICKER HAMILTON, in his official Capacity as Commissioner of the MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	)	
Defendant.	)	

ORDER ON MOTION TO DISMISS

A Medicaid beneficiary and a pooled special needs trust bring this action seeking injunctive and declaratory relief against the Commissioner of the Maine Department of Health and Human Services (MDHHS), alleging improper treatment of deposits into pooled special needs trusts for purposes of benefits eligibility determinations in violation of the Medicaid Act, 42 U.S.C. §§ 1396 *et seq*. The Medicaid beneficiary deposited into the trust the proceeds of the sale of her home, and MDHHS treated this asset transfer as one that did not give the beneficiary equal value. As a result, MDHHS notified the Medicaid beneficiary that it would temporarily suspend certain benefits as a penalty. The beneficiary administratively

persons benefitted" *Gonzaga Univ.*, 536 U.S. at 284 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 692 n.13 (1979)), and is similar to language that the Supreme Court has found to be rights-creating. *See Lewis v. Alexander*, 685 F.3d 325, 345 (3rd Cir. 2012) (finding a private right of action under § 1396p(d)(4)(C) and citing *Gonzaga*, 536 U.S. at 284, 287 (analyzing language from Title VI and Title IX ("No person . . . shall . . . be subjected to discrimination")); *see also Lewis v. Rendell*, 501 F. Supp. 2d 671, 687-88 (E.D. Pa. 2007) (finding § 1396p(d)(4)(A) enforceable via § 1983).

The Eighth Circuit concluded that this provision is intended to benefit a nonprofit corporation which served as a special needs trust trustee, as well as its beneficiaries. *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 698-700 (8th Cir. 2012) (finding a private right of action under § 1396p(d)(4)(C)). The *Olson* Court started with the premise that 1396p(d)(4)(C) specifies how a state treats an individual's trust assets for deciding Medicaid eligibility. *Id.* at 699. It went on to reason that plaintiff, "as a non-profit pooled trustee, would benefit from the trusts authorized by paragraph 1396p(d)(4)(C), and thus is an intended beneficiary of the law. Because paragraph 1396p(d)(4)(C) addresses the [plaintiff]'s business—and does not solely tell the state how to act—it was intended to benefit pooled trusts, as well as individuals." *Id.* The Court agrees that the provision creates rights intended to benefit such trusts and their beneficiaries. Thus, the Court finds that MPDT can sustain its § 1983 action to challenge MDHHS' alleged violation of § 1396p(d).

D. Count II: Whether a Statute Imposes a Transfer of Assets Penalty for Transfers to a Pooled Special Needs Trust

enforce it via § 1983 because they "contend that they would benefit from the State's compliance with" the provision).

1. The Parties' Positions

a. MPDT's Position

MPDT argues that MDHHS is violating § 1396p(d) because, the Trust claims, no statute imposes a transfer of assets penalty for transfers to a pooled special needs trust. *Compl.* ¶¶ 3, 21. It asserts that the general anti-transfer rule contained in § 1396p(c) does not apply to the funding of pooled special needs trusts. *Compl.* ¶ 3. Specifically it argues that § 1396p(d)(4)(C) exempts pooled special needs trusts from the reach of § 1396p(c). *Id.* ¶ 2.

MPDT advances the premise that subsection (c) and subsection (d) should be read together as part of an integrated whole because they were enacted simultaneously as part of the Omnibus Budget and Reconciliation Act of 1993. *Pls.' Opp'n* at 2. MPDT elaborated its view of the comprehensiveness and cohesiveness of the legislative scheme at oral argument. MPDT asserts that subsection (d) governs trusts "and transfers to [] trusts." *Id.; Pls.' Opp'n* at 2-3. It also claims that "[t]rusts are covered when referred to by subsection (d), but the terms of subsection (c) do not otherwise reference or apply to trusts." *Id.* at 4. MPDT claims that "Congress intended that . . . [(d)(4) trusts] be funded without penalty." *Id.* at 9. MPDT cites the actions of certain state Medicaid agencies and state courts that it argues support its position. *Id.* at 8-10; *id.* Attachs. 3, 4, 6-12.

MPDT claims that to treat all actions funding trusts as potentially subject to subsection (c) would render subsection (d) redundant and superfluous. *Id.* at 10-11. MPDT asserts that to treat transfers of funds into trusts listed in (d)(4) as subject to

subsection (c) penalties would defy the purpose of the trusts described in (d)(4)(B), suggesting that Congress could not have intended such a result. *Id.* at 11-12. MPDT then argues that because the seven exclusions that immediately precede (c)(2)(B)(iv) cover only transfers to someone else, (c)(2)(B)(iv) should also be read as applying only to third-party transfers—not to trusts created to benefit an individual who created the trust, such as the MPDT. *Id.* at 13-14. MPDT argues that applying the transfer penalties to transfers of assets into pooled special needs trusts creates "odd" and "harsh" results. *Id.* at 14-15. MPDT argues that the Centers for Medicare and Medicaid Services' (CMS) contrary position is entitled to *Skidmore* deference, which allows a court to evaluate the agency's "thoroughness," the "validity of its reasoning," its "consistency," and its "power to persuade, if lacking the power to control." *Id.* at 15-17 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). MPDT argues that CMS has not sufficiently explained the rationale underlying its position. *Id.* at 16-17. Ultimately, at oral argument, MPDT conceded that the weight of authority runs against its interpretation.

b. MDHHS' Position

MDHHS takes the position that the Medicaid Act requires it to treat transfers of assets into pooled special needs trusts as it does. *Def.'s Mot.* at 1. Its argument begins with the premise that states choosing to participate in Medicaid, such as Maine, must comply with the requirements of the Medicaid Act. *Id.* at 3. Among those requirements is that the state have a plan that complies with § 1396p. *Id.* (citing 42 U.S.C. § 1396a(a)(18)). It points out that subsection (c) of § 1396p provides

for eligibility penalties for beneficiaries who make certain transfers of assets for less than fair market value, while exempting certain such transfers. *Id.* at 3-4, 6-7; *Def.'s Reply* at 1. MDHHS argues that none of the exceptions applies to deposits into the MPDT by persons over age sixty-four. In support, MDHHS cites the text of the exemption from eligibility penalty for certain transfers to pooled special needs trusts codified at § 1396p(c)(2)(B)(iv):

> An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that the assets were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title).

Def.'s Mot. at 4. MDHHS calls attention to the age limitation in the subsection and states that its plan and regulations limit application of the exemption only to where the individual is under age sixty-five. *Id.* at 2, 4; *Def.'s Reply* at 1-2. MDHHS says that the statute applies a penalty to transfers to pooled special needs trust only when such trusts are established for persons age sixty-five and older. *Def.'s Mot.* at 2, 7.

MDHHS points out that § 1396p(d) governs the extent to which states are to consider trusts as resources available to Medicaid beneficiaries for purposes of eligibility determinations. *Id.* MDHHS interprets § 1396p(d)(4) as exempting certain trusts from subsection (d), but not from subsection (c). *Id.* In other words, MDHHS argues that (d)(4) exempts the corpus and payments from certain trusts from impacting eligibility determinations but does not exempt deposits into them from the transfer of assets penalties.

MDHHS highlights that CMS agrees with its position, and it cites a CMS bulletin that expresses that view. *Def.'s Mot.* at 7-8; *id.* Attach. 1 *CMS Bulletin* (*CMS Bulletin*). It also states that the Social Security Administration (SSA) reached a similar conclusion. *Id.* at 8-9; *id.* Attach. 3 *SSA Program Operations Manual System SI 01150.121 Exceptions-Transfers to a Trust* (*SSA Manual*). MDHHS cites the Eighth Circuit's congruent holding in *Olson* and the South Dakota Supreme Court's in *Pooled Advocate Trust v. South Dakota Department of Social Services*, 2012 SD 24, ¶ 53, 813 N.W.2d 130 (2012). *Id.* at 9-10.

2. Discussion

This is a dispute about the proper interpretation of portions of the Medicaid Act. "Of course, the most reliable guide to the meaning of a statute is the statutory text." *Robb Evans & Associates, LLC v. United States*, 850 F.3d 24, 34 (1st Cir. 2017). Many areas of Medicaid law are labyrinthine rending them "almost unintelligible to the uninitiated." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 648 (2013) (Scalia, J. dissenting) (quoting *Friedman v. Berger*, 547 F.2d 724, 727, n.7 (2d Cir. 1976)). Fortunately, the provisions here are not among them.

"Subsection (d) addresses counting resources for eligibility, whereas subsection (c) addresses punishing sham transactions in which assets are transferred for less than fair market value . . . ." *Sable v. Velez*, 388 Fed. App'x 235, 238 n.4 (3d Cir. 2010). Subsection (c) mandates a penalty period when an applicant "disposes assets for less than fair market value" within a five-year period. *Makepeace v. Dougherty*, No. 10–10266–RWZ, 2010 WL 4180575, at *1 (D. Mass. Oct. 20, 2010); *Pike ex. rel*

Pike v. Sebelius, No. CA 13–392S, 2015 WL 4394759, at *7 (D.R.I. Jul. 16, 2015). Subsection (d) mandates the treatment of trust accounts for purposes of Medicaid eligibility determinations. *Family Trust of Mass., Inc. v. United States*, 722 F.3d 355, 356-57 (D.C. Cir. 2013). It provides that, in general, the corpus of a trust is to be counted as an asset of the applicant but exempts certain trusts, including pooled special needs trusts. *Id.*

The Court is unconvinced by MPDT's assertion that subsection (c) applies to trusts only to the extent that subsection (d) refers to subsection (c). Paragraphs (c)(2)(B)(iii) and (iv) provide exemptions from the normal penalties for transfers into certain trusts. Thus, MPDT's assertion that subsection (d) is the exclusive provision governing trusts is without merit. These specifically exempted transfers include: (1) those to special needs trusts, as defined in (d)(4) "*established solely for the benefit of an individual under **65** years of age . . . . .*", 42 U.S.C. § 1396p(c)(2)(B)(iv) (emphasis supplied), and those to a trust established solely for the benefit of the individual's child. § 1396p(c)(2)(B)(iii). Neither exempts transfers to pooled special needs trusts for the benefit of persons over age sixty-four—the transfers at issue in this case. "Because Congress has enumerated a set of express exceptions, rules of statutory interpretation instruct that Congress intended to make no other exceptions than those specified." *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 499 (1st Cir. 2011) (internal citations omitted). Hence, all transfers into trusts not covered by one of those exemptions are captured by the general transfer penalty rules of subsection (c).

