IN THE IOWA SUPREME COURT

NO. 18-0026

SUSAN E. COX and EDWARD A. COX,
Petitioners-Appellants

v.

IOWA DEPARTMENT OF HUMAN SERVICES,
Respondent-Appellee

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HON. SCOTT D. ROSENBERG, JUDGE

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

ISSUES PRESENTED

I. WHETHER THE COURT ERRED IN AFFIRMING THE DEPARTMENT'S DECISION, WHICH VIOLATED NUMEROUS PROVISIONS OF IOWA CODE SECTION 17A.19(10).

Cases

Anderson v. Iowa Dept. of Human Services, 368 N.W.2d 104 (Iowa 1985)

Beach v. State of Tennessee Department of Human Services, ..Memorandum and Order, Case No. 09-2120-III (Tenn. Chancery Ct. Sept. 8, 2010)

Beinke v. Minnesota Dept. of Human Services, Order, File No. V-14-271 (5th Judicial District Minn. June 24, 2014)

Birchansky Real Estate, L.C. v. Iowa Department of Public Health, 737 N.W.2d 134 (Iowa 2007)

Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522 (Iowa 2017)

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

Citizens Aide/Ombudsman v. Rolfes, 454 N.W.2d 815 (Iowa 1990)

City of Marion v. Department of Revenue & Finance, 643 N.W.2d 205 (Iowa 2002)

Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d 82 (Iowa 1994)

De Stefano v. Apartments Downtown, Inc., 879 N.W.2d 155 (Iowa 2016)

Department of Social Services v. Saunders, 724 A.2d 1093 (Conn. 1999)

Des Moines Independent Community School District v. Department of Job Service, 376 N.W.2d 605 (Iowa 1985)

Doe (Redacted) v. El Paso County Dept. of Human Services, Initial Decision, Case No. SHP 2014-0929 (Colorado Office of Administrative Courts, Jan. 28, 2015)

Doe (Redacted) v. Winona County Dept. of Human Services, Decision of State Agency on Appeal, Docket No. 186029 (Minn. Dept. of Human Services, March 13, 2017)

Dziuk v. Minnesota Dept. of Human Services, Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, File No. 21-CV-09-1074 (7th Judicial District Minn. Feb. 2, 2012)

Estate of Wierzbinski v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2010-4343-AA (Macomb County Cir. Ct. July 26, 2011)

Eyecare v. Department of Human Services, 770 N.W.2d 832 (Iowa 2009)
Federal Express Corp. v. Mason City Human Rights Commission, 852 N.W.2d 509 (Iowa Ct. App. 2014)
George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495 (Iowa 1983)
Greenwood Manor v. Iowa Department of Public Health, 641 N.W.2d 823 (Iowa 2002)
Henriksen v. Younglov Construction, 540 N.W.2d 254 (Iowa 1995)
Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598 (Iowa 1990)
Hutson v. Mosier, 401 P.3d 673 (Kan. Ct. App. 2017)
In re: the Guardianship of Scott G.G., 659 N.W.2d 438 (Wisc. Ct. App. 2003)
In re Lindell, 334 B.R. 249 (Bankr. D. Minn. 2005)
In re Northgate Computer Systems, Inc., 240 B.R. 328 (Bankr. D. Minn. 1999)
In re Pooled Advocate Trust, 813 N.W.2d 130 (S.D. 2012)
In re Schultz, 368 B.R. 832 (Bankr. D. Minn. 2007)
Iowa Dental Association v. Iowa Insurance Division, 831 N.W.2d 138 (Iowa 2013)
Kay-Decker v. Iowa State Board of Tax Review, 857 N.W.2d 216 (Iowa 2014)
Kucera v. Baldazo, 745 N.W.2d 481 (Iowa 2008)
Lewis v. Alexander, 685 F.3d 325 (3d Cir. 2012), cert. denied 133 S.Ct. 933 (2013)
Masters v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2011-5372-AA (Macomb County Cir. Ct. Aug. 9, 2012)
Masters v. State of Michigan, Department of Human Services, Opinion and Order (on Motion for Reconsideration), Case No. 2011-5372-AA (Macomb County Cir. Ct. Oct. 3, 2012)
Meinders v. Dunkerton Community School District, 645 N.W.2d 632 (Iowa 2002)
Miller v. Westfield Insurance Co., 606 N.W.2d 301 (Iowa 2000)
Mosher v. Department of Inspections & Appeals, 671 N.W.2d 501 (Iowa 2003)
New Mexico Department of Human Services v. Department of Health & Human Services Health Care Finance Administration, 4 F.3d 882 (10th Cir. 1993)
Office of Consumer Advocate v. Iowa Utilities Board, 744 N.W.2d 640 (Iowa 2008)

