



State of New Mexico
Human Services Department
Human Services Register



I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT

TRUSTS, ASSET TRANSFERS, AND DEFINITIONS FOR MEDICAID ELIGIBILITY FOR CATEGORIES THAT USE SSI INCOME METHODOLOGIES

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

PROPOSED REGULATIONS

V. BACKGROUND SUMMARY

The New Mexico Human Services Department is proposing to repeal the trust provisions for Medicaid Eligibility for Institutional Care found at 8.281.500.15 NMAC, *trusts*. New and revised trust language will be more appropriately placed as the newly created trust provisions found in 8.281.510 NMAC, *Trust Standards*. Language has also been added to provide more detailed descriptions of trust types and their potential effects on Medicaid eligibility. Other language changes are being made for clarity. In addition, the resource provisions for the Home and Community-Based Waivers, Qualified Medicare Beneficiaries, Specified Low-Income Medicare Beneficiaries, Qualified Individuals I, Supplemental Security Income Medicaid Extension, and the Working Disabled Individuals programs will be updated to refer to 8.281.510 NMAC.

The Department is also adding language to 8.281.500.7 NMAC, *definitions*, is correcting the dollar amount in equity value in Subsection E of 8.281.500.13 NMAC, *resource exclusions*, to correspond to Subsection A of 8.200.510.15 NMAC, *excess home equity amount for long-term care services*; and is clarifying language in Section 8.281.500.14 NMAC, *asset transfers*, in the Medicaid Eligibility for Institutional Care provisions.

VI. REGULATIONS

The proposed rule changes are contained in 8.201.500 NMAC, 8.240.500 NMAC, 8.243.500 NMAC, 8.245.500 NMAC, 8.250.500 NMAC, 8.281.500 NMAC and 8.281.510 NMAC of the Medical Assistance Division Eligibility Manual. The proposed rules are attached to the register and are available on the Medical Assistance web site at:

www.hsd.state.nm.us/mad/register/2011. If you do not have Internet access, a copy of the

proposed register and rules may be requested by contacting the Medical Assistance Division at 505-827-3157.

VII. EFFECTIVE DATE

These regulations are effective February 15, 2012.

VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed rules will be held at 10:00 a.m. on January 4, 2012 in the South Park Conference Room, 2055 S. Pacheco, Ste 500-590, Santa Fe, New Mexico.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Division toll free at 1-888-997-2583 and ask for extension 7-3156. In Santa Fe call 827-3156. The Department's TDD system may be accessed toll-free at 1-800-659-8331 or in Santa Fe by calling 827-3184. The Department requests at least ten (10) days advance notice to provide requested alternative formats and special accommodations.

Copies of all comments will be made available by the Medical Assistance Division upon request by providing copies directly to a requestor or by making them available on the MAD website or at a location within the county of the requestor.

IX. ADDRESS

Interested persons may address written or recorded comments to:

Sidonie Squier, Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later than 5:00 p.m. on January 4, 2012. Written and recorded comments will be given the same consideration as oral comments made at the public hearing. Interested persons may also address comments via electronic mail to: barbara.watkins@state.nm.us.

X. PUBLICATION

Publication of these regulations approved by:

SIDONIE SQUIER, SECRETARY
HUMAN SERVICES DEPARTMENT

TITLE 8 SOCIAL SERVICES
CHAPTER 201 MEDICAID ELIGIBILITY - MEDICAID EXTENSION (CATEGORY 01, 03 and 04)
PART 500 INCOME AND RESOURCE STANDARDS

8.201.500.12 TRUSTS: See 8.281.510 NMAC and following subsections.
[8.201.500.12 NMAC – N, 2-15-12]

~~[8.201.500.12]~~ **8.201.500.13 INCOME STANDARDS:** To be eligible for medicaid extension, an applicant/recipient must have countable income below the SSI FBR. See 8.215.500.18 NMAC, *income*, through 8.215.500.22 NMAC, *disregards*, for information on exclusions, disregards, and countable income. [2/1/95; 8.201.500.12 NMAC - Rn, 8 NMAC 4.EXT.520 & A, 10/1/09; Rn, 8.201.500.13, 2-15-12]

~~[8.201.500.13]~~ **8.201.500.14 COMPUTATION OF COLA DISREGARDS IN PICKLE AND 503 LEADS CASES:**

A. An applicant/recipient's countable income, after exclusion of the Title II COLAs received following SSI termination, must be less than the current SSI federal benefit rate (FBR).

B. To determine the total amount of the applicant/recipient's Title II COLAs received since the applicant/recipient lost SSI, the following calculation must be completed:

(1) divide the current Title II amount by the percentage amount of the previous year's COLA;
(2) repeat this calculation for each Title II COLA benefit received after the applicant lost SSI; computations are based on the previous year's COLA and previous benefit; see 8.200.520.12 NMAC, *COLA disregard computation*, of 503 leads and pickle cases;

(3) when the last computation is completed, the result is the Title II benefit amount the applicant/recipient was receiving when he/she lost SSI;

(4) subtract this amount from the current Title II benefit amount; the result is the aggregate Title II COLAs the applicant/recipient received after losing SSI; and

(5) subtract the aggregate COLAs from the applicant/recipient's countable income to determine if the income is below the current SSI FBR.

C. If the resulting income is below the current SSI FBR, and the applicant/recipient meets all other requirements for SSI, he/she is eligible for medicaid extension.

[2/1/95; 8.201.500.13 NMAC - Rn, 8 NMAC 4.EXT.522 & A, 10/1/09; Rn, 8.201.500.14 NMAC, 2-15-12]

~~[8.201.500.14]~~ **8.201.500.15 DEEMED INCOME:** If an applicant/recipient is a minor who lives with a parent(s), deemed income from the parent(s) must be considered. If an applicant/recipient is married and lives with a spouse, deemed income from the spouse must be considered. See 8.215.500.21 NMAC, *deemed income*, for information on deemed income. If an applicant/recipient has a spouse or parent who receives Title II benefits, all COLAs received by the spouse/parent since the applicant/recipient lost SSI are deducted from the spouse/parent's income before it is deemed to the applicant/recipient.

[2/1/95; 8.201.500.14 NMAC - Rn, 8 NMAC 4.EXT.523 & A, 10/1/09; Rn, 8.201.500.15 NMAC, 2-15-12]

~~[8.201.500.15]~~ **8.201.500.16 [RESERVED]**

[2/1/95; 8.201.500.15 NMAC - Rn, 8 NMAC 4.EXT.526 & Repealed, 10/1/09; Rn, 8.201.500.16 NMAC, 2-15-12]

TITLE 8 SOCIAL SERVICES
CHAPTER 240 MEDICAID ELIGIBILITY - QUALIFIED MEDICARE BENEFICIARIES (QMB)
(CATEGORY 040)
PART 500 INCOME AND RESOURCE STANDARDS

8.240.500.12 TRUSTS: See 8.281.510 NMAC and following subsections.

[8.240.500.12 NMAC - N, 2-15-12]

~~[8.240.500.12]~~ 8.240.500.13 **INCOME STANDARDS:** The income ceiling for QMB eligibility is 100 percent of the federal income poverty guidelines. These guidelines are updated annually effective April 1st. See 8.200.520 NMAC, *Income Standards*. If the applicant is a minor child, income must be deemed from the parent(s). Income must be verified and documented in the case record. See 8.215.500.13 NMAC, *countable resources*, and 8.215.500.14 NMAC, *resource exclusions*, for specific information on exclusions, disregards, and calculation of countable income.

[2/1/95; 9/15/95; 8.240.500.12 NMAC - Rn, 8 NMAC 4.QMB.520 & A, 7/15/10; Rn, 8.240.500 NMAC, 2-15-12]

~~[8.240.500.13]~~ 8.240.500.14 **UNEARNED INCOME: Unearned income exclusions:** All social security and railroad retirement beneficiaries receive cost of living adjustments (COLAs) in January of each year. The ISD caseworker must disregard the COLA from January through March when (re)determining QMB eligibility. For redeterminations made in January, February and March and for new QMB applications registered in January, February or March, the ISD caseworker uses the December social security and railroad retirement benefit amounts. For QMB applications registered from April through December, total gross income including the new COLA figures are used to determine income and compared to the new April federal poverty levels. This exclusion does not apply to other types of income.

[2/1/95; 9/15/95; 8.240.500.13 NMAC - Rn, 8 NMAC 4.QMB.522 & A, 7/15/10; Rn, 8.240.500.14 NMAC, 2-15-12]

~~[8.240.500.14]~~ 8.240.500.15 **DEEMED INCOME:**

A. **Minor applicant/recipient living with parent(s):** If the applicant/recipient is a minor who lives with a parent(s), deemed income from the parent(s) must be considered in accordance with 8.215.500.21 NMAC, *deemed income*, and applicable subsections.

B. **Applicant/recipient living with an ineligible spouse:** If an applicant/recipient is living in the same household with an ineligible spouse, the income of the applicant/recipient and the income of the ineligible spouse must be considered in accordance with the following paragraphs.

(1) **Evaluation of applicant/recipient's Income:** The ISD caseworker determines the amount of income available to the applicant/recipient using only the applicant/recipient's own income. Allow the standard \$20 disregard in accordance with instructions in Subsection B of 8.215.500.22 NMAC of the medical assistance division policy manual. If the applicant/recipient has earned income, allow the earned income disregard as specified in Subsection C of 8.215.500.22 NMAC. From the combined total of the applicant/recipient's remaining earned and unearned income, subtract up to the difference between 100 percent of the federal income poverty level for two persons and 100 percent of the federal income poverty level for one person. This is referred to as the FPL disregard. Compare the remaining countable income of the applicant/recipient to the individual income standard for the QMB program. If the applicant/recipient's remaining countable income is greater than the individual standard, s/he is ineligible for the QMB program. If the applicant/recipient's remaining countable income is less than the individual income standard, proceed to the following section.

(2) **Evaluation of the ineligible spouse's gross income:** The ISD caseworker determines the total gross earned and unearned income of the ineligible spouse. From this combined amount, subtract a living allowance for any ineligible minor dependent child(ren) of either member of the couple who live(s) in the home. The deductible amount of the ineligible child(ren)'s living allowance cannot exceed the ineligible spouse's total gross income. The amount of the living allowance for an ineligible child is determined by subtracting the child's gross income from the figure which represents the difference between 100 percent of the federal income poverty level for two persons and 100 percent of the federal income poverty level for one person. A "child" must be under 18 years of age or under 21 years of age if a full-time student at an institution of learning.

(3) **Determination of countable income for eligibility purposes:** The ISD caseworker adds the gross unearned income of the applicant/recipient (without applying any disregards) to the gross unearned income of the

ineligible spouse. The ISD caseworker then adds the total gross earned income of the applicant/recipient to the total gross earned income of the ineligible spouse. From the combined total gross earnings of the couple, the ISD caseworker subtracts one earned income disregard (the first \$65 of the total earnings plus 1/2 of the remainder). The resulting figure is the total combined countable earnings of the couple. Add the couple's total combined countable earned income to their total gross unearned income. From this figure subtract the standard \$20 disregard determined in accordance with Subsection B of 8.215.500.22 NMAC. Next, subtract the amount of the FPL disregard which the applicant/recipient was allowed. Finally, subtract the amount of the ineligible child(ren)'s living allowance which was calculated in Paragraph (2) of Subsection B of 8.240.500.14 NMAC. The resulting figure is the countable income of the couple. Compare it to the couple standard for QMB. If the countable income of the couple exceeds the couple standard, the applicant/recipient is ineligible for the QMB program. If the countable income of the couple is less than the couple standard, the applicant/recipient is eligible for the QMB program of the factor of income.

[2/1/95; 9/15/95; 8.240.500.14 NMAC - Rn, 8 NMAC 4.QMB.523 & A, 7/15/10; Rn, 8.240.500.15 NMAC, 2-15-12]

HISTORY OF 8.240.500 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

MAD Rule 840, Qualified Medicare Beneficiaries, filed 3/7/89.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 3/31/89.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 12/29/89.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 6/22/90.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 12/4/90.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 5/3/91.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 6/30/92.

MAD Rule 840, Qualified Medicare Beneficiaries, filed 9/26/94.

History of Repealed Material: MAD Rule 840, Qualified Medicare Beneficiaries, filed 9/26/94 - Repealed effective 2/1/95.