Subsection (d)'s text does not support MPDT's assertion that it governs transfers into trusts. Subsection (d) speaks repeatedly and exclusively to transfers *from* trusts—that is funds *outgoing from* trusts (to beneficiaries)[15]—not to transfers *into* trusts. This corresponds to the implication from the subsection's title—"treatment of trust amounts." It stands to reason that an amount does not become a "trust amount" until it is transferred into the trust. MDHHS penalizes transfers of funds pursuant to subsection (c) when they are transferred—conceptually prior to the completed transfer and deposit into the trust and conversion into "trust amounts."

As MPDT says, "[t]he principal argument for applying a penalty when an elderly person funds a [pooled special needs trust] account is the [language of] subsection (c)(2)(B)(iv)." *Pls.' Opp'n* at 12. It is this argument that carries the day. The text of (c)(2)(B)(iv) explicitly limits its reach to trusts "established solely for the benefit of an individual under 65 years of age." 42 U.S.C. § 1396p(c)(2)(B)(iv). None of the other exemptions to subsection (c)'s penalty provisions applies here. All transfers of assets not covered by an exclusion—including the transfers at issue here—are subject to penalty. "If the plain language of a statute elucidates its meaning, that meaning governs." *Robb Evans*, 850 F.3d at 34.

The Court's interpretation is consistent with those of the Eighth Circuit and the South Dakota Supreme Court on this same question. In *Olson*, the Eighth Circuit examined § 1396p(c)(2)(B)(iv) and rejected an argument by a trust that the provision

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[15] *See, e.g.*, 42 U.S.C. § 1396p(d)(3)(A)(ii) ("payments from the trust to or for the benefit of the individual shall be considered income of the individual"); § 1396p(d)(3)(A)(iii) ("any other payments from the trust shall be considered assets . . ."); § 1396p(d)(3)(B)(i) ("if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual . . . ").

does not apply to trusts created by the beneficiary. *Olson*, 676 F.3d at 702. It concluded, "[d]espite the lack of an age limit within paragraph 1396p(d)(4)(C) for purposes of counting resources, Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65." *Id.* The South Dakota Supreme Court employed similar reasoning in concluding "that under the unambiguous statutory language, transfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period for Medicaid eligibility purposes." *In re Pooled Advocate Tr. v. South Dakota Dept. of Soc. Servs.*, 2012 S.D. 24, ¶ 38, 813 N.W.2d 130, 142. The court explained that the rules for counting assets for eligibility determinations under subsection (d) and those regarding penalties for asset transfers under subsection (c) are separate and that there is no logical inconsistency in one containing an age limitation for pooled trusts and the other not. *Id.* 2012 S.D. 24, ¶¶ 39-41, 813 N.W.2d at 142-43. The Third Circuit has stated the same basic conclusion in a dictum: "elderly individuals (65 and over) transferring assets into a pooled trust are made ineligible for Medicaid for a period of time." *Lewis*, 685 F.3d at 351.

This interpretation of the statute echoes statements included in state court opinions that MPDT cited. *Pls.' Opp'n* Attach. 10 *Dawn Peittersen v. Minnesota Department of Human Services & Dakota County Social Services*, at 5 (citing § 1396p(c)(1)(A): "transfers of assets to a qualified trust by a person age 65 or greater are generally subject to a transfer penalty for Medicaid eligibility purposes"); *id.*

a.

CMS Brief

No. 18-1223

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MAINE POOLED DISABILITY TRUST,

Plaintiff-Appellant,

YVONNE R. RICHARDSON, by her Conservator Barbara Carlin,

Plaintiff,

v.

RICKER HAMILTON, in his official capacity as Commissioner of the Maine Department of Health and Human Services,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maine

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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We respectfully submit this brief in response to the Court's order inviting the views of the United States on the proper treatment under 42 U.S.C. § 1396p(c) and (d) of a deposit by an 87-year-old Medicaid beneficiary of her own funds into a pooled special needs trust (as defined by *id.* § 1396p(d)(4)(C)) established for the beneficiary's own benefit. The district court correctly held that this transfer of assets is subject to the transfer penalty set out in Section 1396p(c)(1)(A). That conclusion flows from the plain text of this provision, and it is consistent with the longstanding views of the U.S. Department of Health & Human Services (HHS) and the decisions of other courts. *See Center for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688 (8th Cir. 2012); *In re Pooled Advocate Tr.*, 813 N.W.2d 130 (S.D. 2012).

STATEMENT

A. Factual Background

At the time relevant to this case, plaintiff Yvonne Richardson was 87 years old, residing in a nursing-home in Maine, and receiving Medicaid benefits to help pay the cost of her nursing-home care. Appendix (App.) 10, ¶¶ 14, 15. Ms. Richardson's conservator sold

Ms. Richardson's home and transferred $38,500 in proceeds from the sale to the Maine Pooled Disability Trust (the MPDT). *Id.* ¶ 15.

Under the terms of this trust agreement, "all distributions are at the trustees' discretion." App. 102, ¶ 39. The MPDT charges an initial fee to join the trust and an annual fee for trust administration. *See* App. 102, ¶ 37.[1] Upon Ms. Richardson's death, the trust has the right to retain half of the funds remaining in Ms. Richardson's account with the trust. App. 100, ¶ 32.[2]

The Maine Department of Health and Human Services concluded that this transfer of assets made Ms. Richardson temporarily ineligible for nursing-home benefits for a three-month period, during which time the state Medicaid program would not pay her nursing-home expenses.

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[1] Although the trust agreement refers to an attached fee schedule, *see* App. 102, ¶ 37, the fee schedule was not appended to the complaint. The MPDT website indicates that it charges a $900 joinder fee, a $360 annual administrative fee, plus professional fees, administrative expenses, charges and other fees and costs incurred in the administration, creation and/or protection of the Trust. *See* http://mainepooleddisabilitytrust.org/fees.shtml (last visited Dec. 20, 2018).

[2] The trust agreement required Ms. Richardson's conservator to waive claims of "self-dealing, conflict of interest, or any other act" against the trustees. App. 103, ¶ 43(C).

App. 10, ¶ 15; App. 23. In reaching that conclusion, the state agency applied 42 U.S.C. § 1396p(c)(1)(A), which provides that if an "institutionalized individual . . . disposes of assets for less than fair market value" within a specified look-back period, "the individual is ineligible" for nursing-home benefits for a period of time as determined by a statutory formula.

B. District Court Decision

In this suit, the MPDT contends that Ms. Richardson's transfer of assets is not subject to the penalty established by Section 1396p(c). The district court rejected that argument, finding that this penalty provision applies by its plain terms. The court noted that there is an exception in Section 1396p(c) for a transfer of assets to a pooled special needs trust, but that this exception is limited to transfers on behalf of individuals under age 65. *See* Addendum (Add.) 41. The court further explained that its interpretation is in accordance with the views of HHS's Centers for Medicare & Medicaid Services (CMS)—which administers the Medicaid program—and with the decisions of other courts. Add. 36-42.

ARGUMENT

THE TRANSFER OF ASSETS AT ISSUE HERE IS SUBJECT TO THE TRANSFER PENALTY.

The district court correctly held that Ms. Richardson's transfer of assets to the MPDT made her temporarily ineligible for Medicaid coverage for her nursing-home care. That holding flows from the plain text of Section 1396p(c), and it is consistent with the longstanding position of HHS and the decisions of other courts.

1. Under 42 U.S.C. § 1396p(c)(1)(A), if an "institutionalized individual . . . disposes of assets for less than fair market value" on or after a specified look-back date, "the individual is ineligible for medical assistance" for nursing-home services for a period of time set by statutory formula. Under that formula, the period of ineligibility is determined by dividing the total uncompensated value of the transferred assets by the average monthly cost of nursing-home services in the State. *Id.* § 1396p(c)(1)(E)(i). This provision is designed to ensure that individuals "exhaust their own resources before turning to the public for assistance." *Lewis v. Alexander,* 685 F.3d 325, 332-33 (3d Cir. 2012).

Ms. Richardson, an institutionalized individual, disposed of her assets by transferring $38,500 to the MPDT. Moreover, for purposes of this appeal, it is undisputed that she did not receive fair market value in disposing of those assets. Thus, under the plain terms of Section 1396p(c)(1)(A), this transfer of assets made Ms. Richardson temporarily ineligible for Medicaid coverage for her nursing-home care.

Although there is a limited exception in Section 1396p(c) for transfers to pooled special needs trusts, that exception applies only to transfers made on behalf of individuals who are under age 65—that is, persons who are not elderly. *See* 42 U.S.C. § 1396p(c)(2)(B)(iv). Because Ms. Richardson was 87 at the time that she transferred her assets, she cannot avail herself of this exception.