Peittersen v. Minnesota Department of Human Services, Findings of Fact, Conclusions of Law and Order, 19HA-CV-11-5630 (Minn. 1st Judicial District, Oct. 2, 2012)
Perry v. Dowling, 95 F.3d 231 (2d Cir. 1996)
Ramey v. Reinertson, 268 F.3d 955 (10th Cir. 2001)
Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010)
Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (Iowa 1983)
State v. Public Employment Relations Board, 744 N.W.2d 357 (Iowa 2008)
Turner v. Perales, 869 F.2d 140 (2d Cir. 1989)
Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493 (Iowa 2003)

Statutes and Rules

42 C.F.R. § 483.10(c)(8)(ii)
42 C.F.R. § 483.10(f)(11)(ii)
42 U.S.C. § 1396p(c)(2)(B)(iv)
42 U.S.C. § 1396p(c)(2)(C)
42 U.S.C. § 1396p(d)
42 U.S.C. § 1396p(d)(2)(A)
42 U.S.C. § 1396p(d)(3)(B)(i)
42 U.S.C. § 1396p(d)(4)(A)
42 U.S.C. § 1396p(d)(4)(B)
42 U.S.C. § 1396p(d)(4)(C)
42 U.S.C. § 1396p(d)(4)(C)(iv)
Iowa Admin. Code r. 441-75.23
Iowa Admin. Code r. 441-75.23(3)
Iowa Admin. Code r. 441-75.23(5)(c)
Iowa Admin. Code r. 441-75.23(5)(c)(1)
Iowa Admin. Code r. 441-75.23(8)
Iowa Admin. Code r. 441-75.24(2)
Iowa Admin. Code r. 441-75.24(2)(b)(2)
Iowa Admin. Code r. 441-75.24(3)(a)
Iowa Admin. Code r. 441-75.24(3)(b)
Iowa Admin. Code r. 441-75.24(3)(c)
Iowa Admin. Code r. 441-75.24(3)(c)(4)
Iowa Admin. Code r. 441-81.10(5)
Iowa Code ch. 17A
Iowa Code § 17A.2(11)(c)
Iowa Code § 17A.19
Iowa Code § 17A.19(10)
Iowa Code § 17A.19(10)(b)

Iowa Code § 17A.19(10)(c)
Iowa Code § 17A.19(10)(f)
Iowa Code § 17A.19(10)(f)(1)
Iowa Code § 17A.19(10)(g)
Iowa Code § 17A.19(10)(i)
Iowa Code § 17A.19(10)(j)
Iowa Code § 17A.19(10)(k)
Iowa Code § 17A.19(10)(l)
Iowa Code § 17A.19(10)(m)
Iowa Code § 17A.19(10)(n)
Iowa Code § 17A.19(11)
Iowa Code § 249A.3(11)(c)
Iowa Code § 249A.3(11)(d)
Iowa Code § 249A.4
Iowa Code § 249A.4(10)
Iowa Code § 633.04
Iowa Code ch. 633C
Iowa Code § 633C.1
Iowa Code § 633C.2

Other Authorities

Bonfield, Administrative Procedures Act, 60 Iowa Law Rev. 731 (1975)
Program Operations Manual System, § SI 01120.203, available at https://secure.ssa.gov/poms.nsf/lnx/0501120203 (last updated May 14, 2013)
1 Social Security Law & Practice, §§ 1.28, 1.30

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101, this matter should be retained by the Supreme Court. This appeal involves a substantial issue of first impression relating to the treatment of special needs trusts for Medicaid eligibility. See Iowa R. App. P. 6.1101(2)(c). This appeal also presents substantial questions of enunciating or changing legal principles, as is shown by decisions rendered in other states. See id. at 6.1101(1)(f); see also, e.g., Beach v. State of Tennessee Department of Human Services, Memorandum and Order, Case No. 09-2120-III (Tenn. Chancery Ct. Sept. 8, 2010), App. 337-66; Estate of Wierzbinski v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2010-4343-AA (Macomb County Cir. Ct. July 26, 2011), App. 367-72; Masters v. State of Michigan, Department of Human Services, Opinion and Order (on Motion for Reconsideration), Case No. 2011-5372-AA (Macomb County Cir. Ct. Oct. 3, 2012), App. 380-83.