**MEDICAID ELIGIBILITY
WORKING DISABLED INDIVIDUALS (WDI)
CATEGORY 043**

**TITLE 8 SOCIAL SERVICES
CHAPTER 243 MEDICAID ELIGIBILITY – WORKING DISABLED INDIVIDUALS (WDI)
 (CATEGORY 043)
PART 500 INCOME AND RESOURCE STANDARDS**

8.243.500.15 TRUSTS: [~~See 8.215.500.16.A-~~] See 8.281.510 NMAC and following subsections
[8.243.500.15 NMAC - N, 1-1-01; A, 2-15-12]

HISTORY OF 8.243.500 NMAC: [RESERVED]

History of Repealed Material: [RESERVED]

TITLE 8 SOCIAL SERVICES
CHAPTER 245 MEDICAID ELIGIBILITY - SPECIFIED LOW INCOME MEDICARE BENEFICIARIES
(SLIMB) (CATEGORY 045)
PART 500 INCOME AND RESOURCE STANDARDS

8.245.500.8 MISSION: ~~[To reduce the impact of poverty living in New Mexico and to assure low income and disabled individuals individuals with disabilities in New Mexico equal participation in the life of their communities.]~~
To reduce the impact of poverty on people living in New Mexico by providing support services that help families break the cycle of dependency on public assistance.
[8.245.500.8 NMAC - N, 12/1/09; A, 2-15-12]

8.245.500.12 TRUSTS: See 8.281.510 NMAC and following subsections.
[8.245.500.12 NMAC - N, 2/15/12]

~~[8.245.500.12]~~ **8.245.500.13 INCOME STANDARDS:** Income standards for this category are at least 100 percent but no more than 120 percent of the federal income poverty guidelines. The federal income poverty guidelines are adjusted annually, effective April 1. See 8.200.520 NMAC, *Income Standards*, and 8.215.500.19 NMAC, *Income Standards*, for information on exclusions, disregards, and countable income. Verification of income must be documented in the case file.
[2/1/95; 8.245.500.12 NMAC - Rn, 8 NMAC 4.SMB.520 & A, 12/1/09; Rn, 8.245.500.13 NMAC, 2/15/12]

~~[8.245.500.13]~~ **8.245.500.14 UNEARNED INCOME:** Unearned income exclusions: All social security and railroad retirement beneficiaries receive cost of living adjustments (COLAs) in January of each year. The ISD caseworker must disregard the COLA from January through March when (re)determining SLIMB eligibility. For redeterminations made in January, February and March and for new SLIMB applications registered in January, February, or March, the ISD caseworker uses the December social security and railroad retirement benefit amounts. For SLIMB applications registered from April through December, total gross income including the new COLA figures are used to determine income and compared to the new April federal poverty levels. This exclusion does not apply to other types of income.
[2/1/95; 8.245.500.13 NMAC - Rn, 8 NMAC 4.SMB.522, 12/1/09; A, 7/15/10; Rn, 8.245.500.14, 2/15/12]

~~[8.245.500.14]~~ **8.245.500.15 DEEMED INCOME:** If an applicant/recipient is a minor who lives with a parent(s), deemed income from the parent(s) must be considered. If an applicant/recipient is married and lives with a spouse, deemed income from the spouse must be considered. See 8.215.500.21 NMAC, *Deemed Income*, for information on deemed income.
[2/1/95; 8.245.500.14 NMAC - Rn, 8 NMAC 4.SMB.523 & A, 12/1/09; Rn, 8.245.500.15, 2/15/12]

HISTORY OF 8.245.500 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: MAD Rule 843, Specified Low Income Medicare Beneficiaries, filed 9/26/94.

History of Repealed Material: MAD Rule 843, Specified Low Income Medicare Beneficiaries, filed 9/26/94 - Repealed effective 2/1/95.

TITLE 8 SOCIAL SERVICES
CHAPTER 250 MEDICAID ELIGIBILITY - QUALIFIED INDIVIDUALS WHOSE INCOME EXCEEDS
QMB AND SLIMB (CATEGORY 045)
PART 500 INCOME AND RESOURCE STANDARDS

8.250.500.8 MISSION: To reduce the impact of poverty on people living in New Mexico ~~[and to assure low income and disabled individuals in New Mexico equal participation in the life of their communities.]~~ by providing support services that help families break the cycle of dependency on public assistance.
[8.250.500.8 NMAC - N, 12/1/09; A, 2/15/12]

8.250.500.12 TRUSTS: See 8.281.510 NMAC and following subsections.
[8.250.500.12 NMAC - N, 2/15/12]]

~~[8.250.500.12]~~ **8.250.500.13 INCOME STANDARDS:** Income standards for this category are at least 120 percent but less than 135 percent of the federal income poverty guidelines. The federal income poverty guidelines are adjusted annually, effective April 1. See 8.200.520 NMAC, *Income Standards*, and 8.215.500.19 NMAC, *income standards*, for information on exclusions, disregards and countable income. Verification of income must be documented in the case file.
[4/30/98; 8.250.500.12 NMAC - Rn, 8 NMAC 4.QIS.520 & A, 12/1/09; Rn, 8.250.500.13 NMAC, 2/15/12]

~~[8.250.500.13]~~ **8.250.500.14 UNEARNED INCOME:** Unearned income exclusions: All social security and railroad retirement beneficiaries receive cost of living adjustments (COLAs) in January of each year. The ISD caseworker must disregard the COLA from January through March when (re)determining QIIs eligibility. For redeterminations made in January, February and March and for new QII applications registered in January, February or March, the ISD caseworker uses the December social security and railroad retirement benefit amounts. For QII applications registered from April through December, total gross income including the new COLA figures are used to determine income and compared to the new April federal poverty levels. This exclusion does not apply to other types of income.
[4/30/98; 8.250.500.13 NMAC - Rn, 8 NMAC 4.QIS.522, 12/1/09; A, 7/15/10; Rn, 8.250.500.14 NMAC, 2/15/12]

~~[8.250.500.14]~~ **8.250.500.15 DEEMED INCOME:** If an applicant/recipient is a minor who lives with a parent(s), deemed income from the parent(s) must be considered. If an applicant/recipient is married and lives with a spouse, deemed income from the spouse must be considered. See 8.215.500.21 NMAC, *deemed income*, for information on deemed income.
[4/30/98; 8.250.500.14 NMAC - Rn, 8 NMAC 4.QIS.523 & A, 12/1/09; Rn, 8.250.500.15, 2/15/12]

HISTORY OF 8.250.500 NMAC: [RESERVED]

**TITLE 8 SOCIAL SERVICES
CHAPTER 281 MEDICAID ELIGIBILITY - INSTITUTIONAL CARE (CATEGORIES 081, 083, 084)
PART 500 INCOME AND RESOURCE STANDARDS**

8.281.500.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).
[2-1-95; 8.281.500.1 NMAC - Rn, 8 NMAC 4.ICM.000.1, 3-1-01; A, 2-15-12]

8.281.500.3 STATUTORY AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See NMSA 1978 Section 27-2-12 [~~et seq. (Repl. Pamph. 1991)~~] et seq.
[2-1-95; 8.281.500.3 NMAC - Rn, 8 NMAC 4.ICM.000.3, 3-1-01; A, 2/15/12]

8.281.500.7 DEFINITIONS:

- A. **Actuarially sound:** With respect to an annuity or promissory note, the payments made to the beneficiary do not exceed his/her life expectancy and returns to the beneficiary at least equal to the amount used to establish the contract.
- B. **Annuity:** A financial instrument usually sold by a life insurance company, that pays out a regular income at fixed intervals for a certain period of time, often beginning at a certain age and continuing for the life of the owner.
- C. **Assets:** All income and resources of an applicant/recipient and their spouse, if applicable,
- D. **Bona fide:** A bona fide agreement is made in good faith and is legally valid.
- E. **Community spouse:** The spouse of an institutionalized spouse who is residing in the community and not in an institution.
- F. **Community spouse resource allowance:** An amount of a couples' resources that is set aside for the community spouse when the other spouse is institutionalized. There is a state minimum and a federal maximum amount of resources that can be set aside for the community spouse.
- G. **Encumbrance:** A general term for any claim or lien on a parcel of real property, including mortgages, deeds of trust and abstracts of judgments.
- H. **Fair market value:** An estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria used in appraising the value of assets for the purpose of determining medicaid eligibility.
- I. **Home equity:** (Also known as equity value.) The value of a home minus the total amount owed on it in mortgages, liens and other encumbrances.
- J. **Income:** Anything that an applicant/recipient receives in cash or in kind that he/she can use to meet his/her needs for food and shelter. In-kind income is not cash, but is actual food or shelter, or something that the applicant/recipient can use to get one of these.
- K. **Institutionalized spouse:** An applicant/recipient who is in an acute care hospital, nursing facility, intermediate care facility for the mentally retarded, swingbed or certified in-state inpatient rehabilitation center.
- L. **Life estate:** An interest in property that exists for the life of a person. For example, an individual gives a life estate in a house to person A and the remainder to person B. A has a life estate and B has a remainder interest until person A dies.
- M. **Liquid resource:** Cash or something that can easily be converted to cash within 20 business days.
- N. **Loan:** A transaction in which one party advances money to, or on behalf of another party, who promises to repay the lender in full, with or without interest.
- O. **Lookback period:** A period of time in the past through which the ISD worker may examine all financial transactions for asset transfers.
- P. **Minimum monthly maintenance needs allowance:** A minimum level of income that the federal government allows to be set aside for the support of the community spouse when the other spouse is in an institution.
- Q. **Negotiable agreement:** An agreement (i.e., a loan) in which the ownership of the agreement and the whole amount of money can be transferred from one person to another.
- R. **Non-liquid resource:** An asset such as real property, which cannot be easily converted to cash within ~~twenty (20)~~ 20 days.
- S. **Promissory note:** A promissory note is a written, unconditional agreement in which one person

promises to pay a specified sum of money at a specified time to another person.

T. **Relative:** Relative is defined as son/daughter; grandson/granddaughter; step-son/step-daughter; in-laws; mother/father; step-mother/step-father; half sister/half brother; grandmother/grandfather; aunt/uncle; sister/brother; step-brother/step-sister; and niece/nephew.

U. **Remainder/remainderman:** An interest in property that occurs after a life estate. For example, an individual gives a life estate in a house to person A and the remainder to person B. A has a life estate and B has a remainder interest. Person B is also called the remainderman.

V. **Resources:** Cash or other liquid assets and any real or personal property that applicant/recipient (or spouse if any) owns and could convert to be used for his/her support and maintenance.

W. **Restricted coverage:** Eligibility for medicaid except for payment for long term care services in a nursing facility.

X. **Reverse mortgage:** A loan against home equity providing cash advances to a borrower and requiring no repayment until a future date.

~~Y. **Transfer:** To change over the possession, control or ownership of something.~~

Y. **Sole benefit of:** A transfer is considered for the sole benefit of a spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind, or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

Z. **Transfer:** To change over the possession, control or ownership of something.
[8.281.500.7 NMAC - N, 4-1-09; A, 1-1-12]

8.281.500.13 RESOURCE EXCLUSIONS: Some types of resources can be excluded from the calculation of countable resources if they meet the specific criteria listed below.

A. **Burial fund exclusion:** Up to \$1,500 can be excluded from the countable liquid resources of an applicant/recipient if designated as his/her burial fund. An additional amount of up to \$1,500 can be excluded from countable liquid resources if designated as burial funds for the spouse of the applicant/recipient. The burial fund exclusion is separate from the burial space exclusion.

(1) **Retroactive designation of burial funds:** An applicant/recipient can retroactively designate funds for burial back to the first day of the month in which the applicant/recipient intended the funds to be set aside for burial. The applicant/recipient must sign a statement indicating the month the funds were set aside for burial.

(2) **Limit on exclusion:** An applicant/recipient can designate as much of his/her liquid resources as he/she wishes for burial purposes. However, only one burial fund allowance of up to \$1,500 each for the applicant/recipient and his/her spouse can be excluded from countable resources. A burial fund exclusion does not continue from one period of eligibility to another (i.e., across a period of ineligibility). For each new period of eligibility, any exclusion of burial funds must be developed as for an initial application.

(3) **Removal of designation:** An applicant/recipient cannot "un-designate" burial funds, unless one of the following occurs:

- (a) eligibility terminates;
- (b) part, or all, of the funds can no longer be excluded because the applicant/ recipient purchased excluded life insurance or an irrevocable burial contract which partially or totally offsets the available burial fund exclusion; or
- (c) the applicant/recipient uses the funds or any portion of the funds for another purpose; this action makes the funds countable; any designated burial funds used for another purpose will be counted as income in the month withdrawn and as a resource thereafter.

(4) **Reduction of burial fund exclusion:** The \$1,500 burial fund exclusion is reduced by the following:

- (a) the face value of excluded life insurance policies;
- (b) assets held in irrevocable burial trusts; irrevocable means the value paid cannot be returned to the applicant/recipient;
- (c) assets that are not burial space items held in irrevocable burial contracts;
- (d) assets held in other irrevocable burial arrangements; and
- (e) assets held in an irrevocable trust available to meet burial expenses.

(5) **Interest from burial fund:** Interest derived from a burial fund is not considered a countable resource or income if all the following conditions exist:

- (a) the original amount is excluded;

- (b) the excluded burial fund is not commingled with non-excluded burial funds;
- (c) the interest earned remains with the excluded burial funds.

(6) **Commingling of burial funds:** Burial funds cannot be commingled with non-burial funds. If only part of the funds in an account are designated for burial, the burial fund exclusion cannot be applied until the funds designated for burial expenses are separated from the non-burial funds. Countable and excluded burial funds can be commingled.

(7) **Life insurance policy designated as burial fund:** An applicant/recipient can designate a life insurance policy as a burial fund at the time of application. The ISD worker must first analyze the policy according to Subsection H of 8.281.500.13 NMAC, *life insurance exclusion*, and following subsections.

(8) **Burial contracts:** If an applicant/recipient has a prepaid burial contract, the ISD worker determines whether it is revocable or irrevocable and whether it is paid for. Until all payments are made on a burial contract, the amounts paid are considered burial funds and no burial space exclusions apply.

(a) An applicant/recipient may have a burial contract which is funded by a life insurance policy. The life insurance may be either revocably or irrevocably assigned to a funeral director or mortuary.