That conclusion reflects CMS's longstanding position. Shortly after Congress enacted amendments to the Medicaid statute in 1993, which are at issue here, CMS explained that "a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty," if the transfer of assets to establish the trust was for less than fair market value. CMS, *State Medicaid Manual* § 3259.7.B

(1994).[3] Likewise, CMS later confirmed that "[a] pooled trust established by an individual age 65 and older is not exempt from the transfer of assets provisions." App. 107 (May 12, 2008, CMS bulletin to state Medicaid agencies in Region I). "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." *Id.*

Accordingly, the Eighth Circuit recognized that "Congress intended to exempt transfers of assets into pooled trusts from the transfer penalty rules of subsection 1396p(c)(1) only if the transfers were by those under age 65." *See Center for Special Needs Tr. Admin.,*

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[3] Available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html.

The Social Security Administration's Program Operations Manual System (POMS) similarly instructs that "a transfer of resources into a trust for an individual age 65 or over may result in a transfer penalty." POMS, SI 01120.203.D.1, Exceptions to Counting Trusts Established on or after January 1, 2000, https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203 (App. 113). This instruction concerns 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV), which pertains to eligibility for Supplemental Security Income under Title XVI of the Social Security Act, and is substantively similar to the provision at issue here, 42 U.S.C. § 1396p(c)(2)(B)(iv).

Inc. v. Olson, 676 F.3d 688, 702 (8th Cir. 2012). The South Dakota Supreme Court reached the same conclusion. *See In re Pooled Advocate Tr.*, 813 N.W.2d 130, 142 (S.D. 2012) ("[T]ransfers of assets for less than fair market value into pooled trusts by beneficiaries age 65 or older will be subject to a transfer penalty period.").[4]

2. The MPDT provides no persuasive reason to reject the longstanding views of HHS and go into conflict with these other appellate decisions. MPDT's contention (Br. 23-27) that Ms. Richardson did not "transfer" or "dispose" of her assets here does not bear scrutiny. As CMS explained in the 2008 bulletin, "[w]hen a person places funds in a trust, the person gives up ownership of those funds." App. 107. Indeed, it is a basic principle of trust law that, "in order to create a valid trust, there must be an actual conveyance or transfer of property,

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[4] The MPDT's reliance (Br. 58-59) on *Hughes v. McCarthy*, 734 F.3d 473, 483-84 (6th Cir. 2013), and *New Hampshire Hospital Association v. Burwell*, No. 15-cv-460, 2017 WL 822094 (D.N.H. Mar. 2, 2017), is misplaced because neither case addressed the issue presented here. In *Hughes*, the Sixth Circuit addressed the use of a community resource to purchase an annuity by or on behalf of the community spouse. 734 F.3d at 483-84. And *New Hampshire Hospital Association* concerned disproportionate share hospital payments. 2017 WL 822094, at *3-4.

as the trust must be funded by an assignment of property from the settlor to the trustee." 76 Am. Jur. 2d *Trusts* § 47 (2018).

Here, there is no doubt that Ms. Richardson relinquished ownership over the transferred assets. The trust documents themselves describe the transaction as an "irrevocable transfer." App. 44, 73. And they emphasize that any distributions on Ms. Richardson's behalf "are at the trustees' discretion." App. 102 ¶ 39; *see also* App. 37-38, 67-68 (stating that the trustees have generally "sole and uncontrolled discretion" to decide whether to make any distributions from the trust, as the trustee deems "advisable" or "suitable"). Moreover, upon Ms. Richardson's death, the trust has the right to retain half of the funds remaining in Ms. Richardson's account with the trust, with the trustees having "sole discretion" how those retained funds would be used. App. 100-01; *see also* App. 40, 90-91. There is thus no doubt that Ms. Richardson "transferred" and "disposed" of her assets.

The MPDT's contention (Br. 10-11, 26) that the transfer penalty does not apply to "self-settled" trusts flies in the face of the statute's plain language. The transfer penalty in Section 1396p(c)(1)(A) applies when "an institutionalized person" disposes of assets for less than fair

market value. Nothing in that provision excludes a transfer that an institutionalized person makes to a trust for which she is the beneficiary.[5]

The MPDT's argument (Br. 16-19, 27-31) that paragraph (d) of Section 1396p exempts Ms. Richardson's transfer of assets from the transfer penalty is equally unpersuasive. Paragraph (d) addresses a distinct issue: the circumstances under which trust funds are treated as resources or income for purposes of Medicaid eligibility standards. Although paragraph (d) does not restrict the age of individuals who may participate in a pooled special needs trust, nothing in paragraph (d) exempts asset transfers into a pooled special needs trust from the transfer penalty. On the contrary, paragraph (d)(4) states that "[*t*]*his subsection* shall not apply" to the specified trusts. (emphasis added). 42 U.S.C. § 1396p(d)(4). Consequently, under the plain language of the statute, the only statutory protection that Congress provided for the

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[5] *See also* POMS, SI 01150.121.A.3, Exceptions—Transfers to a Trust, https://secure.ssa.gov/apps10/poms.nsf/lnx/0501150121 ("The period of ineligibility does not apply to an individual who transfers a resource to a trust established for the sole benefit of an individual *including himself or herself* who is under age 65 and is blind or disabled.") (emphasis added) (App. 126)).

trusts enumerated in paragraph (d)(4) is an exemption from the rules set out in paragraphs (d)(1)-(3).

The consequences for a transfer of assets are established by paragraph (c), which makes an institutionalized person's transfer of assets into a pooled special needs trust subject to a penalty unless she is under age 65. As the district court explained, "Subsection (c) penalizes transfers of assets that it does not exempt," and there is no categorical exemption for Ms. Richardson's transfer. Add. 41. A trust established by an individual who is age 65 or older is not exempt from the transfer of asset provisions.

The MPDT's reliance on legislative history could not overcome the plain text of Section 1396p(c), even if the legislative history supported the MPDT's position. In fact, the legislative history is entirely consistent with the statutory text. Congress has repeatedly amended the Medicaid statute to ensure that individuals who can afford to pay for their care do not structure their assets in order to qualify for Medicaid eligibility, thus "diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and

children." H.R. Rep. No. 99-265, at 71-72 (1985).[6] The conference report that accompanied the 1993 amendments to the Medicaid statute further explained that Section 1396p(c) "[p]rovides for a delay in Medicaid eligibility for institutionalized individuals . . . who dispose of assets for less than fair market value on or after a specified look-back date." H.R. Rep. No. 103-213, at 834 (1993) (App. 132). That is exactly what happened here.

More generally, when the 1993 amendments were under consideration by Congress, the Acting Administrator of the Health Care Financing Administration (the predecessor to CMS) recommended that the asset rules be changed to ensure that individuals "pay a fair share for nursing-home expenses . . . before they qualify for Medicaid."

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[6] *See, e.g.*, Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 131, 96 Stat. 324, 367; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9506(a), 100 Stat. 82, 210 (Apr. 7, 1986); Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 303(b), 102 Stat. 683, 760-61; Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622-24; *see also Ramey v. Reinertson*, 268 F.3d 955, 958-59 (10th Cir. 2001) (noting that Congress repeatedly revised the Medicaid statute's treatment of trusts in response to various financial devices that individuals have employed to shield their assets from Medicaid eligibility determinations).

Medicare and Medicaid Budget Reconciliation: Hearings Before the Subcomm. on Health and the Env't of the H. Comm. on Energy and Commerce, 103d Cong. 7 (1994) (statement of William Toby, Jr., Acting Administrator, Health Care Financing Administration). The Acting Administrator voiced "deep[] concern[]" that many "individuals with income and resources much greater than was intended by the original creators of the Medicaid program" were receiving Medicaid benefits, whereas "Medicaid . . . was designed to be the last resort payer of medical services for people." *Id.* at 35.

The MPDT asserts (Br. 48-49) that Congress could not have intended to apply the transfer penalty to persons aged 65 or older because the vast majority of nursing-home residents are elderly. This argument underscores why Congress would have limited the exemption in paragraph (c)(2)(B)(iv) to transfers of assets for persons under age 65. State Medicaid resources are finite, and nursing-home care is extremely expensive. By requiring elderly persons to exhaust their own resources before relying on public assistance, Congress sought to ensure that state resources would be available for the low-income individuals who are most in need.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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The Responses

i.

Appellant Maine Pooled Disability Trust

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1223

MAINE POOLED DISABILITY TRUST

Plaintiff–Appellant

YVONNE R. RICHARDSON,
BY HER CONSERVATOR BARBARA CARLIN

Plaintiff

v.

RICKER HAMILTON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant–Appellee

On Appeal from a Judgment of the United States District Court for the District of Maine

BRIEF OF APPELLANT MAINE POOLED DISABILITY TRUST IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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SUMMARY OF ARGUMENT

The brief for the United States, submitted in response to this Court's September 17 order, is the first time the Center for Medicare and Medicaid Services ("CMS") has explained its inconsistent gloss on the trust and transfer provisions of the Omnibus Budget Reconciliation Act of 1993 (in "Transmittal 64"; *see Brief of Appellant* at 19, n.14). Rather than clear up the inconsistencies of its prior statements, CMS's brief compounds them. CMS does not properly address the terms of the statute—indeed, it fundamentally mischaracterizes it—and instead relies on prior judicial decisions which themselves fail to read the entire statute and make demonstrable errors in their understanding of the Medicaid trust and transfer provisions. To the extent it addresses the legislative history, CMS relies on general statements about the wealthy—and those not presented fully or fairly—not what Congress actually did in the legislative history, nor specific discussion of what became subsection (d)(4). Throughout, CMS, like the prior judicial decisions, fails to follow fundamental cannons of statutory construction. Where it does not mischaracterize terms of the statute, CMS ignores them: an admission that it does not have an adequate answer.

The task before the Court is to look at the statute as enacted by Congress and to explain and harmonize all relevant parts. CMS fails to do that in its brief. Appellant provides such an explanation, one with no significant extraneous parts.