STATEMENT OF THE CASE

This appeal arises from a Ruling and Order on Petition for Judicial Review issued on December 6, 2017, which dismissed the challenge of Appellants, Edward A. Cox ("Edward") and Susan E. Cox ("Susan"). App. 159-69. Such Ruling and Order also affirmed the Final Decisions of the

Iowa Department of Human Services ("the Department") issued on February 24, 2017 regarding the eligibility of Edward and Susan for medical assistance (hereinafter "Medicaid"). App. 159-69. Edward and Susan's Petitions for Judicial Review sought reversal of the Final Decisions on a variety of grounds under Iowa Code section 17A.19(10). App. 12-13, 41-42. The parties submitted briefs in the consolidated action to the District Court and presented oral arguments on August 4, 2017. App. 159.

The proceedings involving the parties began on June 14, 2016 when the Department issued a Disposal of Assets Penalty Notice of Decision to Edward. App. 321. The Disposal of Assets Penalty Notice of Decision denied Edward's application for Medicaid on the basis that he "transferred assets for less than fair market value." App. 321. As a result of this alleged transfer, the Department applied a penalty of 18 months and 25 days which made Edward ineligible for Medicaid benefits through July 25, 2017. App. 321. On the same date, Edward was issued a letter from Anne McLeod of the Department purportedly explaining the Department's reasoning for the penalty. App. 199. Edward timely appealed the Disposal of Assets Penalty Notice of Decision by filing an Appeal and Request for Hearing on or about June 28, 2016. App. 200.

On June 14, 2016, the Department also issued a Disposal of Assets Penalty Notice of Decision to Susan. App. 322-23. The Disposal of Assets Penalty Notice of Decision denied Susan's application for Medicaid on the basis that she "transferred assets for less than fair market value." App. 322. As a result of this alleged transfer, the Department applied a penalty of 87 months and 22 days, which made Susan ineligible for Medicaid benefits through July 22, 2023. App. 322. Susan timely appealed the Disposal of Assets Penalty Notice of Decision by filing an Appeal and Request for Hearing on or about July 15, 2016. App. 201.

The appeals of Edward and Susan were consolidated for hearing. App. 202-03. The Department submitted Appeal Summaries and exhibits with regard to Edward and Susan. App. 416. Susan and Edward submitted a Pre-Hearing Brief as well as Exhibits A through U. App. 416. The Department submitted a consolidated Supplemental Appeal Summary and an additional exhibit before the hearing. App. 416. The hearing on the consolidated appeals was held on September 27, 2016. App. 416. On December 12, 2016, Administrative Law Judge Kerry Anderson issued a Proposed Decision affirming the Department's decision as to Edward. App. 416-27. With respect to Susan, the Administrative Law Judge affirmed the Department's decision that the transfer made her ineligible for Medicaid, but

remanded the matter for a recalculation due to the improper inclusion of amounts paid prior to April 1, 2016.[1] App. 416-27.

On December 21, 2016, Edward and Susan timely filed an Appeal and Request for Oral Argument with the Department's Appeals Section. App. 428-42. On January 9, 2017, the Department denied Edward and Susan's request for an oral argument. App. 443-46. Final Decisions were issued by the Department's Director on February 24, 2017. App. 447-55. The Final Decisions adopted the Proposed Decision and also included a "Discussion" allegedly supporting the Final Decision. App. 447-55.

STATEMENT OF THE FACTS

Edward and Susan are husband and wife, and they currently reside at Westview Care Center, located at 1900 W. 3rd Place, Indianola, Iowa 50125. App. 159, 285, 291, 411-12 (Tr. 30:11-15, 30:25-31:5). Both Edward and Susan were born in 1950 and thus, turned 67 in 2017. App. 285, 291, 411-12 (Tr. 30:14, 31:3). Susan has left side neglect that was induced by a stroke. App. 292, 412 (Tr. 31:6-15). Edward has lymphedema, an incurable condition that is caused by a blockage in the lymphatic system and which

[1] Although Susan's case was remanded as to the amount at issue, the legal issue (regarding the transfers and their impact on Medicaid eligibility) remains the same in both Edward and Susan's cases. The Department has issued a new calculation notice to Susan which slightly reduced her penalty period. That notice has been appealed and any hearing on such appeal has been delayed by the Administrative Law Judge due to this pending appeal.

causes swelling. App. 286. Edward's lymphedema makes his left arm unusable, and he requires a walker in order to ambulate safely. App. 289. Edward has received two kidney transplants in his lifetime and thus, has a number of medications. App. 286. There is no chance that either Edward or Susan will be able to live on their own again. App. 411-12 (Tr. 30:22-24, 31:22-24).