(b) A revocable contract exists if the value can be returned to the applicant/recipient. An irrevocable contract exists when the value cannot be returned. If the contract or insurance policy assignment is revocable, the following apply.

(i) If the burial contract is funded by a life insurance policy, the policy is the resource which must be evaluated. The burial contract itself has no value. It exists only to explain the applicant/recipient's burial arrangements.

(ii) No exclusions can be made for burial space items because the applicant/recipient does not have a right to them if the contract is not paid for or the policy is not paid up.

(c) If the assignment is irrevocable, the life insurance or burial contract is not a countable resource, because the applicant/recipient does not own it.

(i) The burial space exclusions can apply if the applicant/recipient has the right to the burial space items.

(ii) The value of the irrevocable burial arrangement is applied against the \$1,500 burial fund exclusion only if the applicant/recipient has other liquid resources to designate for burial.

B. Burial space exclusion: A burial space or an agreement which represents the purchase of a burial space held for the burial of an applicant/recipient, his/her spouse, or any other member of his/her immediate family is an excluded resource regardless of value. Interest and accruals on the value of a burial space are excluded from consideration as countable income or resources.

(1) When calculating the value of resources to be deemed to an applicant/recipient from his/her parent(s) or spouse, the value of spaces held by the parent(s)/spouse which are to be used for the burial of the applicant/recipient, or any member of the applicant/recipient's immediate family, including the deemer parent/spouse, must be excluded.

(2) The burial space exclusion is separate from, and in addition to, the burial fund exclusion.

(3) **Burial space definitions:** "Burial space" is defined as a(n) burial plot, gravesite, crypt, mausoleum, casket, urn, niche, or other repository customarily used for the deceased's bodily remains.

(a) A burial space also includes necessary and reasonable improvements or additions, such as vaults, headstones, markers, plaques, burial containers (e.g., caskets), arrangements for the opening and closing of a gravesite, and contracts for care and maintenance of the gravesite, sometimes referred to as endowment or perpetual care.

(b) Items that serve the same purpose are excluded once per individual, such as excluding a cemetery lot and a casket, but not a casket and an urn.

(4) **Burial space contract:** An agreement which represents the purchase of a burial space is defined as a contract with a burial provider for a burial space held for the eligible applicant/recipient or a member of his/her immediate family.

(a) Until all payments are made on the contract, the amounts paid are considered burial funds and no burial space exclusions apply.

(b) An eligible applicant/recipient's immediate family includes:

- (i) spouse;
- (ii) natural or adoptive parents;
- (iii) minor or adult children, including adoptive and stepchildren;
- (iv) siblings, including adoptive and stepsiblings; and

(v) spouse of any of the above relatives.

(c) If a relative's relationship to an applicant/recipient is by marriage only, the relationship ceases to exist upon the dissolution of the marriage.

(5) **Burial space "held" for an applicant/recipient:** A burial space is considered held for an applicant/recipient if:

(a) someone has title to or possesses a burial space intended for the use of the applicant/recipient or a member of his/her immediate family; or

(b) someone has a contract with a funeral service company for a specified burial space for the applicant/recipient or a member of his/her immediate family, such as an agreement which represents the individual's current right to the use of the items at the amount shown.

(6) Until the purchase price is paid in full, a burial space is not considered "held for" an individual under an installment sales contract or similar device if:

(a) the individual does not currently own the space;

(b) the individual does not currently have the right to use the space; and

(c) the seller is not currently obligated to provide the space.

C. **Life estate exclusion:** The value of a life estate interest in the applicant/recipient's own home or in the home of another is excluded if the applicant/recipient has continuously resided in the home for a period of 12 months or more from the date of the life estate purchase. The value of the remainderman's interest when a life estate is retained in one's own home is considered a transfer of resources to be evaluated in accordance with 8.281.500.14 NMAC, *asset transfers*.

D. **Settlement exclusions:** Agent orange settlement payments made to veterans or their survivors are excluded from consideration as resources.

(1) Payments made under the Radiation Exposure Compensation Act are excluded from consideration as resources.

(2) Payments received from a state-administered fund established to aid victims of crime are excluded for nine months beginning the month after the month of receipt.

(3) Payments under the foundation called 'remembrance, responsibility and the future', are excluded from consideration as resources.

E. **Exclusions for real property and home:** A home is any shelter used by an applicant/recipient or his/her spouse as the principal place of residence. To be excluded, a home must have an equity value of [~~\$750,000~~] **\$758,000** or less. An applicant/recipient with home equity of more than (see 8.200.510.15 NMAC, *excess home equity amount for long-term care services*) shall be placed on restricted coverage for as long as he/she owns the home. The home includes any buildings and contiguous land used in the operation of the home. A home is not considered a countable resource while in use by the applicant/recipient as his/her principal place of residence. The home with an equity value of (see 8.200.510.15 NMAC, *excess home equity amount for long-term care services*) or less continues to be excluded during periods when the applicant/recipient resides in an acute care or long term care medical facility if the applicant/recipient or his/her representative states that the applicant/recipient intends to return to the home. **Exclusion of home:** If the applicant/recipient or his/her representative states the applicant/recipient does not intend to return to the home, but the home is the residence of the applicant/recipient's spouse or dependent minor child or adult disabled child, the home is an excluded resource.

F. **Income-producing property exclusion:** To be excluded from consideration as a countable resource, income-producing property that does not qualify as a bona fide business (e.g., rental property or mineral rights) must have an equity value of no more than \$6,000 and an annual rate of return of at least six percent of the equity value. See Subparagraph (b) or Paragraph (1) of Subsection F of 8.281.500.13 NMAC, *determination of rate of return*, below if the equity value exceeds \$6,000 but the rate of return is at least six percent annually. The \$6,000 and six percent limitation does not apply to property used in a trade or bona fide business, or to property used by an applicant/recipient as an employee which is essential to the applicant/recipient's self-support (e.g., tools used in employment as a mechanic, property owned or being purchased in conjunction with operating a business). Existence of a bona fide business can be established by documentation such as business tax returns.

(1) **Determination of rate of return:** To calculate the annual rate of return for income producing property when the \$6,000 and six percent limits apply, the previous year's income tax statement, or at least three months earnings is used to project the rate of return for the year.

(a) If the income is sporadic or has decreased from that needed to maintain a six percent rate of return for the coming year, the property is reevaluated at appropriate intervals.

(b) If the annual rate of return is at least six percent of the equity value but the equity value

exceeds \$6,000, only the excess equity is a countable resource.

(c) If the annual rate of return is less than six percent but the usual rate of return is more, the property is excluded as a countable resource if all the following conditions are met:

(i) unforeseeable circumstances, such as a fire, cause a temporary reduction in the rate of return;

(ii) the previous year's rate of return, as documented by the income tax statement or several months receipts, is at least six percent; and

(iii) the property is expected to produce a rate of return of at least six percent within 18 months of the end of the year in which the adverse circumstances occurred; the ISD worker records in the case narrative the plan of action which is expected to increase the rate of return.

(d) The ISD worker notifies the applicant/recipient in writing that the property is excluded based on its expected increase in return and that it will be reevaluated at the end of the 18 month grace period. When this period ends, the property must be producing an annual rate of at least six percent to continue to be excluded as a countable resource.

(2) **Types of income-producing property:** Income-producing property includes:

(a) a business, such as a farm or store, including necessary capital and operating assets such as land and buildings, inventory or livestock; the property must be in current use or have been used with a reasonable expectation of resumed use within a year of its most recent use; the ISD worker must account for the cash actually required to operate the business; liquid business assets of any amount are excluded;

(b) non-business property includes rental property, leased property, land leased for its mineral rights, and property producing items for home consumption; property which produces items solely for home use is assumed to be producing an annual rate of return of at least six percent;

(c) employment-related property, such as tools or equipment; the applicant/recipient must provide a statement from his/her employer to establish that tools or equipment are required for continued employment when the applicant/recipient leaves the institution; if the applicant/recipient is self-employed, only those tools normally required to perform the job adequately are excluded; the applicant/recipient must obtain a statement from someone in the same line of self-employment to establish what is excludable.

G. **Vehicle exclusion:** The term "vehicle" includes any mode of transportation such as a passenger car, truck or special vehicle. Included in this definition are vehicles which are unregistered, inoperable, or in need of repair. Vehicles used solely for purposes other than transportation, such as disassembly to resell parts, racing or as an antique, are not included in this definition. Recreational vehicles and boats are classified as personal effects and are evaluated under the household goods and personal effects exclusion. One vehicle is totally excluded if regardless of value if it is used for transportation for the individual or a member of the individual's household. Any other automobiles are considered to be non-liquid resources. Equity in the other automobiles is counted as a resource.

H. **Life insurance exclusion:** The value of life insurance policies is not considered a countable resource if the total cumulative face value of all policies owned by the applicant/recipient does not exceed \$1,500. A policy is considered to be "owned" by the applicant/recipient if the applicant/recipient is the only one who can surrender the policy for cash.

(1) **Consideration of burial insurance and term insurance:** Burial insurance and term insurance are not considered when computing the cumulative face value because this insurance is redeemable only upon death.

(2) **Calculation when value exceeds limit:** If the total cumulative face value of all countable life insurance policies owned by the applicant/recipient exceeds \$1,500, the ISD worker:

(a) verifies the total cash surrender value of all policies and considers the total amount a countable resource;

(b) informs the applicant/recipient that the insurance policies can be converted to term insurance or ordinary life insurance of lower face value at his/her option, if the cash surrender value, alone or in combination with other countable resources, exceeds the resource standard.

I. **Produce for home consumption exclusion:** The value of produce for home consumption is totally excluded.

J. **Exclusion of settlement payments from the department of housing and urban development:** Payments from the department of housing and urban development (HUD) as defined in *Underwood v. Harris* are excluded as income and resources. These one-time payments were made in the spring of 1980 to certain eligible tenants of subsidized housing [Section 236 of the National Housing Act].

(1) **Segregation of payment:** To be excluded as a resource, payments retained by an

applicant/recipient must be kept separate. These payments must not be combined with any other countable resources.

(2) **Income from segregated funds:** Interest or dividend income received from segregated payment funds is not excluded from income, or, if retained, is not an excluded resource. This interest or dividend income must be kept separate from excludable payment funds.

K. **Lump sum payments exclusion:** SSI and social security lump sum payments for retroactive periods are excluded as countable resources for nine months after the month in which they are received. See Subparagraph (4) of Subsection B of 8.281.500.15 NMAC, *treatment of SSI or social security lump sum payments*, for policy regarding SSI and social security lump sums which are placed into the ownership of a medicaid qualifying trust. Social security lump sum payments are considered infrequent income. See (vii) of Subparagraph (b) of Paragraph (2) of Subsection C of 8.281.500.19 NMAC, *infrequent or irregular income*, and following subsections.

L. **Home replacement exclusion:** The proceeds from a reverse mortgage from the sale of an excluded home is excluded. Additionally, the value of a promissory note or similar installment sales contract which constitutes proceeds from the sale of an excluded home is excluded from countable resources if all of the following conditions are met:

(1) the note results from the sale of the applicant/recipient's home as described in Subsection E of 8.281.500.13 NMAC, *exclusions for real property and home*, and following subsections;

(2) within three months of receipt (execution) of the note, the applicant/recipient purchases a replacement home which meets the definition of a home in Subsection E of 8.281.500.13 NMAC, *exclusions for real property and home*, and following subsections;

(3) all note-generated proceeds are reinvested in the replacement home within three months of receipt.

(4) **Additional exclusions:** In addition to excluding the value of the note itself, the down payment received from the sale of the former home, as well as that portion of any installment amount constituting payment on the principal are also excluded from countable resources.

(5) **Failure to purchase another excluded home timely:** If the applicant/recipient does not purchase another home which can be excluded under the provisions of Subsection E of 8.281.500.13 NMAC, *exclusions for real property and home*, and following subsections within three months, the value of the promissory note or similar sales contract received from the sale of an excluded home becomes a countable resource as of the first moment of the first day of the month following the month the note is executed. If the applicant/recipient purchases a replacement home after the expiration of the three month period, the value of the promissory note or similar installment sales contract becomes an excluded resource effective the month following the month of purchase of the replacement home provided that all other proceeds are fully and timely reinvested.

(6) **Failure to reinvest proceeds timely:** If the proceeds from the sale of an excluded home under a promissory note or similar installment sales contract are not reinvested fully within three months of receipt in a replacement home, the following resources become countable as of the first moment of the first day of the month following receipt of the payment:

(a) the fair market value of the note; and

(b) the portion of the proceeds, retained by the individual, which was not timely reinvested;

(c) the fair market value of the note remains a countable resource until the first moment of the first day of the month following the receipt of proceeds that are fully and timely reinvested in the replacement home; failure to reinvest proceeds for a period of time does not permanently preclude exclusion of the promissory note or installment sales contract; however, previously received proceeds that were not timely reinvested remain countable resources to the extent they are retained.

(7) **Interest payments:** If interest is received as part of an installment payment resulting from the sale of an excluded home under a promissory note or similar installment sales contract, the interest payments are considered countable unearned income in accordance with Paragraph (3) of Subsection A of 8.281.500.20 NMAC, *interest on promissory note or sales contract*.