ARGUMENT

I. CMS misstates the scope of the statute in wrongly denying that subsection 1396p(d) is a comprehensive regulation of trusts in the Medicaid context.

The question before the Court is whether 42 U.S.C. § 1396p(d) constitutes Congress's comprehensive treatment of trusts in the Medicaid context. The broad scope of subsection (d) shows that it is. Subsection (d) governs funding trusts, as well as availability and exemptions—every relevant aspect for Medicaid purposes—reflecting Congress' intent that it be the primary source of the rules on treatment of trusts in the Medicaid context.

To avoid the fundamental flaw in its rejection of that argument, CMS misstates the scope of (d) when it says that "(d) addresses [only] a distinct issue: the circumstances under which trust funds are treated as resources or income for purposes of Medicaid eligibility standards." *CMS Brief* at 9.

That is simply not so. Subsection (d)(3)(B)(ii) says, in words that could hardly be more plain, that funding unavailable trusts "shall be considered . . . to be assets disposed of by the individual for purposes of subsection (c) of this section." CMS recognized this in its original explanation of the statute. In Transmittal 64, it directed the States in applying the trust provisions to "treat . . . as a transfer for less than fair market value" the portion "of a trust [that] cannot be paid to the individual [the Medicaid applicant who funded it]." *State Medicaid Manual* ("*SMM*"), § 3259.6C. Failing to see that subsection (d) covers transfers is the same, plain error made by the district court in its decision under review. 2018 WL 10772775; *see Brief of Appellant* at 6, 11-12, 22, 36.

CMS's failure to acknowledge the plain terms of the statute leads it to two errors. First, as noted, it fails to recognize the comprehensive scope of subsection (d). Since (d) comprehensively covers every possible instance of funding a trust, it is wrong to apply (c) to trust transfers beyond the specific references to it from (d). Second, CMS fails to recognize, let alone explain, the resulting plain and rather glaring redundancy in the statute that arises from its

claim that subsection (c)(1) also applies to trust transactions. If that claim is correct, the subsection (d) trust transfer provision is entirely unnecessary. Courts avoid interpretations that result in such redundancies. *Brief of Appellant* at 44-46; *Reply Brief of Appellant* at 8-9; *see also Blum v. Holder*, 744 F.3d 790, 803 (1st Cir. 2014) ("[a]voidance of redundancy is a basic principle of statutory interpretation"); *Levesque v. Lynch,* 802 F.3d 152, 154 (1st Cir. 2015).

CMS also has no answer to another conundrum created by applying subsection (c)(1) to all trust funding: it renders largely useless the subsection (d)(4)(B) trusts codifying *Miller v. Ybarra,* 746 F. Supp. 19 (D. Colo. 1990). *Brief of Appellant* at 48-50; *Reply Brief of Appellant* at 9-10. CMS misstates Appellant's argument rather than answering it,[1] and does not bother to deny that its reading renders subsection (d)(4)(B) trusts as enacted by Congress largely useless for their intended purpose. Courts avoid

[1] Appellant never so much as hinted that subsection (c)(1) does not apply to the elderly, *cf. CMS Brief* at 12, arguing only that (c)(1) does not apply to funding (d)(4)(B) trusts, which are needed mostly by elderly. *Cf. Brief of Appellant* at 48-49.

interpretations that result in such statutory nullities. *Brusewitz v. Wyeth, LLC,* 562 U.S. 223, 233, 131 S. Ct. 1068, 1076 (2011). This approach also disregards CMS's own directive in Transmittal 64 to give the more specific trust rules priority over the general transfer rules. *SMM*, § 3259.6G.

CMS's views are entitled to no deference where, as here, they fail to address the plain language of the statute and the analysis is "without any reference to the statutory text, meaningful analysis, or reference to authority." *Hughes v. McCarthy,* 734 F.3d 473, 484, 485 (6th Cir. 2013). CMS attempts to distinguish *Hughes* and another case explaining the standard for deference to CMS's views on the irrelevant ground that they do not address "the issue presented here," the meaning of subsection (d)(4)(C), *CMS Brief* at 7, n. 4; but that is not why Appellant cited these cases, *cf. Brief of Appellant* at 58-59.

The dissent in the related case of *Cox v. Iowa Dept. of Human Services,* — N.W.2d —, 2018 WL 6259394 (Iowa, Nov. 30, 2018) (*see Brief of Appellant* at 1), recognized the scope of subsection (d) and the problem created by disregarding what Congress sought to

achieve by it. Subsection (d) "is a comprehensive provision designed to address the question of how trusts will be treated for purposes of Medicaid eligibility." It "eliminates the possibility of using creative estate planning devices to achieve eligibility for Medicaid" where heirs are the contingent beneficiaries. 2018 WL 6259394 at *13-14. The dissent also noted that to read subsection (c)(1) as applying to trust transfers would render a central provision of (d) redundant. *Id.* at *15. (The majority relied on the same two cases as CMS; *see infra*, at 6-7.)

This interplay of the subsections of Section 1396p is cemented into the statute. Congress directed the States to implement each of its four separate subsections. In 42 U.S.C. § 1396a(a)(18), Congress requires the States to "comply with the provisions of section 1396p," listing separately and co-equally "[a] liens, [b] adjustments and recoveries . . ., [c] transfers of assets, and [d] treatment of certain trusts. . . ." *Id.* The decision in *Herting v. California Dept. of Health Care Services,* 235 Cal. App. 4th 607 (Cal. App. 2015), reflects that relationship. Specific and narrow exceptions in one do not carry over to the others. Thus, the bar against *inter vivos* liens on the home of

a Medicaid beneficiary lived in by a spouse or disabled child, subsection (a)(2)(A), hardly supports the idea that the spouse or disabled child loses the protection against estate recovery under (b)(2) and (A) if not living in the home.[2] Each subsection cross references the other only when appropriate, as the trust provision does in referring to subsection (c) transfers to or for others, rebutting the claim that other cross-references should be inferred absent compelling reasons to do so.

II. The prior judicial decisions on which CMS relies also fail to see the scope of subsection (d) and plainly misread the statute in other ways.

The two decisions on which CMS relies found that subsection (c) must apply to all trust transfers, largely based on their inference that the exception from transfer penalties for transfers to trusts for individuals under age 65 must mean that transfers to trusts for oneself were penalized, otherwise the exception was unnecessary, 42 U.S.C. § 1396p(c)(2)(B)(iv). *Center for Special Needs Trust*

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[2] *D.C. v. Dionne Kingsury,* D.C. Super. Ct., 2017 Lit 00002, Order, Feb. 2, 2018, available at http://www.ronmlandsman.com/news-center/cases/.

Administration, Inc., v. Olsen, 676 F.3d 688 (8th Cir. 2012); *In re Pooled Trust Advocate, Inc.*, 813 N.W.2d 130 (S.D. 2012). The *Cox* dissent carefully considers and disposes of those cases. 2018 WL 6259394 at *15. Neither recognized the comprehensive nature of subsection (d), the redundancy problem created by their approach, or the need for (c)(2)(B)(iv) for third party funding. Indeed, the South Dakota court was so confused that it thought that third parties could never add funds to (d)(4)(A) or (C) trusts, so that (c)(2)(B)(iv) could apply *only* to self-settled trusts. Again, the statute is plainly to the contrary. 42 U.S.C. § 1396p(d)(2)(B). The *Cox* dissent, by contrast, gets it right: The reference in (c)(2)(B)(iv) to (d)(4) trusts allowed funding trusts for others that would otherwise be penalized by (d)(3)(B)(ii). 2018 WL 6259394 at *15; *Brief of Appellant* at 35-38; *Reply Brief of Appellant* at 10-11.

III. Congress decided not to treat funding self-settled trusts as transfers.

In asserting that funding a trust for one's own benefit is a transfer, CMS (like the Maine Medicaid agency in its brief), *CMS Brief* at 8-9, focuses on authorities other than the one on which

Appellant relies, the statute. CMS's one sentence reference to the statute fails to acknowledge, let alone resolve, the many problems its approach creates.

Congress decided to thwart the abusive use of self-settled trusts[3] in the Medicaid context by making them available, which is the opposite of being transferred. *See* subsections (d)(3)(A)(i) and (d)(3)(B)(i). In Transmittal 64, CMS similarly recognized that funding a trust from which one could get any benefit was not a transfer; it said the assets were still available. *SMM*, § 3259.6B, Example (specifying which trust assets are transferred and which are not because they are still available); p. 3-3-109.28. It does not matter what restrictions the trust document places on the trustee, so long as "payment . . . could be made under some circumstances, even though . . . remote [or] in the distant future . . . ." *SMM*, § 3259.6E, second paragraph; p. 3-3-109.30 (underscoring in original). Everything CMS has to say about the document in this

[3] A self-settled trust is one that is for the benefit of the settlor, the person who funded it.

case or general trust law is irrelevant, *CMS Brief* at 7-8, in the face of the plain words of the statute.

CMS recognizes the problem by arguing that trusts falling within the subsection (d) exceptions are somehow thrown back under subsection (c). *CMS Brief* at 9. But this creates severe problems. It subjects to penalty the elderly who seek to shelter income so that they can qualify for nursing home care, as authorized by the (B) trusts, creating a statutory nullity. *See* p. 4, *supra*. It disregards Congress's choice to specify in subsection (d) *when* trust transactions are to be treated as transfers; funding a trust for oneself is never referred to the transfer rules. *See Brief of Appellant* at 41; *Reply Brief of Appellant* at 5-6. There is, finally, the oddity of penalizing favored trusts as severely as the most disfavored.

