

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, 10/1/2012]

8.281.510.2 SCOPE: The rule applies to the general public.
[8.281.510.2 NMAC - N, 10/1/2012]

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 Sections 27-2-12 et seq., NMSA 1978.
[8.281.510.3 NMAC - N, 10/1/2012]

8.281.510.4 DURATION: Permanent.
[8.281.510.4 NMAC - N, 10/1/2012]

8.281.510.5 EFFECTIVE DATE: October 1, 2012, unless a later date is cited at the end of a section.
[8.281.510.5 NMAC - N, 10/1/2012]

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, 10/1/2012]

8.281.510.7 DEFINITIONS:

A. “Assets” include all income and resources as described in Section 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 Section 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. “Institutionalized individual” is an individual as described in Subsection K of Section 8.281.500.7 NMAC.

J. “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.

K. “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.

L. “Residual beneficiary” is a person or entity that receives the remaining trust principal upon the death of the original trust beneficiary.

M. “Revocable trust” is created when the grantor reserves any right to cancel any provision of the trust.

N. “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 except after medicaid is reimbursed.

O. “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.

P. “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.

Q. “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, 10/1/2012]

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 Section 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 Section 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 - Rp, 8.281.510.15 NMAC, 10/1/2012]

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 Section 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

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Subparagraphs (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 fifty thousand dollars (\$50,000) and the applicant contributes twenty five thousand dollars (\$25,000), the applicant's prorated share is twenty percent 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 Section 8.281.500.20 NMAC, *unearned income*, and Section 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 Section 8.281.500.20 NMAC and Section 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 one thousand dollars (\$1,000) to or for the applicant/recipient out of a ten

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thousand dollars (\$10,000) trust, only the one thousand dollars (\$1,000) is treated as a payment that could be made. The remaining nine thousand dollars (\$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 twenty five thousand dollars (\$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 - Rp, 8.281.500.15 NMAC, 10/1/2012]

8.281.510.11 RECOGNIZED MEDICAID TRUSTS: The trust provisions set forth in Section 8.281.510.9 NMAC and Section 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 and non-profit trusts for certain disabled individuals) are subject to the following.

(1) 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 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.

(9) If the department determines that a trust is invalid under Paragraph (8) above, the department will evaluate the applicant/recipient's medicaid eligibility, applying the provisions of Section 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

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department due to a lack of documentation, the department will presume that the corpus of the trust is a countable resource in excess and will be counted toward the allowable resource limit in Section 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 Section 8.281.510.11 NMAC.
- (14) All trusts under Subsection B 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. A trust established on or after December 13, 2016, by an individual (i.e. the trust beneficiary) with a disability under age 65 for his or her own benefit can qualify as a special needs trust, conferring the same benefits as a special needs trust set up by a parent, grandparent, legal guardian, or 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 to automatically alter the form of the trust from an individual trust to a “pooled trust” under 42 U.S.C. Section 1396p(d)(4)(C). The special needs trust should be properly dissolved and a pooled trust should be created in accordance with federal and state laws.
- (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 for which the beneficiary may be receiving.
- (5) 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.
- (6) 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.
- (7) 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.
- (8) If there is some question about the trust beneficiary's disability, independent proof may be required.
- (9) 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.
- (10) 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.
- (11) 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) after the applicant/recipient reaches age 65 may be subject to transfer of asset provisions (unless an exception to transfer of asset provisions applies).
- (12) 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

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the donor.

(13) 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.

(14) 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.

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

(16) 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.

(17) 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.

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

(19) The trust shall specifically state that the trustee shall be compensated only as provided by law. The costs of administration must comply with Section 46A-8-805 (2003) NMSA 1978. 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.

(20) 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.

(21) 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.

(22) 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.

(23) 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 (20) through (22) above have been made shall be considered available for other expenses or beneficiaries of the estate.

(24) 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.

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

(26) 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.

(27) Distributions from the trust made to or for the benefit of a third party that are not for the sole primary 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.

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 trust terminates upon the death of the beneficiary. An income diversion trust must meet all of the following requirements.

(1) The trust is composed only of pension, social security, and other income to the applicant/recipient, including accumulated income in the trust.

(2) Only income 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 or shelter for him/herself.

(3) An income diversion trust is a reversionary trust 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.

(4) 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 the states on the applicant/recipient's behalf.

(5) 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.

(6) 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.

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; and

(iii) 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 - Rp, 8.281.500.15 NMAC, 10/1/2012; A, 3/1/2018]

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 - Rp, 8.281.500.15 NMAC, 10/1/2012]

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 caseworker 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 - Rp, 8.281.500.15 NMAC, 10/1/2012]

8.281.510.14 USE OF TRUST V. 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.

[8.281.510.14 NMAC - N, 10/1/2012]

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 Subsection B or D of Section 8.281.510.11 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 Subsection B or D of Section 8.281.510.11 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, 10/1/2012]

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, 10/1/2012]

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, 10/1/2012]

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, 10/1/2012]

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, 10/1/2012]

HISTORY OF 8.281.510 NMAC:

NMAC History:

8 NMAC 4.ICM.500, Eligibility Policy, Income and Resource Standards, filed 12/30/1994.

8 NMAC 4.ICM.500, Eligibility Policy, Income and Resource Standards, filed 7/17/1997.

8.281.500 NMAC, Income and Resource Standards, filed 2/15/2001.

8.281.500.15 NMAC, Trusts, filed 2/15/2001- Replaced by 8.281.510 NMAC, Trust Standards, effective 10/1/2012.