(8) **When the home replacement exclusion does not apply:** If the home replacement exclusion does not apply, the market value of a promissory note or sales contract as well as the portion of the payment received on the principal are considered countable resources.

M. **Household goods and personal effects exclusion:** Household goods and personal effects are excluded if they meet one of the following four criteria. They are:

(1) items of personal property, found in or near the home, which are used on a regular basis; items may include but are not limited to: furniture, appliances, recreational vehicles (i.e. boats and RVs), electronic

equipment (i.e. computers and television sets), and carpeting;

(2) items needed by the householder for maintenance, use and occupancy of the premises as a home; items may include but are not limited to: cooking and eating utensils, dishes, appliances, tools, and furniture;

(3) items of personal property ordinarily worn or carried by the individual; items may include but are not limited to: clothing, shoes, bags, luggage, personal jewelry including wedding and engagement rings, and personal care items;

(4) items otherwise having an intimate relation to the individual; items may include but are not limited to: prosthetic devices, educational or recreational items such as books or musical instruments, items of cultural or religious significance to an individual; or items required because of an individual's impairment.

[2-1-95; 7-31-97; 8.281.500.13 NMAC - Rn, 8 NMAC 4.ICM.513, 3-1-01; A, 5-1-01; A, 1-1-06; A, 4-1-09; A, 1-1-11; A, 2-15-12]

8.281.500.14 ASSET TRANSFERS: The ISD worker must determine whether an applicant/recipient or his/her spouse transferred assets within a specified period of time (look back period) before applying for institutional care medicaid or at any time after approval of the application. Then the ISD worker must determine if the applicant/recipient or his/her spouse received fair market value for the asset. If the applicant/recipient or his/her spouse did not receive fair market value for the asset, then the applicant/recipient may be subject to a penalty. In the case of an asset held by the applicant/recipient in common with another individual or individuals in a joint tenancy, tenancy in common, or similar arrangement including life estate/remainderman relation, the asset (or the affected portion of such asset) is considered to be transferred by the applicant/recipient when any action is taken, either by the applicant/recipient or by any other individual, acting on behalf of the applicant/recipient (including but not limited to a spouse, representative payee, trustee, guardian, conservator, individuals acting pursuant to a power of attorney), that reduces or eliminates the applicant/recipient's ownership or control of such asset. Any asset transferred to a community spouse in excess of the community spouse resource allowance (CSRA) is considered to be totally available to the institutionalized spouse and must be spent down before eligibility can be established.

A. **Lookback period:** Any transfer of assets made prior to February 8, 2006 is subject to a 36-month look back period prior to the date of application or at any time subsequent to the approval of an application for institutional care medicaid. Transfers made on or after February 8, 2006 are subject to a 60-month look back period.

(1) The lookback period is 60 months if the transfer occurred as the result of payments from a trust or portions of a trust that are treated as assets disposed of by the applicant/recipient.

(2) The lookback period starts on the date the applicant applies for institutional care medicaid and is in an institution.

B. **Transfer of assets for less than fair market value:** If a transfer of assets occurred within the applicable lookback period, or at any time after approval of the application, the ISD worker must determine whether the applicant/recipient or his/her spouse received fair market value for the transferred asset(s).

(1) **Documentation requirement:** The applicant/recipient or his/her spouse must provide documentation of the transfer, the fair market value of the asset(s) transferred, the circumstances surrounding the transfer and the amount, if any, received as compensation for the transferred asset.

(2) If the applicant/recipient fails to provide this information without good cause within 30 days from the date requested by the ISD worker, the ISD worker denies the application or closes the case, as appropriate.

(a) Good cause is considered to exist if the applicant/recipient or representative can show that he/she was effectively precluded from timely reporting because of legal, financial, or other reasons, or because of the existence of a health related problem including death of a family member within the specific degree of relationship (see old AFDC program definition Subsection C of 8.202.400.13 NMAC, *relationship*) during the period of time in which the applicant/recipient or representative has to report the required information. The health or other problem must have been of such severity and duration as to have effectively precluded the applicant/recipient or representative from reporting in a timely manner.

(b) To document the good cause claim, the applicant/recipient or representative must provide proof of the existence of the health or other problem and must explain the circumstances which precluded provision of the required information.

(c) The ISD worker makes the determination of good cause subject to review and approval by the county director or designee.

(3) **Restricted coverage:** If a transfer of assets occurred within the applicable lookback period, or at any time subsequent to approval for institutional care medicaid, for which the applicant/recipient or his/her spouse did not receive fair market value, the ISD worker determines if a penalty period must be calculated. The penalty for

transfers of assets for less than fair market value in the institutional care medicaid categories is restricted coverage. "Restricted coverage" means that the applicant/recipient is eligible for all medicaid-covered services except services furnished in a nursing facility or services considered to be long-term care services.

(a) Determine the current average monthly cost of nursing facilities for private patients. See 8.200.510.13 NMAC, *resource exclusions*.

(b) Divide the total uncompensated value (amount) of the resources transferred for less than fair market value by the current average monthly cost of nursing facilities for private patients.

(c) The result is the number of months and partial months for which the applicant/recipient will be on restricted coverage.

(4) **Calculating restricted coverage when the transferred asset is income:** If income has been transferred as a lump sum, the period of restricted coverage is calculated based on the lump sum value. For transfers of the right to an income stream, the period of restricted coverage is calculated using the actuarial value of all payments transferred. See 8.200.520.19 NMAC, *life expectancy tables*.

C. **Transfer rules based on date of transfer:** Two sets of rules govern the calculation of penalty periods if a transfer of assets for less than fair market value has occurred. The date of transfer and approval date for institutional care medicaid governs which set of rules is used to calculate the penalty period.

(1) **For transfers made on or after August 11, 1993:** Periods of restricted coverage are calculated as follows [Omnibus Budget Reconciliation Act of 1993]:

(a) The period of restricted coverage begins the month the resources were transferred. The total uncompensated value of the transferred assets divided by the average cost to a private patient of nursing facility services in the state at the time of application is the methodology used to calculate a period of restricted coverage.

(b) transfers for less than fair market value made by institutionalized SSI recipients or community spouses of institutionalized individuals may subject the institutionalized individual to a period of restricted coverage.

(c) penalty periods are now consecutive rather than concurrent; if multiple transfers occur in different months, the periods of restricted coverage begin with the month of the initial transfer and run consecutively: for example, if an applicant/recipient transfers an asset for less than fair market value in February causing four months of restricted coverage (i.e., February through May) and transfers another asset in April causing three months of restricted coverage, the second period of restricted coverage begins in June and lasts through August; and.

(d) if an institutionalized individual with a community spouse is placed on restricted coverage as the result of a transfer of assets for less than fair market value and the community spouse subsequently becomes eligible for institutional care medicaid, any remaining months in the restricted coverage period must be divided equally between the spouses.

(2) **For transfers made on or after February 08, 2006:** Pursuant to the Deficit Reduction Act of 2005, otherwise eligible institutionalized recipients who transfer assets for less than fair market value after this date are penalized as follows:

(a) the period of restricted coverage begins the first day of the month in which the resources were transferred, or the date on which the individual becomes eligible for medicaid, and would otherwise be receiving institutional level care but for the application of the penalty period, whichever is later, and does not occur during any other period of ineligibility as a result of an asset transfer; see Paragraph (3) of Subsection B of 8.281.500.14 NMAC, *restricted coverage*, for the methodology used to calculate a period of restricted coverage;

(b) once eligibility has been determined and a penalty period has begun to run, it continues until expiration, whether or not there is a break in the institutionalized recipient's eligibility;

(c) the beginning date of restricted coverage is the first day of the month in which the resources were transferred provided the applicant/recipient is institutionalized and eligible for medicaid; for current recipients who fail to report a transfer, the recipients will continue to receive benefits until the adverse action notice date, but the state may seek to recover any medicaid costs paid for long term care services during what should have been a period of restricted coverage; federal law does not provide a basis to impose a transfer penalty based on date of discovery;

(d) for non-institutionalized individuals, the date restricted coverage begins is the month in which the individual becomes institutionalized;

(e) transfers for less than fair market value made by institutionalized SSI recipients or community spouses of institutionalized individuals may subject the institutionalized individual to a period of restricted coverage; and

(f) multiple transfers occurring in different months are added together and calculated as a single period of ineligibility, that begins on the earliest date that would otherwise apply if the transfer had been made in a single lump sum.

D. **Non-excludable transfers:** Certain financial instruments must be evaluated before they can be considered a transfer of assets.

(1) **Annuities:** Annuities belonging to the applicant/recipient or to the spouse of the applicant/recipient must be declared. Annuities must be actuarially sound with no deferral and no balloon payments. Annuities purchased or issued after February 8, 2006 must meet the following additional requirements for exclusion as a transfer of assets:

(a) the state is named as the remainder beneficiary in the first position for at least the total amount of medicaid expenditures paid on behalf of the institutionalized individual; the state may be named the remainder beneficiary in the second position if there is a community spouse or a minor or a disabled child and is named in the first position if the community spouse or representative of the child disposes of any such remainder for less than fair market value;

(b) when medicaid is a beneficiary of an annuity, issuers of annuities are required to notify medicaid of any changes in the disbursement of income or principal from the annuity as well as any changes to the state's position as remainder beneficiary; and

(c) it is non-assignable and irrevocable.

(2) **Life estates:** If an applicant/recipient purchases a life estate in another individual's home, the applicant/recipient must live in that home for a period of at least 12 months after the date of purchase or the transaction will be treated as a transfer of assets for less than fair market value.

(3) **Promissory notes:** If an applicant/recipient uses funds to purchase a promissory note, the repayment terms must be actuarially sound, provide for equal payment amounts with no deferral or balloon payments, and it must contain a provision that prohibits cancellation of the balance upon the death of the lender. A promissory note not meeting these requirements shall be treated as a transfer of assets for less than fair market value.

E. **Excludable transfers:** If certain conditions are met, an applicant/recipient is not placed on restricted coverage for transferring assets for less than fair market value.

(1) **Transferred asset was home:** The asset transferred was a home and title to the home was transferred to:

(a) the spouse of the applicant/recipient;

(b) the son/daughter of the applicant/recipient who is under 21 years of age or who meets the social security administration's definition of disability or blindness. If the child is receiving benefits based on disability or blindness from a program other than social security or SSI, or is not receiving benefits based on disability or blindness from any program, the ISD worker must request a determination of disability or blindness from disability determination services;

(c) sibling of the applicant/recipient who has an equity interest in the home and who was residing in the home for a period of at least one year immediately before the applicant/recipient was institutionalized; or

(d) son/daughter of the applicant/recipient who was residing in the home for a period of at least two years immediately before the applicant/recipient was institutionalized. For this exclusion to apply, the ISD worker must determine that the son/daughter provided care to the applicant/recipient which permitted the applicant/recipient to reside at home rather than in a medical facility or nursing home.

(2) **Other asset transfers:** Sufficient information must be given to the ISD worker to establish that either:

(a) the applicant/recipient intended to dispose of the asset at fair market value; or

(b) at the time of the transfer the applicant/recipient had no expectation of applying for medicaid and the resources were transferred exclusively for a purpose other than to qualify for medicaid as demonstrated by a preponderance of evidence; unless these conditions are met, the transfer is presumed to have been for the purpose of qualifying for medicaid; or

(c) the state determines that the denial of eligibility would work an undue hardship.

(3) **Asset transferred to or for the sole benefit of the community spouse:** No transfer penalty is assessed when assets are transferred from one spouse to another (e.g., assets are transferred from an institutionalized spouse to a community spouse). Any asset transferred to a community spouse or to another individual for the sole benefit of the community spouse in excess of the community spouse resource allowance (CSRA) is considered to be totally available to the institutionalized spouse and must be spent down before eligibility can be established. No

transfer penalty is assessed when assets are transferred to another for the sole benefit of the community spouse if all of the conditions listed in (a) through (c) below are met.

(a) A transfer is considered to be for the sole benefit of the community spouse if it is arranged in such a way that no individual or entity except the community spouse can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

(b) A transfer, or transfer instrument, that provides for funds or property to pass to a beneficiary who is not the community spouse is not considered to be established for the sole benefit of the community spouse. For a transfer to be considered to be for the sole benefit of the community spouse, the instrument or document must provide for the spending of the funds involved for the benefit of the community spouse on a basis that is actuarially sound based on the life expectancy of the community spouse. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

(c) To determine whether an asset was transferred for the sole benefit of the community spouse, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the community spouse since there is no way to establish, without a document, that only the community spouse will benefit from the transfer.

(4) **Asset transfers to or for the sole benefit of a blind or disabled child of the institutionalized individual:** No transfer penalty is assessed when assets are transferred to a blind or disabled child of the institutionalized individual, or to a trust established solely for the benefit of a blind or disabled child of the institutionalized individual. For this exemption to apply, the child must meet the social security administration's definition of blindness or disability. [~~See 8.281.500.15 NMAC, trusts, and following subsections for rules regarding trusts.~~] The transfer must either meet the criteria set forth in 8.281.510.11 NMAC (recognized medicaid trusts) or meet all of the conditions listed in (a) through (c) below to be excluded in the eligibility determination process.