The fact that (d) refers to (c) for treatment as transfers only those trust distributions that benefit someone other than the Medicaid applicant[4] underscores that the target of (c) is transfers to or for others. To the extent Congress wanted to allow some of those

[4] Including trusts from which the applicant can get no benefit; plainly, someone else must benefit sometime.

transfers—including to the applicant's disabled child or other disabled individuals under age 65—it of course had to provide the exceptions in (c)(2)(B)(iii) and (iv) to avoid penalizing them.

Treating the (d)(4) exclusions as reflecting Congress's choice of a binary system—those that are consistent with Medicaid eligibility and those that are not, as the Third Circuit did in *Lewis v. Alexander*, 685 F.3d 325, 343-344 (3d Cir. 2012)—is plainly the better approach. *See Brief of Appellant* at 29-31.

IV. The legislative history does not support the claim that the general transfer rule applies to trust transfers.

CMS supports its view by references to rich people qualifying for nursing home services, but it avoids what Congress actually did and quotes selectively from its sources to over-emphasize the problem of wealthy people getting benefits. That may be a problem, but it is decidedly not the problem in funding payback trusts like MPDT. Specific discussion of the trust exemption provision in the legislative rebuts any inference from the general references it cites.

First, the claim that subsection (c)(1) applies to all trust funding unless exempt under (c)(2)(B) requires the conclusion that

both houses of Congress enacted the trust and transfer provisions—including (d)(4)(A) trusts for people under age 65, as well as (d)(4)(B) trusts for elderly nursing home residents—without realizing, until the last moment, in Conference, that they were penalizing people for funding their own exempt trusts. *Brief of Appellant* at 32-33. A respectful analysis recognizes that, from the beginning, funding one's own trust was covered comprehensively by subsection (d): available (thwarting eligibility), transferred (and referred to the transfer penalty provision), or exempt (by (d)(4)). Subsections (c)(2)(B)(iii) and (iv) were added to allow funding trusts for others: one's own child and others under age 65. CMS is silent on why Congress would explode the range of exempt transfers if it sought only to exempt funding favored trusts by people under 65. *Brief of Appellant* at 36-38.

CMS makes no attempt to reconcile its interpretation with Congress's obvious goals and how the statute was enacted, which are inconsistent with that interpretation.

CMS's gloss on the legislative history is incomplete. It cites general language about transfers, but the specific discussion of the

trust provisions is to the contrary. The Senate reconciliation report explained that what would become subsection (d)(4) "[t]reats most grantor [self-settled] trusts as either resources or illegal transfers," but "[c]reates exemptions from [those] provisions for two types of grantor trusts," what became the (d)(4)(A) and (B) trusts. That is, the exemption was from being treated as a resource *or* a transfer. Senate Committee on the Budget, Reconciliation Submissions of the Instructed Committees Pursuant to the Concurrent Resolution on the Budget (H. Con. Res. 64), S. Prt. 103-36 (June 1993), p. 145/p. 46. This is subsection (d)(4), to which the pooled trust provision was later added. *See Brief of Appellant* at 33.

To support its imprecise reading of the statute, CMS quotes selectively from the authorities it relies on, obscuring the focus on wealth transfer. The House Report on the prior anti-trust provision, 42 U.S.C. § 1396a(k) (since repealed), dealing with the problem of "diverting scarce . . . resources from low-income elderly and disabled individuals," *CMS Brief* at 10-11, was aimed at "[financial planning] techniques that potentially enrich heirs at the expense of poor people[, which] are unacceptable," quoted in *Miller v. State Dept. of*

Social and Rehabilitation Services, 275 Kan. 349, 353-354, 64 P.3d 395, 399 (2013). The Third Circuit in *Lewis v. Alexander, supra*, said the anti-transfer provision was designed to require people to use their own resources before public benefits (*CMS Brief* at 4) to discourage "shelter[ing] their own assets for their benefit and the benefit of their heirs." *Lewis,* 685 F.3d at 343. Similarly, the hearing whose testimony was quoted by CMS (*CMS Brief* at 11-12) was chaired by the principal sponsor of the legislation, Rep. Henry Waxman (D-Cal.). In his opening statement on the second day of hearings, he said the question was, "Since this country has no long-term care program, should a means tested program like Medicaid be used to finance the transmission of wealth from one generation to the next?" *Medicare and Medicaid Budget Reconciliation: Hearings Before the Subcomm. on Health and the Environment of the House Comm. On Energy and Commerce,* 103rd Cong., 1st Sess., Serial No. 103-61, April 1, 1993, p. 334.

CMS's citations do not reach the real issue in this case. Congress *intended* to allow the elderly to qualify for Medicaid, including long term care, notwithstanding income or assets that

were otherwise too high, using either (B) or (C) trusts, without allowing them to enrich heirs. Pooled trusts are an especially unattractive way to get money to the next generation: the trusts' right to retain some (or even all) assets remaining at the beneficiary's death, in addition to 100% Medicaid payback, makes pooled trust accounts useless as a mechanism for transmitting wealth to one's descendants.

Mrs. Richardson, with nothing but a house of very modest value, is emblematic of the appropriate use of pooled trusts. Her small account would give her a little extra comfort in her old age. To the extent not spent for her, it would go for others similarly situated or back to Medicaid to pay for others like her.

CONCLUSION

The brief filed in response to the Court's request for the views of CMS reveals the agency's failure to come to grips with the statute in its full complexity. The Court should, for the reasons stated in Appellant's briefs, reverse the District Court's order and conclude that Mrs. Richardson's funding her account in the Maine Pooled

Disability Trust is governed by 42 U.S.C. § 1396p(d), not § 1396p(c), and is therefore exempt from transfer penalties.

Dated: January 3, 2019

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National Academy of Elder Law Attorneys and Guardian Community Trust

No. 18-1223

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MAINE POOLED DISABILITY TRUST;
Plaintiff–Appellant,

YVONNE R. RICHARDSON,
by her Conservator Barbara Carlin;
Plaintiff,

v.

RICKER HAMILTON,
in his Capacity as Commissioner of the
Maine Department of Health and Human Services
Defendant–Appellee.

On Appeal from the United States District Court
for the District of Maine, Portland

REPLY BRIEF OF AMICI CURIAE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS AND GUARDIAN COMMUNITY TRUST SUPPORTING PLAINTIFF-APPELLANT AND REVERSAL

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INTRODUCTION

The cursory treatment by the Department of Health and Human Services ("HHS") of this Court's invitation is disappointing. The complexity of the legal issue before the Court—and its significant practical importance to elderly citizens in skilled living facilities—warrants precisely the substantive legal analysis this Court sought from HHS, but did not receive.

Moreover, an administrative agency's position is due deference based only upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). HHS' brief is due no deference under *Skidmore* because it (1) conflicts with the Medicaid statute, and (2) conflicts with (but makes no attempt to reconcile or explain) the better-reasoned existing positions of the Centers for Medicare and Medicaid Services ("CMS") in the State Medicaid Manual, Transmittal 64, § 3259 (Nov. 1994) (hereinafter, "Transmittal 64"). As articulated below and in *amici's* prior brief, the statute and Transmittal 64 require that the decision of the District Court be reversed.

ARGUMENT

Skidmore deference is appropriate when an agency's position is derived from "the 'specialized experience and broader investigations and information' available to the agency." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore*, 323 U.S. at 139). Yet HHS' "specialized experience and broader investigations and information" regarding the Medicaid statute are nowhere to be found in its brief:

- HHS offers no legal analysis of the scope of Subsection 1396p(d), beyond the legally incorrect assertion that Subsection 1396p(d) does not deal with trust transfers.
- HHS fails to explain what the pertinent section of Transmittal 64 means, and instead discusses a different provision of Transmittal 64 that does not support its position.
- HHS offers no view on the financial import of its interpretation for Medicaid beneficiaries—namely that they may be subjected to double penalties that Transmittal 64 instructs should be avoided—even though such consequences should be well within HHS' expertise.
- Nor does HHS offer its perspective on the practical effect of depriving Medicaid beneficiaries of pooled trusts for obtaining basic

necessities like glasses and hearing aids.[1] HHS instead offers such platitudes as "nursing-home care is extremely expensive," HHS Brief, 12, but does not explain why Congress nonetheless created exceptions to otherwise-applicable penalties to permit the use of trusts for such purchases—and simultaneously incorporated safeguards against misuse by requiring those trusts to reimburse state Medicaid programs upon death.[2]

In short, HHS has neither fulfilled this Court's request nor provided a comprehensive reading of the Medicaid statute informed by its expertise. Its brief is not due *Skidmore* deference.

I. HHS' Litigation Position Conflicts with the Medicaid Statute.

The Court should not defer to HHS' interpretation because it is legally wrong. "[N]o deference is due to an agency interpretation at odds with the plain language of the statute itself." *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989).

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[1] *Amici* have detailed these ramifications extensively. *See* Brief of *Amicus Curiae* National Academy of Elder Law Attorneys and Guardian Community Trust ("NAELA Brief"), 9-13.

[2] When Subsections 1396p(c) and (d) are read comprehensively, Congress' intention to create such exceptions is clear. *See* NAELA Brief, 23-26.

HHS, like the State of Maine, the District Court, and the decisions upon which they rely, has failed to read Subsection 1396p(d) as anything other than subsidiary to Subsection 1396p(c). It is not.

Subsection 1396p(d) is an independent, co-equal section of the Medicaid statute that deals with trust transfers comprehensively, including—in certain instances where Congress saw fit to do so—applying the transfer penalties of Subsection 1396p(c). HHS' brief treats Subsection 1396p(d)'s cross-references to Subsection 1396p(c) as redundancies, rather than as the intended operation of a comprehensively-designed statute. HHS also fails to acknowledge that its litigation position imposes double penalties that CMS has itself warned state Medicaid programs to avoid.