In late 2015, Susan received compensation for a medical malpractice lawsuit related to the cause of her stroke. App. 412-13 (Tr. 31:25-32:3). In addition, Edward received compensation for loss of consortium. App. 412-13 (Tr. 31:25-32:3). The majority of the funds from the lawsuit settlement were placed into separate special needs trusts, which will be described more fully below. App. 413 (Tr. 32:4-7).

The Center for Special Needs Trust Administration ("the Center"), a Florida-based non-profit association, established a National Pooled Trust on February 5, 2002. App. 226. The National Pooled Trust has been reformed, amended and restated since that time, with its most recent amendment taking place on November 4, 2015. App. 226-41. On February 8, 2016, Edward and Susan executed Joinder Agreements for the National Pooled Trust. App. 242-84. The effect of these Joinder Agreements was to create individual sub-accounts established for the benefit of Edward and Susan within the

National Pooled Trust (hereinafter referred to as "the pooled trust(s)" or the "pooled special needs trust(s)"). App. 228 (at § 2.5). Edward's sub-account received $101,921.81, and Susan's sub-account received $474,457.88. App. 307, 314. The Center acts as the Trustee for Edward and Susan's pooled trusts, and the Center is required to distribute the funds in accordance with the trust documents. App. 229 (at § 2.12), 414-15 (Tr. 33:18-34:2). The pooled trust funds can only be used for Edward and Susan's respective care. App. 229 (at § 2.9), 415 (Tr. 34:3-9). More specific, relevant provisions of the trust documents will be set forth in the Argument section below.

Edward and Susan both applied for Medicaid in 2016 around or after the time they moved to Westview Care Center. App. 321-23. The Department rejected Edward and Susan's applications and applied a calculation to determine a penalty period. App. 321-23. As a result of the penalty period, Edward was unable to obtain Medicaid benefits to pay for his long term care being provided at Westview Care Center through July 25, 2017. App. 321. Susan remains unable to obtain Medicaid benefits for her long term care through July 22, 2023. App. 322-23.

ARGUMENT

I. THE DISTRICT COURT'S RULING AND ORDER ON PETITION FOR JUDICIAL REVIEW SHOULD BE REVERSED, BECAUSE THE FINAL DECISIONS THE

COURT AFFIRMED VIOLATE NUMEROUS PROVISIONS OF IOWA CODE SECTION 17A.19(10).

A. Preservation of Error and Standard of Review.

Edward and Susan preserved error on this argument by raising it at the agency level with the Administrative Law Judge and with the Department in its appeal from the Proposed Decision. App. 204-25, 428-42. Edward and Susan also preserved error on this argument by raising it with the District Court through their Petitions for Judicial Review and their briefs to the Court. App. 10-95, 107-58.

Judicial review of agency actions is governed by Iowa Code section 17A.19. See Iowa Code § 17A.19; Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522, 530 (Iowa 2017) (citing Kay-Decker v. Iowa State Board of Tax Review, 857 N.W.2d 216, 222 (Iowa 2014)). This Court is to '"apply the standards of section 17A.19(10) to determine if [it] reaches the same results as the district court."' Id. (quoting Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8, 10 (Iowa 2010)). The District Court may reverse, modify or grant other appropriate relief from agency action if the substantial rights of petitioner have been prejudiced because the agency action meets any one of fourteen grounds listed. Iowa Code § 17A.19(10).

Four of the fourteen grounds listed in Iowa Code section 17A.19(10) specifically relate to an agency's interpretation of a provision of law. First,

an agency action may be reversed or modified if the action is "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Id. at § 17A.19(10)(c). Second, an agency action may also be reversed or modified if it is "[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency." Id. at § 17A.19(10)(l); see also id. at § 17A.19(10)(m) (providing similar irrational, illogical and wholly unjustifiable standard to agency's application of law to fact). Third, an agency's action may be reversed if it is beyond the agency's authority or in violation of any provision of law. Id. at § 17A.19(10)(b). Fourth, an agency's action may be reversed or modified if it is not required by law and its negative impact on private rights is so grossly disproportionate to the public interest that it lacks foundation in rational agency policy. Id. at § 17A.19(10)(k).