(a) A transfer to such a blind or disabled child is considered to be for the sole benefit of that child if the transfer is arranged in such a way that no individual or entity, except the blind or disabled child, can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

(b) A transfer, or transfer instrument, that provides for funds or property to pass to a beneficiary who is not the blind or disabled child of the institutionalized individual is not considered to be established for the sole benefit of the blind or disabled child. For a transfer or trust to be considered to be for the sole benefit of a blind or disabled child, the instrument or document must provide for the spending of the funds involved for the benefit of the blind or disabled child on a basis that is actuarially sound based on the life expectancy of the child. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

(c) To determine whether an asset was transferred for the sole benefit of the blind or disabled child of the institutionalized individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the blind or disabled child since there is no way to establish, without a document, that only the blind or disabled child will benefit from the transfer. [~~See 8.281.500.15 NMAC, trusts, and following subsections for policy regarding trusts.~~]

(5) **Asset transfers to a trust for the sole benefit of a disabled individual under age 65:** No transfer penalty is assessed when assets are transferred to a trust established for the sole benefit of an individual under age 65 who meets the social security administration's definition of disability. [~~See 8.281.500.15 NMAC, trusts, and following subsections for policy regarding trusts.~~] The transfer must either meet the criteria set forth in 8.281.510.11 NMAC (recognized medicaid trusts) or meet all of the conditions listed in (a) through (c) below to be excluded in the eligibility determination process.

(a) A transfer is considered to be for the sole benefit of a disabled individual under age 65 as described above if the transfer is arranged in such a way that no individual or entity except the disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

(b) A transfer, transfer instrument, or trust that provides for funds or property to pass to a beneficiary who is not a disabled individual under age 65 as described above, is not considered to be established for the sole benefit of the disabled individual. For a transfer or trust to be considered to be for the sole benefit of the disabled individual, the instrument or document must provide for the spending of the funds involved for the benefit

of the disabled individual on a basis that is actuarially sound based on the life expectancy of the disabled individual. When the instrument or document does not so provide, any potential exemption from penalty or consideration for eligibility purposes is void.

(c) To determine whether an asset was transferred for the sole benefit of the disabled individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the disabled individual since there is no way to establish, without a document, that only the disabled individual will benefit from the transfer. [~~See 8.281.500.15 NMAC, trusts, and following subsections for policy regarding trusts.~~]

F. **Re-establishing eligibility:** If an asset is transferred for less than fair market value and the applicant/recipient is placed on restricted coverage, he/she has options to re-establish full medicaid coverage.

(1) **Reimbursement by transferee:** The individual to whom the asset was transferred can reimburse the applicant/recipient for the asset at fair market value or liquidate/sell the asset and spend an amount equal to the uncompensated fair market value on the applicant/recipient's care or other exempt assets as listed in 8.281.500.13 NMAC, *resource exclusions*, and following subsections.

(2) **Return asset to applicant:** The asset can be transferred back to the applicant/recipient, liquidated, or sold and then spent down to the resource limit on the applicant/recipient's care or other exempt assets as listed in 8.281.500.13 NMAC, *resource exclusions*, and following subsections.

(3) If the transferred asset is restored to an applicant/recipient, he/she may become totally ineligible for medicaid due to excess resources. The ISD worker must verify that the applicant/recipient's countable assets do not exceed the standard for institutional care medicaid.

[2-1-95, 7-31-97; 8.281.500.14 NMAC - Rn, 8 NMAC 4.ICM.515, 3-1-01; A, 4-1-09; A, 2-15-12]

8.281.500.15 [~~**TRUSTS:** A trust is a legal device in which property or other assets are held by one or more individuals for the benefit of others. The one who holds the assets is called the trustee. The trustee usually has legal title to the assets held in the trust and is considered the owner of the trust assets in most dealings with third parties. The individual for whose benefit the assets are held by the trustee is called the beneficiary. A trust is usually created by a transfer of assets to the trustee from the owner, who is referred to as the settlor, trustor, or grantor. The transfer may be made while the settlor is alive or it may be made by will. The transfer of assets into a trust divests the original owner of legal title or restricts access to those assets.~~

~~A. **Definitions applicable to trust provisions:**~~

~~(1) "Assets" includes all income and resources of the applicant/recipient and his/her spouse, including any income or resources which the applicant/recipient or his/her spouse is entitled to but does not receive because of action by:~~

~~(a) applicant/recipient or his/her spouse;~~

~~(b) any individual, including a court or administrative body, with legal authority to act in place of or on behalf of the applicant/recipient or his/her spouse; or~~

~~(c) any individual, including any court or administrative body, acting at the direction or upon the request of the applicant/recipient or his/her spouse.~~

~~(2) "Institutionalized individual" is an individual who is a resident in a nursing facility or who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility.~~

~~(3) "Revocable trust" is created when the grantor reserves the right to cancel any provision of the trust.~~

~~(4) "Irrevocable trust" is created when the grantor does not reserve the right to cancel any provision of the trust.~~

~~B. **Medicaid qualifying trusts (MQTs):** This policy applies to trusts created prior to August 11, 1993. A "medicaid qualifying trust" (MQT) is a trust or similar legal device established, other than by will, by an applicant/recipient or his/her spouse, under which the applicant/recipient may be the beneficiary of all or part of the payments from the trust. The distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the applicant/recipient. When the use of an attorney is solicited to establish a trust, the beneficiary of that trust is not exempt from the requirements of MQT provisions. Legal instruments such as trusts are almost always drafted by an attorney. It is the grantor him/herself who actually establishes or creates the trust when he/she signs or executes it.~~

~~(1) **Amount deemed available from an MQT:** The amount from an MQT that is deemed available to an applicant/recipient of institutional care medicaid is the maximum amount that could be distributed to the applicant/recipient or for the care of the applicant/recipient, regardless of restrictions imposed by the trust on the allowable use of the funds. This provision applies regardless of whether the MQT was set up for the purpose of qualifying for medicaid or whether the trust is irrevocable.~~

~~(2) **Revocable trusts:** Revocable trusts that limit access to the assets held in trust must be dissolved and the assets spent down before eligibility can be established. If the ISD worker determines that all or part of the assets held in a trust are not accessible or available to the applicant/recipient, or the trustees have limited discretion over distribution of the assets held in trust, transfer provisions must be applied. Under transfer of resource policy, an applicant/recipient who transfers resources without fair return may incur a penalty for a specified period of time. See 8.281.500.14 NMAC, *asset transfers*, and following subsections.~~

~~(3) **Beneficiary of trust lives in an ICF-MR:** If the beneficiary of a trust is an applicant/recipient who is mentally retarded and resides in an intermediate care facility for the mentally retarded (ICF-MR), that applicant/recipient's trust is not considered an MQT if the trust or trust decree was established prior to April 7, 1986, and is solely for the benefit of that applicant/recipient.~~

~~(4) **Treatment of SSI or social security lump sum payments:** SSI or social security lump sum payments for retroactive periods which are placed in an MQT do not qualify for the nine month exclusion from countable resources. The trust is evaluated as an MQT for purposes of medicaid eligibility.~~

~~C. **Trusts established on or after August 11, 1993:** Trusts established on or after August 11, 1993 are evaluated using the provisions of OBRA 93. The term "medicaid qualifying trust" is no longer used after that date. Most trusts are considered when determining eligibility for medicaid. Depending on how the trust is structured, the amounts in the trust may count as resources, income, or transfer of assets.~~

~~(1) **Trust establishment:** An applicant/recipient is considered to have established a trust and that trust is considered to belong to that applicant/recipient if his/her assets were used to form all or part of the corpus (body) of the trust. The trust must have been established, other than by will, by any of the following individuals:~~

- ~~(a) applicant/recipient;~~
- ~~(b) applicant/recipient's spouse;~~
- ~~(c) an individual, including a court or administrative body, with legal authority to act in place of, or on behalf of, the applicant/recipient or his/her spouse; or~~
- ~~(d) an individual, including a court or administrative body, acting at the direction of, or upon the request of, the applicant/recipient or his/her spouse;~~
- ~~(e) if the corpus of a trust includes assets of an applicant/recipient and assets of any other individual or individuals, the portion of the trust representing the assets of the applicant/recipient is considered in determining his/her eligibility for medicaid;~~

~~(f) income or resources from the trust must be considered available to the applicant/recipient without regard to any of the following:~~

- ~~(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 distribution may be made from the trust; or~~
- ~~(iv) any restrictions on the use of distributions from the trust.~~

~~(2) **Revocable trusts:** Assets in a revocable trust may be counted as income, resources, or transfer of assets based on the following rules:~~

- ~~(a) the corpus of the trust is considered as a resource available to the applicant/recipient;~~
- ~~(b) payments from the trust to or for the benefit of the applicant/recipient are considered income of the applicant/recipient; and~~
- ~~(c) any other payments from the trust are considered assets transferred by the applicant/recipient in accordance with the provisions on transfers; see 8.281.500.14 NMAC, *asset transfers*, and following subsections.~~

~~(3) **Irrevocable trusts:** Assets in an irrevocable trust may be counted as income, resources, or transfer of assets based on the following rules:~~

- ~~(a) if payments from the trust could be made to or for the benefit of the applicant/recipient, the portion of the corpus from which the payment is made or the corpus income from which payments to the applicant/recipient could be made, are considered resources available to the applicant/recipient; and~~
 - ~~(i) payments from that portion of the corpus or income to or for the benefit of the applicant/recipient are considered income of the applicant/recipient;~~

~~_____ (ii) payments for any other purpose are considered a transfer of assets by the applicant/recipient which are subject to transfer of asset provisions;~~

~~_____ (b) any portion of the trust from which, or any income on the corpus from which, payments could not under any circumstances be made to the applicant/recipient is considered, as of the date of establishment of the trust (or, if later, the date on which payment to the applicant/recipient was foreclosed), to be assets disposed of by the applicant/recipient and the value of the trust is determined by including the amount of any payments made from such portion of the trust after such date.~~

~~_____ (4) **Value of the irrevocable trust:** The value of the trust is determined by including the amount of any payments made from portions of the trust after the date of establishment or, if later, the date on which payments to the applicant/recipient were foreclosed.~~

~~_____ D. **Other trusts:** The following types of trusts are not subject to the conditions specified under revocable and irrevocable trusts noted above. Only income and resources distributed directly to the applicant/recipient or to a third party on the applicant/recipient's behalf by the trustee are considered available to the applicant/recipient in determining medicaid eligibility if the applicant/recipient could use the payment for food, clothing or shelter for him/herself. The trusts described in this section are reversionary trusts meaning the trust must provide that, upon the death of the applicant/recipient, any funds remaining in the trust revert to the state medicaid agency, up to the amount paid in medicaid benefits on the applicant/recipient's behalf. If the applicant/recipient 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 applicant/recipient received medicaid, based on the state's proportionate share of the total amount of medicaid benefits paid by all of the states on the applicant/recipient's behalf. The trustee may, upon the death of the beneficiary, pay the expenses of the beneficiary's burial or cremation up to the amount then authorized for burial expenses under federal and state medicaid law and regulations, to the extent other resources are not so designated.~~

~~_____ (1) **Reversionary trust for certain disabled individuals:** This trust contains the assets of an applicant/recipient who is under 65 years of age at the time the trust is established and who meets the social security administration's definition of disability. A reversionary trust must be established for the sole benefit of the applicant/recipient by a parent, grandparent, legal guardian, or a court. Upon the death of the applicant/recipient, the state receives all amounts remaining in the trust up to the amount of the total medicaid benefits paid on behalf of the applicant/recipient.~~

~~_____ (2) **Income diversion trusts:** To be considered an income diversion trust, a trust must meet the following requirements:~~

~~_____ (a) the trust is composed only of pension, social security, and other income to the applicant/recipient, including accumulated income in the trust; and~~

~~_____ (b) the state receives all amounts remaining in the trust upon the death of the applicant/recipient up to an amount equal to the total medicaid benefits paid on behalf of the applicant/recipient;~~

~~_____ (c) the trusts described in this section are also known in New Mexico as *Maxwell v. Heim* income diversion trusts; those trusts executed on or after August 11, 1993 no longer have to be court ordered or approved.~~

~~_____ (3) **Non-profit trusts for certain disabled individuals:** Trusts containing the assets of applicants/recipients who meet the social security administration's definition of disability and which meet all the following criteria are considered non-profit trusts for certain disabled individuals:~~

~~_____ (a) the trust is established and managed by a non-profit association;~~

~~_____ (b) 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;~~

~~_____ (c) accounts in the trust are established solely for the benefit of applicants/recipients who meet the social security administration's definition of disability and are established by the parent, grandparent, or legal guardian of such applicants/recipients, by such applicants/recipients themselves, or by a court; and~~

~~_____ (d) amounts remaining in the applicant/recipient's account upon his/her death will first be used to pay the state an amount equal to the total amount of medicaid benefits paid on behalf of the applicant/recipient.~~

~~_____ E. **Undue hardship:** An institutionalized spouse who (or whose spouse) has excess resources and is unable to access resources from an existing trust will not be found ineligible for medicaid under Section 1924(c)(3)(C) of the Social Security Act, where the state determines, on a case by case basis, that denial of eligibility on the basis of excess resources would work an undue hardship. Undue hardship is considered to exist if denial of medicaid would deprive the applicant/recipient of food, shelter, or medical care. Cases of undue hardship will be reviewed every six months to monitor changes in circumstances.~~