A. Subsection 1396p(d) is comprehensive in its treatment of trusts.

The very first section of the entire Medicaid statute mandates that "[a] State plan for medical assistance must [...] (18) comply with the provisions of [Subsection 1396p] with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." 42 U.S.C. § 1396a(a). Congress has thus expressly articulated four *independent* compliance obligations, and elaborated upon each in its own respective statutory regime. Subsection 1396a(a)(18) conclusively contravenes the argument of the

State of Maine (and now HHS) that the "treatment of certain trusts" is a mere subcategory of "transfers of assets."

Having ignored the statutory text indicating Congressional intent that Subsection 1396p(d) be independent and comprehensive, HHS compounds this failure by assuming that Subsection 1396p(d) is inapplicable to trust transfers. This is incorrect: Subsection 1396p(d) *does* apply to trust transfers, dealing with *all* transfers to or from trusts.

Subsection 1396p(d) establishes a binary classification system for trusts, each with a different mechanism for preventing misuse. With respect to *self-settled* trusts,[3] Subsection 1396p(d)(3) treats trust assets as fully "available" to the settlor for purposes of calculating the settlor's eligibility for Medicaid, whether or not the trust is actually revoked or the trustee actually distributes any property to settlor. By contrast, *third-party trusts*—irrevocable instruments from which the settlor may not receive benefits under any circumstances—are *not* deemed "available" assets, and are instead "considered [...] to be assets disposed by the individual for purposes of Subsection (c)." Subsection 1396p(d)(3)(B)(ii).

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[3] Subsection 1396p(d) does not use the term "self-settled," but creates such a category *de facto* by assigning the same consequences to revocable trusts and to irrevocable trusts from which the transferor (or settlor) can, under some set of circumstances—regardless of how remote—receive trust property back from the trust.

The division is strict: no third-party trust is deemed to be an available asset, and no self-settled trust is subject to review "for purposes of Subsection (c)." Read together, these provisions demonstrate that Congress did *not* intend to subject self-settled trusts to Subsection 1396p(c).

Subsection 1396p(d)(4) supplements this binary system by allowing self-settled trusts for certain disabled individuals to avoid being deemed "available" under Subsection 1396p(d)(3) *if* the trust reimburses the state Medicaid program upon the beneficiary's death. Because, however, Subsection 1396p(d)(4) applies only to self-settled trusts,[4] third-party trusts are *not* entitled to its protection, even if the beneficiary is disabled and under age 65, or the trust is a pooled trust. Third-party trusts, even those that otherwise would qualify under Subsection 1396p(d)(4), therefore remain "assets disposed by the individual for purposes of subsection (c)" under Subsection (d)(3)(B)(ii).

B. HHS offers no explanation of the interplay between Subsections 1396p(c) and (d).

Nowhere in its brief does HHS acknowledge, let alone explain, the independent authority of Subsection 1396p(d) in establishing the rules for applying transfer penalties to third-party trusts. HHS instead follows the lead of the District

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[4] To qualify under Subsection (d)(4)(A)–(C), the trust must be established with assets "of the [beneficiary]."

Court, and waves off Subsection 1396p(d) as effectively a subordinate provision of Subsection 1396p(c) that "addresses a distinct issue: the circumstances under which trust funds are treated as resources or income for the purposes of Medicaid eligibility standards." HHS Brief, 9.

This assertion is erroneous as a matter of law. It conflicts with multiple statutory references and basic canons of statutory interpretation. First, Subsection 1396p(d)(3) explicitly imposes penalties upon trusts. These include penalties on (1) transfers into a third-party trust where the trust cannot, under any circumstances, distribute the trust property back to the settlor (Subsection 1396p(d)(3)(B)(ii)); (2) payments to third parties from a self-settled revocable trust (Subsection 1396p(d)(3)(A)(iii)); and (3) payments to third parties from a self-settled irrevocable trust (Subsection 1396p(d)(3)(B)(i)(II)). Each of these provisions characterizes the respective transactions as transfers of assets "for purposes of Subsection (c)." HHS simply ignores this language.

If, as HHS contends, Subsection 1396p(c) applies to *all* trust transfers, there would have been no need for Congress to identify—three separate times—the specific trust transactions in Subsection 1396p(d) that are subject to penalties. It is neither legally nor practically likely that Congress intended multiple provisions within related sections of Subsection 1396p(d)(3)(B) to constitute surplusage.

Second, contrary to HHS' position, Subsection 1396p(c) itself treats trust penalties as sanctions *imposed by* Subsection 1396p(d). In providing for a "look-back" period for penalties, Subsection 1396p(c)(B)(ii) specifies that a look-back applies to "a trust that [is] treated as assets disposed of by the individual, *pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d)*" (emphasis added).

Finally, if correct, HHS' interpretation would have a serious practical consequence: Subsections 1396p(c) and 1396p(d) could *both* apply to the *same* transaction. For instance, an individual placing assets into an irrevocable trust for his or her own benefit would be deemed to continue *owning* such assets under Subsection 1396p(d)(3)(A)(i), but would also be penalized for *transferring* such assets under Subsection 1396p(c)(1)(A). HHS fails even to recognize this contradiction (while ignoring the fact that Transmittal 64 resolves any such contradiction by instructing states to "[d]eal with assets placed in trusts exclusively under the trust provisions," *id.* at 3259.6(G)), much less explain why Congress would have intended a double penalty.

C. The Court should give effect to all of Subsection 1396p(d)'s provisions.

Examining the interplay of Subsections 1396p(c) and (d), specifically with respect to trusts that conform to Subsection 1396p(d)(4)(A)-(C), reveals a coherent structure that is sharply at odds with the limited role that HHS ascribes to Subsection 1396p(d).

First, while Subsection 1396p(d) imposes no penalty on self-settled trusts (including self-settled Subsection 1396p(d)(4) trusts) it *does* potentially expose all third-party trusts (including third-party Subsection 1396p(d)(4) trusts) to the penalty provisions of Subsection 1396p(c). *See* Transmittal 64, §3259.6A-C. This is equally true of third-party Subsection 1396p(d)(4) trusts, even though they include a Medicaid reimbursement-upon-death provision, and otherwise conform to the Subsection 1396p(d)(4) requirements. Subsection 1396p(d)(4) itself exempts from penalty only trusts containing "assets of the individual[.]" *See* Transmittal 64, §§3259.7A & 7C; *compare* Subsections 1396p(d)(4)(A) & (C). Such trusts therefore are considered "assets disposed of for purposes of subsection (c)[,]" notwithstanding Subsection 1396p(d)(4), and are potentially subject to Subsection 1396p(c) penalties.

Second, there is no need to read Subsection 1396p(c)'s cross-reference to Subsection 1396p(d)(4) trusts as subjecting *all* trust transfers to Subsection 1396p(c), as HHS does, because there is a better, more specific explanation for the cross-reference. Subsection 1396p(c) has long exempted from penalty *direct gifts* of assets to a child who is disabled.[5] Yet when Subsection 1396p(d)(4) was added subsequently (in 1993), its straightforward application would have imposed a

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[5] *See, e.g.,* Pub. L. No. 100-360, § 303(b), 102 Stat. 760-61 (1988).

penalty on a transfer of those same assets to a third-party Subsection 1396p(d)(4) *trust* for such a child, per Subsection 1396p(d)(3)(ii). This would have been an absurd result: a direct gift of assets to a disabled child would not be penalized, but a trust established with the same assets for the benefit of the same disabled child would be. The cross-reference to "a trust described in subsection (d)(4)" in Subsection 1396p(c)(2)(B)(iii)— inserted by the same law that added Subsection 1396p(d)[6]—clarified that *trusts* for such third parties remained excepted from penalties, and thus avoided this specific absurd result.

Self-settled trusts, by contrast, are not penalized under Subsection 1396p(d)(3), and thus do not require any exception under Subsection 1396p(c)(2) in order to avoid being penalized. Given the specific, practical purpose for the reference to Subsection 1396p(d)(4) trusts in Subsection (c)(2)(B)(iii), there is no reason to believe that Congress implicitly intended the cross-reference to upend the binary system of Subsection 1396p(d)(3) that it had just established, as HHS would do by imposing penalties on *self-settled* Subsection 1396p(d)(4) trusts. *See, e.g.*, *Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms

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[6] *See* Pub. L. No. 103-66, § 13611, 107 Stat. 312 (1993).

or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").[7]

D. At least one court has recognized that other decisions have failed to read Subsection 1396p(d) comprehensively.

Despite this Court's invitation, HHS failed to offer its own expertise in interpreting Subsection 1396p(d), instead referencing the reasoning and authorities of the District Court. The Iowa Supreme Court recently took a similar approach in *Cox v. Iowa Department of Human Services*, No. 18-0026 (Nov. 30, 2018), but over a thorough dissent that is instructive as to the perils of such reflexive reliance.[8] While the majority affirmed an eligibility penalty on transfers by seniors into pooled trusts, the *Cox* dissent took the time to review in detail the statute and the decisions upon which the majority had relied. The dissent was clearly troubled by the same complexities that presumably caused this Court to seek further insight from HHS.

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[7] When this reference to trusts was added to Subsection 1396p(c)(2)(B)(iii), an even broader trust exception was included as a new Subsection 1396p(c)(2)(B)(iv). This exception extends the same protection as Subsection 1396p(c)(2)(B)(iii) to special needs trusts for disabled grandchildren and other third parties under age 65. Given the clear third-party intent of the trust exceptions in Subsection 1396p(c)(2)(B), the reference in Subsection 1396p(c)(2)(B)(iv) to "**an** individual under 65" would, as the Court suggested at argument, more accurately refer to "**another** individual under 65."

[8] Opinion attached as Exhibit A.