This Court has held that review of an agency's interpretation of a provision of law is "under either the highly deferential 'irrational, illogical or wholly unjustifiable' standard, or the nondeferential errors-at-law standard." Iowa Dental Ass'n v. Iowa Insurance Division, 831 N.W.2d 138, 142-43 (Iowa 2013). Deference is given "only if our legislature clearly

vested authority to interpret the provision with the agency." Id. at 143 (citing Iowa Code § 17A.19(10)(c)); Iowa Code § 17A.19(11). Accordingly, in order to determine the appropriate standard of review, the Court must first address whether the agency (in this case, the Department) has been clearly vested with authority to interpret the provision of law at issue. On this issue, the District Court did not undertake this analysis, but rather simply concluded that "the expertise of the agency justifies some degree of deference to [the Department] and the Director in their determination of whether the transfer was for fair market value." App. 167. The giving of deference to the Department or its Director based upon general "expertise" was in error.

Here, Edward and Susan's challenge is to the Department's interpretation of its rules as well as federal law regarding Medicaid eligibility and pooled trusts. In Eyecare v. Department of Human Services, the Iowa Supreme Court specifically held that the Department is *not* clearly vested with interpretive authority over Medicaid-related rules:

> Iowa Code section 249A.4 empowers the director of [the Department] to adopt rules regarding reimbursement for medical and health services for Medicaid patients. [The Department] argues because the legislature has given them broad or sole authority to run the Medicaid program, it has the power to interpret its own rules and regulations. However, the statute does not clearly give [the Department] the authority to interpret its rules and regulations. See State v. Public

> Employment Relations Board, 744 N.W.2d 357, 360 (Iowa 2008) (finding the power to enact, implement, and administer rules and regulations is not the same as the power to interpret them); Mosher v. Department of Inspections & Appeals, 671 N.W.2d 501, 509 (Iowa 2003) (finding "general regulatory authority… does not qualify as legislative delegation of discretion" to the agency). As the legislature has not clearly vested [the Department] with the authority to interpret its rules and regulations, we will not defer to [the Department]'s interpretation. Therefore, our review of [the Department]'s interpretation of its rules and regulations is for correction of errors at law.

Eyecare v. Department of Human Services, 770 N.W.2d 832, 836 (Iowa 2009) (citing Iowa Code § 17A.19(10)(c)). Because it is clear that the Department has not been clearly vested with the discretion to interpret its own Medicaid-related rules, the Department most certainly is not vested with discretion to interpret federal statutes and rules relating to Medicaid. See Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (citing Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989)) (holding that when state agency is involved in interpreting a federal statute, deference is not appropriate). Accordingly, the District Court erred when it failed to apply the non-deferential error at law standard to its review of the Department's actions in this matter. See Iowa Dental Ass'n, 831 N.W.2d at 143; Iowa Code § 17A.19(11).

Even if the Department's interpretation of the law at issue were entitled to deference, the Department's actions are still subject to reversal if

they are irrational, illogical or wholly unjustifiable and/or "unreasonable, arbitrary or an abuse of discretion." Iowa Code §§ 17A.19(10)(i), (l), (n). This Court has held that even when giving weight to the agency's interpretation, "the meaning of any statute is always a matter of law to be determined by the court." Birchansky Real Estate, L.C. v. Iowa Department of Public Health, 737 N.W.2d 134, 138-39 (Iowa 2007) (citing City of Marion v. Department of Revenue & Finance, 643 N.W.2d 205, 206 (Iowa 2002)). The Court has long recognized that it is not bound by an agency's interpretation of an administrative rule. See Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598, 601 (Iowa 1990). Additionally, the Court must not give deference to an agency's interpretation of its own rule when the interpretation is plainly inconsistent with the rule. Des Moines Independent Community School District v. Department of Job Service, 376 N.W.2d 605, 609 (Iowa 1985) (citing Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470, 475 (Iowa 1983)). Accordingly, even under this arguably more deferential standard, the Department's interpretation and application of the law as to Edward and Susan's eligibility should be reversed.

Agency actions are also subject to reversal for reasons other than the interpretation or application of law. See Iowa Code § 17A.19(10)(f), (j),

(m), (n). "Unreasonable" is defined as the agency acting '"in the face of evidence as to which there is no room for difference of opinion among reasonable minds…or not based upon substantial evidence.'" Greenwood Manor v. Iowa Department of Public Health, 641 N.W.2d 823, 831 (Iowa 2002) (quoting Citizens Aide/Ombudsman v. Rolfes, 454 N.W.2d 815, 819 (Iowa 1990) (further citation omitted in original)). A separate ground of the judicial review standards specifically recognizes that agency decisions must be supported by substantial evidence in the record when that record is reviewed as a whole. Iowa Code § 17A.19(10)(f). Substantial evidence is defined as "the quality and quantity of evidence that would be deemed sufficient by a neutral, detached and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be of serious and great importance." Id. at § 17A.19(10)(f)(1). This substantial evidence review must involve a "fairly intensive review of the record to avoid rubber-stamping the agency's finding." Federal Express Corp. v. Mason City Human Rights Commission, 852 N.W.2d 509, 511 (Iowa Ct. App. 2014) (citing Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003)).