~~_____ F. **Documentation of trusts:** Upon learning of the existence of a trust, the ISD worker must obtain a~~

MAD-MR:

**MEDICAID ELIGIBILITY
INSTITUTIONAL CARE
CATEGORIES 081, 083, 084**

EFF: proposed

~~copy of the trust document, including all attachments, and forward it to the MAD eligibility unit for review.]~~

[RESERVED]

[2-1-95, 7-31-97; 8.281.500.15 NMAC - Rn, 8 NMAC 4.ICM.517, 3-1-01; A, 4-1-09; A, 2-15-12]

TITLE 8 SOCIAL SERVICES
CHAPTER 281 MEDICAID ELIGIBILITY - INSTITUTIONAL CARE (CATEGORIES 081, 083, AND 084)
PART 510 TRUST STANDARDS

8.281.510.1 ISSUING AGENCY: New Mexico Human Services Department (HSD).
[8.281.510.1 NMAC - N, 2-15-12]

8.281.510.2 SCOPE: The rule applies to the general public.
[8.281.510.2 NMAC - N, 2-15-12]

8.281.510.3 STATUTORY AUTHORITY: The New Mexico medicaid program is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX of the Social Security Act, as amended and by the state human services department pursuant to state statute. See NMSA 1978, Sections 27-2-12 et seq.
[8.281.510.3 NMAC - N, 2-15-12]

8.281.510.4 DURATION: Permanent.
[8.281.510.4 NMAC - N, 2-15-12]

8.281.510.5 EFFECTIVE DATE: January 1, 2012, unless a later date is cited at the end of a section.
[8.281.510.5 NMAC - N, 2-15-12]

8.281.510.6 OBJECTIVE: The objective of this rule is to provide eligibility criteria and procedures for the medicaid programs.
[8.281.510.6 NMAC - N, 2-15-12]

8.281.510.7 DEFINITIONS:

A. "Assets" include all income and resources as described in 8.281.500 NMAC of an applicant/recipient and his/her spouse. Assets not in a trust are considered under the applicable rule to determine if they are countable or excludable for the purposes of medicaid eligibility.

B. "Beneficiary" is the individual(s) for whose benefit the assets are held by the trustee.

C. "Benefit" is something to the advantage of or profit to the recipient.

D. "Community spouse" is an individual as described in Subsection E of 8.281.500.7 NMAC, *definitions*.

E. "Corporate trustee" means a bank, trust company, or company whose primary business is trust services. A corporate trustee may not have any affiliation with the beneficiary either through relatives working for the corporate trustee or investments by the beneficiary with the company other than for administrative fees.

F. "Corpus" is the body of the trust or the original asset used to establish the trust (to include principal, interest, and subsequent additions), such as a sum of money or real property.

G. "Department" is the New Mexico human services department or successor agency.

H. "Grantor" is the owner of or has legal control over the assets placed into a trust. A grantor may also be referred to as a settlor or trustor.

I. "Independent trustee" means a bank, trust company, attorney, or other professional fiduciary that is not controlled by the beneficiary. If the independent trustee is related to the beneficiary, he/she must post a bond to render trustee services.

J. "Institutionalized individual" is an individual as described in Subsection K of 8.281.500.7 NMAC.

K. "Irrevocable trust" is created when the grantor does not reserve any right to cancel or revoke any provision of the trust.

(1) Although termed irrevocable, a trust which provides that the trust can only be modified or terminated by a court is a revocable trust because the applicant/recipient (or his/her responsible party) or the trustee can petition the court to amend or terminate the trust.

(2) Although termed irrevocable, a trust that will terminate if a certain circumstance occurs during the lifetime of the applicant/recipient, such as the applicant/recipient leaving the nursing facility and returning home, is a revocable trust.

(3) Although termed irrevocable, a trust that can be revoked or terminated upon the agreement of any

or all beneficiaries (including residual beneficiaries) is a revocable trust.

L. "Payment" means any disbursement 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 non-cash or property disbursements, such as the right to use and occupy real property.

M. "Residual beneficiary" is a person or entity that receives the remaining trust principal upon the death of the original trust beneficiary.

N. "Revocable trust" is created when the grantor reserves any right to cancel any provision of the trust.

O. "Sole benefit of" means that no individual or entity, except the person for whom the trust was established, may benefit from the assets in any way whether at the time the trust is created or at any time in the future.

P. "Trust" includes any legal instrument, device or arrangement, that is reduced to writing, signed and executed, which may not be called a trust under state law, or which is similar to a trust. A trust is a legal device in which property (real or personal) or other assets are held by one or more individuals for the benefit of others. A trust is usually created by a transfer of assets from the owner (grantor) to the trustee. Assets are not part of a trust and are considered outside of the trust until the date they are actually transferred into the trust, as demonstrated by verifiable documentation, regardless of the effective date of the trust. The transfer may be made while the grantor is alive or it may be made by will. The transfer of assets into a trust divests the original owner of legal title or restricts access to those assets. Trusts may also include structured settlements meeting the requirements stated above.

Q. "Trust records" include, but are not limited to verifiable documentation of all transactions paid by or paid into a trust. Minimal documentation of distributions includes date of transaction, amount of payment (or if not paid by cash or other legal tender, type of asset distributed), person or entity receiving distribution, purpose of distribution, if distribution was made to acquire a non-consumable good, the location of that non-consumable good, and person or entity authorizing the distribution. Minimal documentation of additions to the trust includes the date of the transaction and a description of or amount of the asset transferred into the trust. The Department shall not pay any costs or fees for obtaining trust records from the applicant/recipient or the trustee.

R. "Trustee" is a person or entity who holds and controls the assets in the trust. The trustee usually has legal title to the assets held in the trust and is considered the owner of the trust assets in most dealings with third parties.

[8.281.510.7 NMAC - N, 2-15-12]

8.281.510.8 [RESERVED]

8.281.510.9 MEDICAID QUALIFYING TRUSTS (MQT): An MQT is a trust created prior to August 11, 1993. An MQT is a trust, or similar legal device, established (other than by will) by an applicant/recipient or an applicant/recipient's spouse, under which the applicant/recipient may be the beneficiary of all or part of the distributions from the trust and such distributions are determined by one or more trustees who are permitted to exercise any discretion with respect to distributions to the applicant/recipient. A trust established by an applicant/recipient or an applicant/recipient's spouse includes trusts created or approved by a representative of the applicant/recipient (parent, guardian or person holding power of attorney) or the court where the property placed in trust is intended to satisfy or settle a claim made by or on behalf of the applicant/recipient or the applicant/recipient's spouse. This includes trust accounts or similar devices established for a minor child. In addition, a trust established jointly by at least one of the applicant/recipients who can establish an MQT and another party or parties (who do not qualify as one of these applicant/recipients) is an MQT as long as it meets the other MQT criteria. The provisions regarding MQTs apply even though an MQT is irrevocable or is established for purposes other than enabling an applicant/recipient to qualify for medicaid; and, whether or not discretion is actually exercised.

A. **Similar legal device.** MQT rules listed in this subsection also apply to "similar legal devices" or arrangements having all the characteristics of an MQT except that there is no actual trust document. The determination whether a given document or arrangement constitutes a "similar legal device" shall be made by the department.

B. **MQT resource treatment.** For revocable MQTs, the entire principal is an available resource to the applicant/recipient. For irrevocable MQTs, the countable amount of the principal is the maximum amount the trustee can disburse to (or for the benefit of) the applicant/recipient, using his/her full discretionary powers under the terms of the trust. If the trustee has unrestricted access to the principal and has discretionary power to disburse the entire principal to the applicant/recipient (or to use it for the applicant/recipient's benefit), the entire principal is an available resource to the applicant/recipient. Placement of an asset excluded by 8.281.500.13 NMAC, *resource*

exclusions, into a trust does not change the nature of the asset. The asset remains excluded, except for the home of an institutionalized individual. If the home of an institutionalized individual is placed in a trust, it becomes a countable resource. The value of the property is included in the value of the principal. If the MQT permits a specified amount of trust income to be distributed periodically to the applicant/recipient (or to be used for his/her benefit), but those distributions are not made, the applicant/recipient's countable resources increase cumulatively by the undistributed amount.

C. **Income treatment.** Amounts of MQT income distributed to the applicant/recipient or to third parties for the applicant/recipient's benefit are countable income when distributed.

D. **Transfer of resources.** If the MQT is irrevocable, a transfer of resources has occurred to the extent that the applicant/recipient or grantor's access to the principal is restricted (e.g., if the trust states that the trustee cannot access the principal, but must distribute the income produced by that principal to the applicant/recipient, the principal is not an available resource and has, therefore, been transferred). See 8.281.500.14 NMAC.

E. **Beneficiary of trust lives in an ICF-MR:** If the beneficiary of a trust is an applicant/recipient who is mentally retarded and resides in an intermediate care facility for the mentally retarded (ICF-MR), that applicant/recipient's trust is not considered an MQT if the trust or trust decree was established prior to April 7, 1986, and is solely for the benefit of that applicant/recipient.

F. **Treatment of SSI or social security lump sum payments:** SSI or social security lump sum payments for retroactive periods which are placed in an MQT do not qualify for the 9-month exclusion from countable resources. The trust is evaluated as an MQT for purposes of medicaid eligibility.

G. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided upon the request of an authorized representative of the department.
[8.281.510.9 NMAC - N, 2-15-12]

8.281.510.10 TRUSTS ESTABLISHED ON OR AFTER AUGUST 11, 1993: Trusts established on or after August 11, 1993 are evaluated using the provisions of OBRA 93. The term "medicaid qualifying trust" or MQT is no longer used after that date. Any trust which meets the basic definition of a trust can be counted in determining eligibility for medicaid. No clause or requirement in a trust, no matter how specifically it applies to medicaid or other federal or state programs (i.e. exculpatory clauses) precludes a trust from being considered under 8.281.500 NMAC. Depending on how the trust is structured, the amounts in the trust may count as resources, income, or a transfer of assets. All trusts submitted for review by the department must be in writing, signed, and fully executed. Trusts that are not signed and executed will not be considered as effective trusts until they are signed and executed. Assets are not part of a trust and are considered outside of the trust until the date they are actually transferred into the trust, as demonstrated by verifiable documentation, regardless of the effective date of the trust.

A. The standards set forth in this section shall apply to trusts or similar legal devices without regard to:

- (1) the purposes for which the trust is established;
- (2) whether the trustee(s) has discretion or exercises such discretion under the trust;
- (3) any restrictions on when or whether distributions can be made from the trust; and
- (4) or any restrictions on the use of distributions from the trust.

B. **Trust establishment:** An applicant/recipient is considered to have established a trust and that trust is considered to belong to that applicant/recipient if his/her assets were used to form all or part of the corpus of the trust. Applicants/recipients to whom the trust provisions apply shall include any applicant/recipient who establishes a trust and who is an applicant/recipient for medicaid services. An applicant/recipient shall be considered to have established a trust if any of his/her assets, regardless of the amount, were used to form part or all of the corpus of the trust.

(1) The trust must have been established, other than by will, by any of the following individuals:

- (a) applicant/recipient;
- (b) applicant/recipient's spouse;
- (c) an individual, including a court or administrative body, with legal authority to act in place of, or on behalf of, the applicant/recipient or his/her spouse; or
- (d) an individual, including a court or administrative body, acting at the direction of, or upon the request of, the applicant/recipient or his/her spouse.

(2) When the corpus of a trust includes assets of another person or persons not described in (a) through (d) above, as well as assets of the applicant/recipient, the rules apply only to the portion of the trust attributable to the assets of the applicant/recipient. Thus, in determining countable income and resources in the trust

for eligibility and post-eligibility purposes, the ISD caseworker shall prorate any amounts of income and resources, based on the proportion of the applicant/recipient's assets in the trust to those of other persons. (For example: if the applicant/recipient and his two sisters create a trust and each sister contributes a total value of \$50,000 and the applicant contributes \$25,000, the applicant's prorated share is 20% of the entire value of the trust.)

C. **Treatment of Trusts:** For purposes of determining medicaid eligibility, the treatment of trusts shall be dependent on the characteristics of the trust.

D. **Revocable trusts:**

(1) The entire corpus of the trust shall be counted as a resource available to the applicant/recipient; and

(2) Any payments from the trust made to or for the benefit of the applicant/recipient shall be counted as income (unless otherwise excludable, see 8.281.500.20 NMAC, *unearned income*, and 8.281.500.21 NMAC, *deemed income*); and

(3) Any payments from the trust which are not made to or for the benefit of the applicant/recipient shall be considered as assets transferred for less than fair market value (see Section 8.281.500.14 NMAC, *asset transfers*).

E. **Irrevocable trusts:** In an irrevocable trust from which payment can be made under the terms of the trust to or for the benefit of the applicant/recipient from all or a portion of the trust.

(1) The following shall apply to that trust or that portion of the trust:

(a) Payments from income or from the corpus made to or for the benefit of the applicant/recipient shall be treated as income to the applicant/recipient unless otherwise excludable (see 8.281.500.20 NMAC and 8.281.500.21 NMAC);

(b) Income on the corpus of the trust which could be paid to or for the benefit of the applicant/recipient shall be counted as a resource available to the applicant/recipient;

(c) The portion of the corpus that could be paid to or for the benefit of the applicant/recipient shall be treated as a resource available to the applicant/recipient; and

(d) Payments from income or from the corpus that are made, but not to or for the benefit of the applicant/recipient, shall be treated as a transfer of assets for less than fair market value (see Section 8.281.500.14 NMAC).