The dissent observed that prior state and federal decisions on the question before this Court have a common flaw: "[T]hese courts do not consider that, because their approach implicitly assumes that Subsection c applies to all transactions funding a trust, the treatment of assets in §1396p(d)(3)(B)(ii) would be redundant under their approach." *Cox* Dissent, 29.

The *Cox* dissent recognizes that Subsection 1396p(d) "is a comprehensive provision designed to address the question of how trusts will be treated for Medicaid eligibility," and observes that "Subsection d [...] generally eliminates the possibility of using creative estate planning devices to achieve eligibility for Medicaid." *Cox* Dissent, 26. With respect to the interplay between Subsections 1396p(c) and (d), it explains that "the best reading of the statutory provisions in tandem is that, generally, the establishment of a pooled trust is not a transfer of assets under the statute," because Subsection 1396p(d) "clearly outlines" when assets are "considered to have been disposed of and thus subject to the benefit-limiting provisions of Subsection c." *Cox* Dissent, 29. If the statute is not read this way, "a person could simultaneously be penalized [under Subsection 1396p(d)] for having an available asset and penalized under Subsection c for a transfer." *Cox* Dissent, 29. *Amici* agree.

II. HHS' Position Conflicts with the Better-Reasoned Position Taken by CMS in Transmittal 64.

Transmittal 64 unambiguously instructs state Medicaid programs to"[d]eal with assets placed in trusts *exclusively* under the trust provisions[.]" Transmittal 64, §3259.6(G) (emphasis supplied). This is because "the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust" and because simultaneous application of the provisions of Subsections 1396p(c) and (d) "could result in the individual being penalized twice for actions involving the same asset." *Id.* This instruction is especially apt with regard to pooled trusts for persons 65 and older. If it is disregarded, such individuals are first penalized by delay of their Medicaid eligibility (directly proportional to the amount transferred), and then penalized again when the remainder of the trust must be used to reimburse the state Medicaid agency after death.

HHS should be well-positioned to explain Transmittal 64's meaning and relevance to this case—indeed, it was *written* by HHS—but has inexplicably failed to do so. The above-quoted provision of Transmittal 64 has been at issue repeatedly in briefing and argument of this case, yet HHS does not even acknowledge its existence. HHS instead focuses on a cherry-picked "Note" in

Transmittal 64[9] that states that "a special needs trust established for a disabled individual who is age 66 could be subject to a transfer penalty."

This "Note" does not support HHS' position, for two reasons. First, the Note does not indicate whether it refers to a self-settled or third-party special needs trust. As discussed above, because Subsection 1396p(d)(4) does not protect *third-party* trusts from penalties, such trust would avoid penalty *only* if one of the exceptions in Subsection 1396p(c)(2)(B) applies, and neither does if the beneficiary is 65 or older. But if the trust is *self-settled*, no penalty applies in the first place. *See* Subsections 1396p(d)(3)(A) & (B)(ii)(I). As the Note says, a trust therefore "could be" subject to penalty, depending on whether it is self-settled or third-party. *See* Transmittal 64, §3259.7(A).

Second, the term "special needs trust" is a defined term in Transmittal 64 that refers to *individual* special needs trusts (Transmittal 64, § 3259.7(A)). These are established by Subsection 1396p(d)(4)(A) and are limited expressly to "individual[s] under age 65 who [are] disabled." In contrast, the *pooled* special needs trusts at issue here (which Transmittal 64 calls "pooled trusts," *see* §

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[9] HHS also cites the two-page sub-regulatory Bulletin cited by the District Court and briefed at length by the parties. The Bulletin is both legally less authoritative than Transmittal 64, *see* NAELA Brief, 21, and legally incorrect. *See* NAELA Brief, 24-26.

3259.7(B)) are established under Subsection 1396p(d)(4)(C), which contains *no* age limit. Read plainly, the Note simply alerts state Medicaid agencies that an individual age 66 or older who attempts to establish a "special needs trust" described in Subsection 1396p(d)(4)(A) could incur a penalty.

To summarize, HHS' interpretation of Transmittal 64 is due no deference because HHS fails to provide a cognizable explanation of what Transmittal 64 means, or why Transmittal 64's command to "[d]eal with assets placed in trusts *exclusively* under the trust provisions"—an instruction directly contrary to HHS's litigation position—does not mean exactly what it says.

CONCLUSION

For the reasons stated above, *amici* respectfully submit that HHS' brief should be accorded no weight by this Court, and that the judgment below should be reversed for the reasons stated in the prior briefs of *amici* and Plaintiff-Appellant.

January 3, 2019

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type volume limitation set forth in this Court's September 17, 2018 order because it contains 3000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Certificate of Service

I, Thaddeus A. Heuer, certify that on this 3rd day of January, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

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January 3, 2019

iii.

Special Needs Alliance

No. 18-1223

United States Court of Appeals for the First Circuit

Maine Pooled Disability Trust
Plaintiff–Appellant

Yvonne R. Richardson,
by her Conservator Barbara Carlin
Plaintiff

v.

Ricker Hamilton,
in his official Capacity as Commissioner of the
Maine Department of Health and Human Services
Defendant–Appellee

Appeal from the United States District Court
District of Maine, Portland

Supplemental Brief of Special Needs Alliance as Amicus Curiae Supporting Appellant and Reversal

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The transfer penalty in § 1396p(c) does not apply to funding a self-settled pooled trust. 4

A. Richardson did not dispose of her assets when funding her pooled trust. To determine whether subsection (c) applies, a caseworker must first look to subsection (d). 4

B. The trustees only have discretion to spend Richardson's money on her. 8

C. At the district court and in its principal brief, MPDT argued that funding a self-settled trust is not a transfer. 10

D. In subsection (c)(2)(B)(iv), *an individual* does not mean *the individual*. It must mean *another individual*. 12

E. The parenthetical references to (d)(4) in (c)(2)(B)(iii) and (c)(2)(B)(iv) do not refer to a trust for *the individual*. 14

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Defendant–Appellee

Supplemental Brief of Special Needs Alliance as Amicus Curiae Supporting Appellant and Reversal

This brief is submitted under the Court's order inviting parties to file a supplemental brief if the government filed an amicus brief.

Argument

The transfer penalty in § 1396p(c) does not apply to funding a self-settled pooled trust.

A. Richardson did not dispose of her assets when funding her pooled trust. To determine whether subsection (c) applies, a caseworker must first look to subsection (d).

When Richardson's conservator deposited her money in her

own pooled-trust account with the Maine Pooled Disability Trust, she did not dispose of her assets because she kept all the beneficial interest. She still owned her assets as the beneficial owner. To determine whether subsection (c) applies, a Medicaid caseworker must first look to subsection (d) to determine the kind of trust. Under subsections (d) and (c), Richardson did not dispose of her assets, so no transfer penalty applies.

In its amicus brief, the government disagreed. Although the government relied on decisions by the Eighth Circuit and the South Dakota Supreme Court, neither of those decisions fully examined whether funding a pooled-trust disposes of the assets. *See Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 700–03 (8th Cir. 2012); *In re Pooled Advocate Trust*, 813 N.W.2d 130, 141–42, 146–47 (S.D. 2012). Recently, the Iowa Supreme Court also agreed with the Eighth Circuit and South Dakota. *Cox v. Iowa Dep't of Human Servs.*, No. 18-0026, 2018 WL 6259391 (Iowa Nov. 30, 2018). But there was a dissent.

The dissent agreed that "generally, the establishment of a pooled trust itself is not a transfer of assets under the statute." *Id.*

at *14 (Appel, J., dissenting) ("While the Medicaid statute does not define 'transfer,' I conclude that if you establish a qualifying pooled trust, no transfer occurs."). Moreover, "subsection d addresses the question of when and under what circumstances transactions involving a pooled trust established for the benefit of the individual are considered transfers subject to unfavorable treatment for purposes of Medicaid eligibility." *Id.*

The dissent in *Cox* and Appellant Maine Pooled Disability Trust are correct: subsection (d) instructs how to treat all trust amounts and the conveyances to fund them. For example, imagine a Medicaid caseworker who must determine whether funding a trust should incur a transfer penalty. What if the caseworker relied only on subsection (c)? The caseworker might see a check written to a trustee and conclude that it was a transfer. But what kind of trust was it?

If it was a revocable trust, then placing assets in a revocable trust is not a transfer under subsection (c) because the settlor may simply revoke the trust and keep the assets—they're still available. So to determine whether subsection (c) applies, a caseworker must

first determine what kind of trust it is and refer to subsection (d). If it's a revocable trust, then there was no transfer under subsection (c) because the assets are still available to the settlor—they haven't been disposed of. § 1396p(d)(3)(A)(i). If it's an irrevocable trust and the only payments could be made to the settlor (i.e., a self-settled trust), then it's also not a transfer. § 1396p(d)(3)(B)(i). Subsection (d) covers all trust transactions because to determine whether subsection (c) applies, a Medicaid caseworker must first know what kind of trust it is.

When Richardson's conservator deposited her assets in an account with the Maine Pooled Disability Trust, it was placed in an irrevocable trust. To determine whether funding her pooled trust should be penalized under subsection (c), a Medicaid caseworker must look to subsection (d) for instruction. Because it's an irrevocable trust and the only payments could be made to Richardson, the assets are still available to her and have not been transferred. § 1396p(d)(3)(B)(i). So there is no penalty under subsection (c).

Next, the caseworker would need to determine whether the

available assets would exclude Richardson from eligibility. Normally, they would. § 1396p(d)(3)(B)(i). But because the Maine Pooled Disability Trust is a pooled trust, Richardson's assets are exempt. § 1396p(d)(4)(C).