In reviewing an agency decision, the Court may also consider whether the agency appropriately considered the information presented to it. Iowa

Code § 17A.19(10)(j). The Court may reverse the Department's decision if during the decision-making process, the Council "did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision-maker in similar circumstances would have considered prior to" granting the application. Id. As set forth below, the Department failed to engage in a factual review of the information presented to it with regard to the alleged improper pooled trust transfers by Edward and Susan. Accordingly, the Department's decision must be reversed for its failure to consider relevant information and failure to have any evidence – let alone substantial evidence – to support its findings. Id. at §§ 17A.19(10)(f), (j).

B. The Department's Final Decision, and the District Court's Approval of it, Erroneously, Irrationally, Unreasonably and Arbitrarily Penalized Edward and Susan.

In 1993, the United States Congress enacted the Omnibus Reconciliation Budget Act, which sought to stop divestment of assets into irrevocable trusts by wealthy individuals who then sought to qualify for Medicaid. See Lewis v. Alexander, 685 F.3d 325, 332-33 (3d Cir. 2012), cert. denied 133 S.Ct. 933 (2013). The Act was successful in that it eliminated this practice by providing that the income and assets of self-settled trusts would be deemed available if the trustee could make a

distribution to the grantor under any circumstances. 42 U.S.C. § 1396p(d)(3)(B)(i). Under this federal act and the Iowa law that was enacted to comply with it, assets that an individual transfers to a trust for his or her own benefit are generally treated as the person's assets for purposes of determining his or her eligibility for Medicaid. See 42 U.S.C. § 1396p(d)(2)(A); Iowa Admin. Code r. 441-75.24(2).

However, Congress did not completely prohibit the establishment of trusts. Rather, it carved out three types of exempt trusts – special needs trusts, Miller Trusts and pooled trusts. 42 U.S.C. § 1396p(d)(4)(A), (B), (C). Iowa law provides the same exceptions. Iowa Admin. Code r. 441-75.24(3)(a), (b), (c). The purpose of these exceptions is to allow certain individuals living with chronic diseases or disabilities to pay for goods and/or services that would sustain their most basic needs. Lewis, 685 F.3d at 332-33 ("[Congress's] primary objective was unquestionably to prevent Medicaid recipients from receiving taxpayer-funded health care while they sheltered their own assets….But its secondary objective was to shield special needs trusts from impacting Medicaid eligibility."). The exclusion of special needs and pooled trusts from the general rule has been recognized by other courts. In re: the Guardianship of Scott G.G., 659 N.W.2d 438 (Wisc. Ct. App. 2003) (holding that a special needs trust comprised of funds from a

claims settlement is an exception to the general rule of trusts being a countable asset and referring to the trust as a "Medicaid Payback Trust"); Department of Social Services v. Saunders, 724 A.2d 1093 (Conn. 1999) (holding that trusts funded with proceeds from a negligence settlement could be created and would not be considered a countable resource).

The Department did not dispute that Edward and Susan validly created pooled special needs trusts and thus, such assets could not be counted as a resource when determining whether they were eligible for Medicaid. App. 419 (holding that the parties agree that the trusts involved here qualify as pooled or C trusts under federal and state rules and regulations); App. 324-25 (Appeal Summary re: Edward quoting policy specialist who stated that "the trust retains its exempt status, the assets are not considered a countable resource…"); App. 326-27 (Appeal Summary re: Susan stating that the trust was approved and that the trust met "all required qualifications.").

Despite the Department's acknowledgment, its actions ultimately penalize Edward and Susan as if the trusts are a countable resource. The period of ineligibility determined for Edward and Susan is based upon the statewide average cost to a private-pay resident of a nursing facility. App. 321-23; Iowa Admin. Code r. 441-75.23(3) (describing the calculation for

determining the number of months of ineligibility). Practically speaking, the Department's determination requires Edward and Susan to use the funds deposited in the pooled trusts – or perhaps even go into debt if the actual costs of their nursing facility or supplemental care are higher than the statewide average cost – before they can receive Medicaid. App. 304-06 (showing that actual costs paid for Edward and Susan's nursing facility care exceed the statewide average cost of $5,407.24 per month and thus, showing that Edward and Susan will deplete those funds well before their ineligibility expires). In effect, the amounts deposited into the pooled special needs trusts are serving as a countable resource to bar Edward and Susan from receiving Medicaid funds, even though the Department agrees that the trusts are not a countable resource. App. 324-27.