(2) In the case of an irrevocable trust from which payments from all or a portion of the trust cannot, under any circumstances, be made to or for the benefit of the applicant/recipient, all of the trust, or any such portion or income thereof, shall be treated as a transfer of assets for less than fair market value (see Section 8.281.500.14 NMAC).

(a) In treating these portions as a transfer of assets, the date of transfer shall be considered to be the date the trust was established, or, if later, the date on which the applicant/recipient no longer had a right of payment.

(b) For transfer of assets purposes, in determining the value of the portion of the trust which cannot be paid to the applicant/recipient, amounts that have been paid, for whatever purpose, shall not be subtracted from the value of the trust on the date the trust was created or, if later, the date that payment could no longer be made. The value of the transferred amount shall be no less than the value on the date the trust is established or, if later, on the date that payment could no longer be made. If additional funds are added to this portion of the trust, those funds shall be treated as a new transfer of assets for less than fair market value, as of the date the additional funds were added to the trust. (See Section 8.281.500.14 NMAC)

F. Payments are considered countable to the applicant/recipient when made from a revocable or irrevocable trust to or on behalf of the applicant/recipient including 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 applicant/recipient derives some benefit from the payment.

G. In determining whether payments can or cannot be made from a trust to or for an applicant/recipient, the department shall 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. Any amount in a trust for which payment can be made, no matter how unlikely the circumstance of payment might be or how distant in the future shall be considered a payment that can be made under some circumstances. For example, if an irrevocable trust provides that the trustee can disburse only \$1,000 to or for the applicant/recipient out of a \$10,000 trust, only the \$1,000 is treated as a payment that could be made. The remaining \$9,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the applicant/recipient and may be subject to a transfer penalty. On the other hand, if a trust contains \$25,000 that the trustee can pay to the applicant/recipient only in the event that the applicant/recipient needs, for example, a heart transplant, this full amount is considered as a payment

that could be made under some circumstance, 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 and the funds are counted as a resource.

H. Institutionalized individuals with a community spouse: A transfer to a trust (or similar instrument) for the sole benefit of a community spouse shall be treated in accordance with the provisions above. If the trust is established by either spouse (using at least some of the couple's assets), the trust shall be reviewed by the department for availability of resources, in accordance with the provisions above. If the payment from such a trust shall be considered an available resource to either spouse, the trust shall be included as a countable resource in determining medicaid eligibility for the institutionalized spouse.

I. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided upon the request of an authorized representative of the department. The department shall not be charged any fees or costs associated with providing trust records to the department.

[8.281.510.10 NMAC - N, 2-15-12]

8.281.510.11 RECOGNIZED MEDICAID TRUSTS: The trust provisions set forth in Sections 8.281.510.9 NMAC and 8.281.510.10 NMAC shall not apply to the following trusts so long as the trust document meets all the requirements set forth in this section.

A. The recognized medicaid trusts described in this section (special needs trusts, income diversion trusts, and non-profit trusts for certain disabled individuals) are subject to the following:

(1) Only income and resources distributed directly to the applicant/recipient and/or to a third party on the applicant/recipient's behalf by the trustee are considered available to the applicant/recipient in determining medicaid eligibility if the applicant/recipient could use the payment for food or shelter for him/herself.

(2) The trusts are reversionary trusts meaning the trust must provide that, upon the death of the applicant/recipient, any funds remaining in the trust revert to the state medicaid agency, up to the amount paid in medicaid benefits on the applicant/recipient's behalf. If the applicant/recipient 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 applicant/recipient received medicaid, based on the state's proportionate share of the total amount of medicaid benefits paid by all of the states on the applicant/recipient's behalf.

(3) All trusts submitted for review to the department must be in writing, signed, and fully executed. Trusts that are not signed and executed will not be considered as effective trusts until they are signed and executed. Trusts must also be funded as demonstrated by verifiable documentation prior to review by the department.

(4) Assets are not part of a trust and are considered outside of the trust until the date they are actually transferred into the trust, as demonstrated by verifiable documentation, regardless of the effective date of the trust. Assets outside of a trust will be evaluated according to the applicable regulations regarding the counting of resources.

(5) Since the department is a reversionary beneficiary for all of the trusts described in the rest of this section, any legal action concerning one of these trusts must name the department as an interested party and the department must be notified by service of process in accordance with the New Mexico Rules of Civil Procedure.

(6) The applicant/recipient may not be the trustee and may not have any ability, access, or authority to manage or control the trust account.

(7) Each trust document must identify the person or organization that drafted the trust document.

(8) If the department approves or previously approved a recognized medicaid trust, the trust and administration of the trust are subject to review by the department, at least annually, and more frequently upon the request of the department, to determine if the trust remains a valid trust for the purposes of meeting the requirements of a recognized medicaid trust. The department will consider a trust to be an invalid trust for the purposes of meeting the requirements of a recognized medicaid trust if:

(a) the applicant/recipient functions as the trustee or has any other ability, access, or authority to manage or control the trust account;

(b) the trustee fails to provide the department with all requested information necessary to identify the corpus of the trust;

(c) the trustee fails to cooperate or interferes with the department's ability to track and monitor the trust account, including failing to disclose or account for any payments and disbursements from or deposit and additions into the trust;

(d) for the purposes of an income diversion trust only, the applicant/recipient has a medical care credit, but the trustee fails to make full payments toward the medical care credit; or

(e) the trustee fails to adhere to the terms of the trust as written.

(9) If the department determines that a trust is invalid under paragraph (8) above, the department will re-determine the applicant/recipient's medicaid eligibility, applying the provisions of 8.281.500 NMAC to the corpus of any existing trust. If the corpus of the trust is not disclosed, or cannot be identified by the department due to a lack of documentation, the department will presume that the corpus of the trust is a countable resource in excess of the allowable resource limit in 8.281.500.11 NMAC, *applicable resource standards*.

(10) The trustee and any alternate trustees shall be specifically identified by name and address.

(11) The department shall not be charged any fees or costs for obtaining trust records or documents.

(12) The trust may not under any circumstances provide a loan to the beneficiary or any other individual or entity.

(13) The trust must be in compliance with all applicable criteria as set forth in 8.281.510.11 NMAC.

(14) All trusts under Subsections B and C below must terminate upon the death of the beneficiary and provision made to immediately disburse the remaining corpus in accordance with the terms of the trust.

B. Special needs trusts: A special needs trust is a trust containing the assets of a disabled applicant/recipient established and funded prior to the time the disabled applicant/recipient reaches the age of 65 and which is established for the sole benefit of the disabled applicant/recipient by a parent, grandparent, legal guardian of the disabled applicant/recipient, or a court. To qualify as a special needs trust, the trust shall contain the following provisions:

(1) The trust shall be identified as an OBRA '93 trust established pursuant to 42 U.S.C. Section 1396p(d)(4)(A).

(2) The trust shall not contain any provisions intended to give anyone or a Court the power to alter the form of the trust from an individual trust to a "pooled trust" under 42 U.S.C. Section 1396p(d)(4)(C).

(3) The trust shall specifically state that the trust is for the sole benefit of the trust beneficiary. Only trusts which are intended for the sole benefit of the disabled applicant/recipient are special needs trusts. Any trust which provides benefits to other persons is not for the sole benefit of the trust beneficiary and shall not be considered a special needs trust. The trust may provide for reasonable compensation to a trustee and shall provide for the reimbursement to the department on the death of the trust beneficiary.

(4) The trust shall specifically state that its purpose is to permit the use of trust assets to supplement, and not to supplant, impair or diminish, any benefits or assistance of any federal, state or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

(5) If the trust provides for food or shelter, such expenditures shall be considered income under Social Security and medicaid eligibility rules.

(6) Parents shall not be relieved of their duty to support a minor child. A minor's funds in a trust shall not be expended on routine support that should be provided by the parents, nor can a parent receive any payments from a minor's trust funds.

(7) The trust shall specifically state the age of the trust beneficiary, whether the trust beneficiary is disabled within the definition of 42 U.S.C. Section 1382c(a)(3), and whether the trust beneficiary is competent at the time the trust is established.

(8) If the trust beneficiary is a minor, the trustee shall execute a bond to protect the child's funds or shall get a court's written order exempting him/her from the bond requirement.

(9) If there is some question about the trust beneficiary's disability, independent proof may be required.

(10) If the trust beneficiary is a minor, the trust shall state whether the trust beneficiary is expected to be competent at his or her majority.

(11) The trust shall specifically identify, in an attached schedule, the source of the initial trust property and all assets of the trust. If the trust is being established with funds from the proceeds of a settlement or judgment subsequent to the bringing of a legal cause of action, medicaid's claim for its expenditures that are related to the cause of action shall be repaid immediately upon the receipt of such proceeds and prior to the establishment of the trust.

(12) Subsequent additions made to the trust corpus shall be reported to the ISD caseworker upon application and recertification. Subsequent additions to the trust (other than interest on the corpus) shall cease when the trust beneficiary reaches age 65, or shall be counted as a resource or shall be subject to transfer of asset provisions (unless an exception to transfer of asset provisions applies).

(13) If subsequent additions are to be made to the trust corpus with funds not belonging to the trust beneficiary, it shall be understood that those funds are a gift to the trust beneficiary and cannot be reclaimed by the donor.

(14) If the trust makes provisions which are intended to limit invasion by creditors or to insulate the

trust from liens or encumbrances, the trust shall state that such provisions are not intended to limit the state's right to reimbursement or to recoup incorrectly paid benefits.

(15) The special needs trust shall identify the grantor by name, indicate his/her relationship to the primary beneficiary, and state that it is established by a parent, grandparent, or legal guardian of the trust beneficiary, or by a court. A court can be named as the grantor, if the trust is established pursuant to a settlement of a case before it, or if the court is otherwise involved in the creation of the trust.

(16) The trust may pay administration fees and legal bills incurred by the beneficiary related to the trust administration.

(17) The trust shall specifically state that it is irrevocable. Neither the grantor, nor the beneficiary, or any remainder beneficiaries shall have any right or power, whether alone or in conjunction with others, in whatever capacity, to revoke or terminate the trust or to designate the persons who shall possess or enjoy the trust estate during his/her lifetime. However, the trustee may seek an amendment for the limited purpose of ensuring that the trust complies with any changes to the laws governing the trust, per the agreement of all interested parties, to include the department. All such amendments shall be reviewed, consented to, and approved in writing by the department or its successor agency prior to finalizing the amendments. Any amendments not agreed to in writing by the department are void. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department.

(18) The trustee shall be specifically identified by name and address. The trust shall state that the original trust beneficiary cannot be the trustee. The trust shall make provisions for naming a successor trustee in the event that any trustee is unable or unwilling to serve. The department as well as the trust beneficiary or guardian (if applicable), shall be given prior notice if there is a change in the trustee.

(19) The trust shall specifically state that the trustee shall fully comply with all state laws and regulations, including prudent administration per, NMSA 1978, Section 46A-8-804 (2003). The trust shall provide that the trustee cannot take any actions not authorized by, or without regard to, state laws and regulations.

(20) The trust shall specifically state that the trustee shall be compensated only as provided by law. The costs of administration must comply with NMSA 1978, Section 46A-8-805(2003). If the trust identifies a guardian, the trust shall specifically identify him or her by name. A guardian shall be compensated only as provided by law. The parent of a minor child shall not be compensated from the trust as the child's guardian.

(21) The trust shall specifically name the department as a remainder beneficiary with priority over any other beneficiaries except the primary beneficiary for whom the trust was created. The trust shall specifically state that, upon the death of the primary beneficiary, the department will be immediately notified by the trustee in writing, and shall be paid all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of the primary beneficiary. The trustee shall comply fully with this obligation to first repay the department, without requiring the department to take any action except to establish the amount to be repaid. Repayment shall be made by the trustee to the department or to any successor agency within 30 days after receiving written notification by the department of the amounts expended on behalf of the primary beneficiary.

(a) Allowable administrative expenses: The following types of administrative expenses may be paid from the trust prior to reimbursement to the department for medical assistance paid: taxes due from the trust to the state or federal government because of the death of the beneficiary, and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Payment of such expenses must be fully documented and copies of the documentation provided to the department within seven calendar days of making such payments.

(b) Prohibited expenses and payments: Examples of some types of expenses that are not permitted prior to reimbursement to the department for medical assistance, include but are not limited to: taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties other than the department, funeral expenses, and payments to residual beneficiaries.

(22) If there is a provision for repayment of other assistance programs, the trust shall specifically state that the medicaid program shall be repaid prior to making repayment to any other assistance programs.

(23) The trust shall specifically state that if the beneficiary has received medicaid benefits in more than one state, each state that provided medicaid benefits shall be repaid. If there is an insufficient amount left to cover all benefits paid, then each state shall be paid its proportionate share of the amount left in the trust, based upon the amount of support provided by each state to the beneficiary.

(24) No provisions in the trust shall permit the trustee or the estate's representative to first repay other persons or creditors at the death of the beneficiary. Only what remains in the trust after the repayments specified in

Paragraphs (21) through (23) above have been made shall be considered available for other expenses or beneficiaries of the estate.