Therefore, although subsection (c) might apply to funding a trust, it is necessary to refer to subsection (d) first to determine whether subsection (c) applies. When Richardson's conservator established her pooled trust, subsection (c) did not apply.

B. The trustees only have discretion to spend Richardson's money on her.

Although the trustees gained legal title of Richardson's assets, she remained the sole beneficiary. She was the only beneficial owner; the trustees only held legal title. And even though they have discretion, the trustee's only have discretion to spend Richardson's money on her.

First, the government claims that a conveyance by a trustor to a trustee is a disposal of assets. (Br. United States as Amicus Curiae 7–8.) But the trustor is only transferring legal title—not beneficial ownership. (Br. Special Needs Alliance as Amicus

Curiae 15–20.) Indeed, the assets are still considered available to the settlor after funding a self-settled irrevocable trust because the settlor is the only beneficiary. § 1396p(d)(3)(B)(i). Moreover, when Richardson's conservator gained legal title of her assets, she wasn't penalized under subsection (c) because Richardson was still the beneficial owner. So when the trustees of the Maine Pooled Disability Trust gained legal title of Richardson's assets from Richardson's conservator, she shouldn't have been penalized because she was still the beneficial owner.

Next, the government claims that because the trustees have discretion to disburse the funds, giving control of one's assets to a trustee is a disposal under subsection (c). (Br. United States as Amicus Curiae 8.) But a trustee's discretion is irrelevant as to whether trust assets are considered available (i.e., whether the settlor still owns them). § 1396p(d)(1)(C)(ii). When a settlor has beneficial ownership of assets in an irrevocable trust, the assets are still available, and the settlor is not penalized under subsection (c) because she still owns the assets. *Compare* § 1396p(d)(3)(B)(i) *with* § 1396p(d)(3)(B)(ii).

The trustees of MPDT have discretion on how to spend Richardson's pooled-trust funds, but they can only spend Richardson's money on her: "During the life of the Designated Beneficiary, the Trustees shall use, apply, or expend as much of the net income and principal of the trust account *for the benefit of the Designated Beneficiary* of the Trust account as the Trustees, in their sole and uncontrolled discretion, shall deem advisable." (J.A. 67 (emphasis added).)

When establishing a self-settled pooled trust, the settlor gives control and discretion to the trustee, but she keeps all beneficial ownership. Although the trustee has discretion, the trustee may only disburse assets for the beneficiary's benefit. The trustee has no beneficial ownership. So there is no transfer under subsection (c) because the settlor did not dispose of her assets.

C. At the district court and in its principal brief, MPDT argued that funding a self-settled trust is not a transfer.

At the district court, Appellant Maine Pooled Disability Trust argued that funding a self-settled trust is not a transfer. "[T]he trust subsection—covering transfers to and from trusts—governs and

imposes no penalty for self-funding any exempt trust." (Pl.'s Opp'n to Def.'s Mot. Dismiss 2, ECF No. 8.) "Assets in an available trust are, of course, available; subsection (d) imposes no transfer penalty on funding them." (*Id.* at 5.)

In its principal brief, Appellant Maine Pooled Disability Trust also argued that funding a self-settled trust is not a transfer. "Funds going into an available trust are to be treated as if they are still in the individual's own name. … Assets of such trusts still belong to the applicant; they have not been transferred." (Br. Appellant Maine Pooled Disability Trust 23 (citations omitted).) "Assets given to the trustee of a trust that can be used for the benefit of the Medicaid applicant are to be treated as if they had *not* been transferred." (*Id.* at 25.) "Congress could not decide to subject assets in self-settled trusts to the transfer rules precisely because these assets are all available to the applicant." (*Id.*) "No transfer occurs when the asset is given to the trustee of a self-settled trust; it is still available and belongs to the applicant." (*Id.* at 26.)

D. In subsection (c)(2)(B)(iv), *an individual* does not mean *the individual*. It must mean *another individual*.

Because subsection (c) penalizes an individual for disposing of assets (i.e., permanently giving them to someone else), *an individual* does not mean *the individual* in subsection (c)(2)(B)(iv). It must mean *another individual*. There are two ways to read "an individual" in § 1396p(c)'s last transfer-penalty exception:

> (2) *An individual* shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that—
>
> ...
>
> (B) the assets—
>
> ...
>
> (iii) were transferred to, or to a trust (*including a trust described in subsection (d)(4)*) established solely for the benefit of, *the individual's child* ..., or
>
> (iv) were transferred to a trust (*including a trust described in subsection (d)(4)*) established solely for the benefit of *an individual* under 65 years of age who is disabled.

§ 1396p(c)(2)(iii)–(iv) (emphasis added). In subparagraph (iv), the Department is reading *an individual* to include *the individual*. The other way of reading *an individual* is for it to mean *another individual*. Under subsection (c)'s context—where it penalizes transfers to third parties and every other exception is for a transfer to another individual—which makes more sense?

Every exception in § 1396p(c)(2) is for transferring assets to another individual because subsection (c) only penalizes transfers of assets to third parties. *Cox*, 2018 WL 6259391 at *14 (Appel, J., dissenting) ("I view subsection c as designed to handle situations where individuals seek to divest themselves of assets for the benefit of third parties."). Put differently, subsection (c) only penalizes someone who disposes of her assets by permanently giving them to someone else. (Br. Special Needs Alliance as Amicus Curiae 13–15.) So (c)(2)(B)(iv) cannot mean that an individual is not penalized for transferring assets to a trust for her own benefit because she is not penalized for doing so in the first place. When funding a self-settled trust, she still has beneficial ownership of her assets—she did not dispose of them.

Instead, like the exception in (c)(2)(B)(iii), which exempts a transfer to the individual's child's (d)(4) trust, (c)(2)(B)(iv) is an exception for transferring assets to another disabled individual's trust, including that individual's (d)(4)(C) pooled trust. *Cox*, 2018 WL 6259391 at *15 (Appel, J., dissenting) ("I do not think that [the Eighth Circuit in *Olson* and the South Dakota Supreme Court

in *In re Pooled Trust Advocate*] adequately considered the reasons why § 1396p(c)(2)(B)(iv) may apply to transactions benefitting others but not transactions in which an individual funds her own pooled trust."). "The [(d)(4)] reference … is included because an individual ordinarily could not deposit resources into the pooled trust of another person without incurring a transfer penalty under subsection c. *See id.* § 1396p(d)(3)(B)(ii)." *Id.* "The exemption in § 1396p(c)(2)(B)(iv) allows the individual to make such a deposit when the other person is disabled and under age sixty-five." *Id.*

Therefore, "an individual" in subsection (c)(2)(B)(iv) does not mean *the individual*. It must mean *another individual*.

E. The parenthetical references to (d)(4) in (c)(2)(B)(iii) and (c)(2)(B)(iv) do not refer to a trust for *the individual*.

There are two parenthetical references to subsection (d)(4) in the exceptions to subsection (c)'s transfer penalty: (c)(2)(B)(iii) and (c)(2)(B)(iv). But neither of those references refers to a (d)(4) trust for *the individual*.

Under (c)(2)(B)(iii), the individual is not penalized for transferring assets to a trust (including a (d)(4) trust) for his

disabled child's benefit. Even though (c)(2)(B)(iii) has a parenthetical reference to (d)(4), that (d)(4) trust cannot be *the individual's* (d)(4) trust because it refers to *the individual's* disabled child's (d)(4) trust. This makes sense because subsection (c) penalizes transfers to others. And (c)(2)(B)(iii) creates an exception for the individual to transfer assets to her disabled child's trust, including the disabled child's (d)(4) trust.

The same is true for (c)(2)(B)(iv). Under (c)(2)(B)(iv), *the individual* is not penalized for transferring assets to a trust (including a (d)(4) trust) for *another individual*. Because subsection (c) only penalizes transfers to others, this is an exception to that general rule. The individual may transfer assets to another disabled individual's trust, including the other disabled individual's (d)(4) trust. *Cox*, 2018 WL 6259391 at *15 (Appel, J., dissenting) ("The exemption in § 1396p(c)(2)(B)(iv) allows the individual to make such a deposit when the other person is disabled and under age sixty-five.").

For example, under (c)(2)(B)(iii), the individual may transfer assets to her disabled child's (d)(4) trust and not be penalized.

Likewise, under (c)(2)(B)(iv), the individual may transfer assets to her disabled grandchild's (d)(4) trust or her disabled nephew's (d)(4) trust without penalty: "[I]f an individual places assets in a trust and names another person as the beneficiary, that person ordinarily has equitable title to the assets. Thus, an individual can fund another person's pooled trust and the assets in the trust can still 'contain[ ] the assets of an individual who is disabled.'" *Cox*, 2018 WL 6259391 at *15 (Appel, J., dissenting).

Therefore, the parenthetical references to (d)(4) in in (c)(2)(B)(iii) and (c)(2)(B)(iv) do not refer to a trust for *the individual.*

Conclusion

When Richardson was conserved, she wasn't penalized for transferring assets to her conservator. But when her conservator funded her pooled trust, she was penalized. Neither the Department nor the government has explained why there is a difference. If Richardson wasn't penalized when her conservator gained legal title of her assets, then she shouldn't have been penalized for funding her own pooled trust when the trustees

gained legal title of her assets. Richardson still owned all the beneficial interest in her assets after she was conserved and after her conservator established her pooled-trust account. So she did not dispose of her assets, and subsection (c) did not apply. She should not have been penalized.

Therefore, states may not penalize an individual over age 64 for funding a self-settled pooled trust, and the district court's decision should be reversed.

Respectfully submitted,

s/ David S. Hamilton

January 3, 2019

Certificate of Compliance

This supplemental brief complies with the 3,000 word limit set in the Court's order. This brief contains 2,402 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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Respectfully submitted,

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January 3, 2019

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