It is inconsistent for the Department to determine that Edward and Susan's pooled special needs trusts are not a countable resource, but then to penalize Edward and Susan for placing funds into those trusts. In effect, the resources *are* being counted against Edward and Susan to prohibit their eligibility for Medicaid, and they are being subjected to the same treatment as a person who established a prohibited trust. This is certainly not what Congress intended, and the Department's determination is erroneous, irrational, illogical, unreasonable and lacks any foundation in rational

agency policy. Iowa Code §§ 17A.19(10)(b), (c), (i), (k), (l), (m), (n); see Lewis, 685 F.3d at 332-33.

C. The District Court Erred in Upholding the Department's Erroneous Decision that Edward and Susan's Deposits into the Pooled Special Needs Trusts Delayed Their Eligibility for Medicaid.

In the Notices to Edward and Susan, the Department asserted that eligibility for Medicaid would be delayed, because their respective deposits into the National Pooled Trust were a disposal of assets for less than fair market value. App. 324-27 (citing Iowa Admin. Code r. 441-75.23). The Final and Proposed Decisions incorrectly held that the deposits by Edward and Susan were a transfer or disposal of assets for less than fair market value. App. 420-21, 447-55. The District Court's Ruling and Order was erroneous in its approval of the Final Decision and in it finding that the Director actually conducted a fair market value analysis. App. 163-67. For a number of reasons, the Department's decision to delay Edward or Susan's eligibility for Medicaid and the District Court's approval of such delay is erroneous, irrational, illogical, unreasonable, arbitrary and/or an abuse of discretion and thus, should be reversed. See Iowa Code §§ 17A.19(10)(c), (i), (k), (l), (m), (n). Each of these reasons will be addressed below.

1. Edward and Susan's deposits were not a transfer or disposal of assets.

Iowa Administrative Code section 441-75.23(8) provides the following definition for the transfer or disposal of assets:

> "Transfer or disposal of assets" means any transfer or assignment of any legal or equitable interest in any asset as defined above, including:
>
> 1. Giving away or selling an interest in an asset;
> 2. Placing an interest in an asset in a trust that is not available to the grantor (see 75.24(2) "b"(2));
> 3. Removing or eliminating an interest in a jointly owned asset in favor of other owners;
> 4. Disclaiming an inheritance of any property, interest, or right pursuant to Iowa Code section 633.04 on or after July 1, 2000 (see Iowa Code section 249A.3(11) "c");
> 5. Failure to take a share of an estate as a surviving spouse (also known as "taking against a will") on or after July 1, 2000, to the extent that the value received by taking against the will would have exceeded the value of the inheritance received under the will (see Iowa Code section 249A.3(11) "d"); or
> 6. Transferring or disclaiming the right to income not yet received.

Iowa Admin. Code r. 441-75.23(8). The deposits made by Edward and Susan into the pooled trusts do not meet any of these six identified categories of transfers. The only subpart that even discusses the deposit of funds into a trust is item number two, but even that category is inapplicable.

In describing the type of trust that falls under item number two, the drafters of this section of the Iowa Administrative Code referred to section 441-75.24(2)(b)(2). Iowa Administrative Code section 441-75.24(2) describes the proper treatment of revocable and irrevocable trusts, with

revocable trusts being described in subsection (a) and irrevocable trusts being described in subsection (b). However, pooled special needs trusts – the type of trusts into which Edward and Susan deposited funds – are not described in Iowa Administrative Code section 441-75.24(2). Rather, such trusts are given their own specific description under the "Exceptions" described in Iowa Administrative Code section 75.24(3)(c). Accordingly, the type of trusts into which Edward and Susan deposited funds is not described in the Iowa Administrative Code section referenced in the definition of "transfer or disposal of assets." Because the drafters of the Iowa Administrative Code did not include the Administrative Code section that pertains to pooled special needs trusts, it is clear that they did not intend to include deposits into such trusts as a "transfer or disposal of assets." The intent of a rule can be expressed by omission and '"the express mention of one thing implies the exclusion of others not so mentioned.'" De Stefano v. Apartments Downtown, Inc., 879 N.W.2d 155, 183 (Iowa 2016) (quoting Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008); Meinders v. Dunkerton Community School District, 645 N.W.2d 632, 637 (Iowa 2002)).[2]

[2] Although these cases discuss construction of a statute, the Iowa Supreme Court has held that it will apply the rules of statutory construction to the construction of administrative rules. See Office of Consumer Advocate v. Iowa Utilities Board, 744 N.W.2d 640, 643 (Iowa 2008) (citing Hollinrake, 452 N.W.2d at 601).