(25) The trust shall specify that an accounting of all additions and expenditures made by or into the trust shall be submitted to the department on an annual basis, or more frequently upon the request of the department. The department shall not be charged any fees or costs for obtaining these records.

(26) The department shall be given advance notice of any expenditure in excess of \$5,000, and of any amount which would substantially deplete the principal of the trust. Written notice shall be given to the department, or any successor agency, at least 45 days prior to the expenditures.

(27) The trust shall not create other trusts within it.

(28) If the trust is funded, in whole or in part, with an annuity or other periodic payment arrangement, the department must be named in the controlling documents as the primary remainder beneficiary up to the total amount of medical assistance paid on behalf of the individual.

(29) Distributions from the trust made to or for the benefit of a third party that are not for the sole benefit of the disabled individual are treated as a transfer of assets for less than fair market value and may create a period of ineligibility for certain medicaid services. This includes such things as payments of expenses or travel costs of persons other than a medically-necessary attendant.

C. **Income diversion trusts:** An applicant/recipient whose income exceeds the income standard may be eligible to receive medicaid through the creation and funding of an income diversion trust. The only permissible distributions from the trust are: personal needs allowance, medical insurance (i.e. medicare), trustee fees, administration fees, the medical care credit and if applicable, the community spouse monthly income allowance and family allowance. An income diversion trust must meet all of the following requirements.

(1) The applicant/recipient is in need of institutional level care and has countable income above the standard for institutional care in 8.200.520.16 NMAC, *maximum countable income for intermediate care medicaid in home and community-based waiver categories*, but less than the current average monthly cost of nursing facilities in Section 8.200.510.13 NMAC, *average monthly cost of nursing facilities for private patients used in transfer of asset provisions*, a in effect at the time of each eligibility or re-certification.

(2) The trust is composed only of pension, social security, and other income to the applicant/recipient, including accumulated income in the trust. No resources may be used to establish the trust and no resources may be added to the trust. Any resources in an income diversion trust are countable per 8.281.500 NMAC. All sources of income funding the trust shall be specifically identified in the trust.

(3) The applicant/recipient's income is paid into the trust and then the permissible distributions are made from the trust. An applicant is not eligible until a completed application for services is submitted and the trust is established in writing, executed, his/her income is paid into the trust, and the applicant meets all other eligibility requirements.

(4) The trust must be irrevocable and cannot be amended or dissolved without the written agreement of the department. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department.

(5) The trust must specifically name the department as the primary residual beneficiary. The trust shall state that the department receives all amounts remaining in the trust upon the death of the applicant/recipient up to an amount equal to the total medicaid benefits paid on behalf of the applicant/recipient. The trust shall specifically state that, upon the death of the primary beneficiary, the department will be immediately notified. The trustee shall comply fully with this obligation to first repay the department, without requiring the department to take any action except to establish the amount to be repaid. Repayment shall be made to the department, or to any successor agency.

(6) Funds in the trust may only be paid out of the trust for the personal needs allowance, medical insurance (i.e., medicare), trustee fees, administration fees, medical care credit, and if applicable, the community spouse monthly income allowance and family allowance. The medical care credit includes medical care provided to the applicant/recipient by a nursing home or other institution. When such payments are made, the applicant/recipient 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 applicant/recipient and to the extent that the payments purchase care at fair market value. Use of the accumulated funds in the trust for any other reason than making a permissible distribution or failure to pay the medical care credit on a monthly basis will be considered as countable income or as a transfer of assets and may subject the applicant/recipient to a penalty.

(7) The trustee of an income diversion trust must be an independent trustee. The trustee may claim a fee of up to three percent of the funds added to the trust that month as compensation. The trustee may pay reasonable costs associated with the administration of the trust, not to exceed one and one half percent of the funds

available for distribution each month.

(8) No provisions in the trust shall permit the trustee or the estate's representative to first repay other persons or creditors at the death of the beneficiary. Only what remains in the trust after the repayment to the department as specified in paragraph 5 above has been made shall be considered available for other expenses or beneficiaries of the estate.

D. Non-profit trusts for certain disabled individuals: Trusts containing the assets of applicants/recipients who meet the social security administration's definition of disability.

(1) The trust must meet all the following criteria to be considered a non-profit trust for certain disabled individuals:

- (a) the trust is established and managed by a non-profit association;
- (b) 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;
- (c) accounts in the trust are established solely for the benefit of applicants/recipients who meet the social security administration's definition of disability and are established by the parent, grandparent, or legal guardian of such applicants/recipients, by such applicants/recipients themselves, or by a court;
- (d) to the extent that any amounts remaining in the applicant/recipient's trust account upon his/her death are not retained by the trust, the trust pays to the department an amount equal to the total amount of medicaid benefits paid on behalf of the applicant/recipient;

(i) allowable administrative expenses: The following types of administrative expenses may be paid from the trust prior to reimbursement to the department for medical assistance paid: taxes due from the trust to the state or federal government because of the death of the beneficiary, and reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust. Payment of such expenses must be fully documented and copies of the documentation provided to the department within seven calendar days of making such payments.

(ii) prohibited expenses and payments: Examples of some types of expenses that are not permitted prior to reimbursement to the department for medical assistance, include but are not limited to: taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties, funeral expenses, and payments to residual beneficiaries.

(iii) must be created prior to the age of 65 or the trust is subject to transfer of asset penalties; and

(iv) any income or resources added to the trust after the applicant/recipient reaches 65 years of age may subject him or her to a transfer of assets penalty.

(2) A trustee of a non-profit trust, in order to fulfill his or her fiduciary obligations with respect to the state's remainder interest in the trust, must:

- (a) notify the department, in writing, of the creation or funding of the trust for the benefit of an applicant/recipient; and
- (b) notify the department, in writing, of the death of the beneficiary of the trust; and
- (c) notify the department, in writing, in advance of any transactions involving transfers from the trust principal for less than fair market value.

(3) Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department. [8.281.510.11 NMAC - N, 2-15-12]

8.281.510.12 OTHER TRUSTS:

A. Limited partnerships: A limited partnership is a "similar legal device" to a trust. Trust provisions of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93) direct that the term "trust" includes any legal device similar to a trust. Therefore, OBRA 93 trust provisions of this section apply to limited partnerships. The general partners act as trustee, and the limited partners are the equivalent of beneficiaries of an irrevocable trust. To the extent that the general partners can make each limited partner's ownership interest available to him, that interest is a countable resource and not a transfer of assets. However, a transfer of assets has occurred to the extent that:

- (1) The value of the share of ownership purchased by the limited partner is less than the amount he invested.
- (2) The general partners cannot make the limited partner's share available to him.
- (3) If transfer-of-assets provisions apply, the look-back period is 60 months.

B. Trusts created by will. Trusts that are created by will, but are not in effect (i.e., the testator is not deceased) are not considered as countable resources. Once a trust created by will is in effect and funded (i.e., the testator is deceased), the trust will be reviewed according to Subsection C, below.

C. Third party trusts:

(1) Third party trusts are trusts which are established with assets contributed by individuals other than the applicant/recipient or the applicant/recipient's spouse for the benefit of an applicant/recipient.

(2) The terms of the trust will determine whether the trust fund is countable as a resource or income for medicaid eligibility.

(a) Trusts which limit distributions to non-support or supplemental needs will not be considered as a countable resource in their entirety.

(b) If the applicant/recipient has the right to demand a distribution, the amount that may be demanded is countable, whether or not it is actually distributed.

(c) If the trustee may exercise discretion in distributing income or resources to the applicant/recipient or on behalf of the applicant/recipient, only the actual distributions of income or resources are countable in determining eligibility.

(d) If the applicant/recipient as the beneficiary of the trust may revoke or direct distributions from the trust, the trust is considered a countable resource.

(3) Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided, at no cost to the department, upon the request of an authorized representative of the department. [8.281.510.12 NMAC - N, 2-15-12]

8.281.510.13 UNDUE HARDSHIP: An applicant/recipients who has excess resources and is unable to access resources from an existing trust will not be found ineligible for medicaid where the department determines, on a case by case basis, that denial of eligibility on the basis of excess resources would work an undue hardship.

A. The applicant/recipient must demonstrate that the application of the trust regulation would deprive the applicant/recipient or his/her spouse of

(1) medical care such that the applicant/recipient's health or life would be endangered; or

(2) food, clothing, shelter or other necessities of life.

B. The applicant/recipient must submit any documentation to support the claim that application of the trust regulation would constitute an undue hardship within 30 days of the date of the notice regarding eligibility for medicaid.

C. Undue hardship does not exist when the application of the trust regulation causes an applicant/recipient or his/her family members inconvenience or restricts their lifestyle.

D. The county director of the ISD office will make a decision regarding an application for waiver of the trust regulation within 30 days of receipt of the application. The decision to grant a waiver shall be reviewed at every re-certification to determine if the circumstances justifying a waiver are still applicable.

E. Notice of the decision shall be mailed to the applicant/recipient or his/her representative.

F. The applicant/recipient or his/her representative must notify the ISD worker of any change in circumstances which affects the application of the undue hardship waiver exception within ten days of the change in circumstances. The department will review the change of circumstances and determine the next appropriate action, which may include withdrawal of the waiver.

[8.281.510.13 NMAC - N, 2-15-12]

8.281.510.14 USE OF TRUST VS. TRANSFER RULES FOR ASSETS PLACED IN TRUST: When a non-excluded asset is placed in a trust, a transfer of assets for less than fair market value generally takes place. An applicant/recipient (or someone acting on behalf of the applicant/recipient) placing an asset in a trust generally gives up ownership of the asset to the trust. If the applicant/recipient does not receive fair compensation in return, a penalty is imposed under the transfer of assets provisions. However, the trust provisions contain specific requirements for treatment of assets placed in trusts. These requirements indicate when assets are considered countable as income or resources, and as a transfer of assets depending on the specific circumstances of the particular trust. Application of the trust regulations, along with the imposition of a penalty for the transfer of the assets into the trust, could result in the applicant/recipient being penalized twice for actions involving the same asset. If an asset is subject to the trust regulations and a transfer of asset penalty, the requirements of the trust regulations take precedence over a transfer of assets penalty for the same asset.

[8.281.510 NMAC - N, 2-15-12]

8.281.510.15 EXCLUDED ASSETS PLACED IN A TRUST: Placement of excluded assets in a trust, with the exception of a home, shall not result in a penalty of ineligibility because the transferred asset is not an asset for transfer purposes. However, a home, whether excluded or not, when transferred into a trust shall be considered a resource unless:

- A. The trust is for the sole benefit for the applicant/recipient's spouse; or
- B. Was transferred to a trust that is in compliance with 8.281.510.11(A) or (C) NMAC that is established for the sole benefit of the applicant/recipient's disabled child, or
- C. Was transferred to a trust that is in compliance with 8.281.510.11(A) or (C) NMAC that is established solely for the benefit of an individual who is under 65 years of age and who is disabled.

[8.281.510.15 NMAC - N, 2-15-12]

8.281.510.16 DOCUMENTATION OF TRUSTS AND TRUST RECORDS: Applicants/recipients shall disclose the existence of any trust to which they have contributed income, resources, or are a beneficiary. Upon learning of the existence of a trust, the ISD caseworker must obtain a copy of the trust document, including all attachments, and forward it to the MAD eligibility unit so that it may be reviewed by MAD for a determination on how the trust may affect medicaid eligibility. Trust records shall be open at all reasonable times to inspection by the department and copies shall be provided upon the request of an authorized representative of the department. The department shall not be charged any fees or costs associated with providing trust records to the department. Any records relating to a trust that are sealed by a court order or settlement agreement shall be produced to the department by the applicant/recipient or trustee upon request. Failure to provide such records will result in the presumption that the applicant/recipient's trust is a countable resource that exceeds the resource limitation at 8.281.500 NMAC.

[8.281.510.16 NMAC - N, 2-15-12]

8.281.510.17 COMMENCEMENT OF PROCEEDINGS: The department may commence a proceeding against the trustee of a trust, if the department considers any acts, omissions, or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations, or contrary to the fiduciary obligations of the trustee.

[8.281.510.17 NMAC - N, 2-15-12]

8.281.510.18 NON-COMPLIANCE WITH TERMS OF TRUST: If the department suspects or determines that the trustee is not complying with the terms of a trust that has been approved by the department, the department will send a letter to the recipient of services or his or her representative requesting more information or describing the specific actions that are not in compliance with the trust which may include but is not limited to proper management of the funds in the trust. The recipient will have 15 days to provide the requested information or demonstrate, through documentation, that the actions of the trustee are not in violation of the terms of the trust. Failure to respond or to adequately demonstrate that the terms of the trust have not been violated may result in a transfer of assets penalty, disqualification from eligibility to receive benefits, and legal action, as appropriate. If the department identifies that the violation of the terms of the trust has been to inadequately fund the trust, the recipient shall immediately obtain a corporate trustee and amend the trust to be managed by that corporate trustee.

[8.281.510.18 NMAC - N, 2-15-12]

8.281.510.19 AMENDMENTS TO CERTAIN TRUSTS: A special needs trust, income diversion trust, or pooled charitable trust that was created prior to the effective date of these regulations must fully comply with these regulations as part of any subsequent amendments made to those trusts on or after the effective date of these regulations.

[8.281.510.19 NMAC - N, 2-15-12]