The Final and Proposed Decisions attempt to avoid this result by stating that the reference to Iowa Administrative Code section 441-75.24(2)(b)(2) "merely refers the reader to the rule regarding the general treatment of trusts." App. 420, 447, 451. This assertion is without basis in the actual language used, because the reference is not to the "general" treatment of trusts, but rather to a specific subsection of trusts that does *not* include pooled special needs trusts. This is, as stated above, a clear indication that the definition of transfer was not being applied to pooled special needs trusts, which are an exception to this general rule. See Iowa Admin. Code r. 441-75.24(3)(c). The District Court ignored this argument and rather than analyze the definition set forth above, simply assumed that a transfer occurred. App. 163-67.

The Department's determination and the District Court's assumption that the deposits made by Edward and Susan into the pooled trusts were transfers or disposals of assets is an erroneous interpretation of a provision of law or is otherwise an irrational, illogical or wholly unjustifiable interpretation of the law or application of law to fact. See Iowa Code § 17A.19(10)(c), (l), (m). Accordingly, such determination should be reversed.

2. Even if the deposits constituted a transfer, the Department erred in deeming them to be a transfer for less than fair

market value.

Even if the deposits by Edward and Susan into the pooled trusts constituted a transfer or disposal of assets, the Final and Proposed Decisions incorrectly held that any transfer into the trust after Edward and Susan turned age 65 was "automatically" a transfer causing ineligibility. App. 421-22, 449-50, 453-54.[3] The Department failed to do any analysis to determine what the funds placed into the trust would be used for or whether such use constituted a transfer for fair market value. App. 405-08, 410 (Tr. 20:21-21:1, 23:16-24:20, 27:3-23) (providing testimony of Department that it did not do any analysis to determine whether the transfers were for fair market value or other valuable consideration). Instead, the Department relied solely upon a statement in its Employees' Manual (hereinafter "the Manual"), which provides that "[a]ny additions made to the [pooled] trust after the trust beneficiary reaches age 65 will be considered a transfer of assets for less than fair market value." App. 324-28, 406, 410 (Tr. 21:2-5, 27:18-23).

[3] If the transfer provisions apply to pooled trusts at all, the law does not just limit allowable transfers to those for fair market value. Rather, it also provides that a transfer is allowable (and does not subject an applicant to disqualification for benefits) if it is for "other valuable consideration." Iowa Admin. Code r. 441-75.23(5)(c)(1); 42 U.S.C. § 1396p(c)(2)(C). This is certainly a broader concept than fair market value and recognizes that there may be other indirect benefits that make the transfer allowable. The Department's and District Court's complete avoidance of this additional language also violates the basic rules of statutory construction. See Miller v. Westfield Insurance Co., 606 N.W.2d 301, 305 (Iowa 2000).

There are multiple reasons that the Department's conclusion, its reliance upon the statement in this Manual, and its failure to conduct any assessment as to whether the transfers were for fair market value violate the provisions of Iowa Code section 17A.19(10).

The District Court also relied upon the Manual and attempted to escape this issue by erroneously holding that the Director's Final Decision did not apply this "per se" policy. App. 165-67. The District Court asserted that because the Director agreed that the funds placed in the trust and paid out for Susan's benefit before the beginning of the penalty period should be deducted from the amount used to calculate the penalty period, the Director had conducted an individual review "and concluded that the assets were transferred for less than fair market value." App. 167 (citing App. 449-50, 453-54). This statement by the Director, however, was not an analysis of the individual transactions and whether they were for fair market value. App. 449-50, 453-54. Rather, just like the Manual, the Director simply picked a date in time (the beginning of the penalty period) and determined that any payments made from the trust after such time should not be reduced from the total utilized to make the penalty period calculation, whereas payments made from the trust before such time would be reduced from such total. App. 449-

50, 453-54. This was not a fair market value analysis of the individual transactions.

The Department and District Court's reliance on the Manual is erroneous, because the Manual is not a validly adopted rule and thus, it does not have the force of law. See Anderson v. Iowa Dept. of Human Services, 368 N.W.2d 104, 108 (Iowa 1985) (citing Bonfield, Administrative Procedures Act, 60 Iowa Law Rev. 731, 835 (1975) (citing, in turn, what is now Iowa Code § 17A.2(11)(c)); see also Ramey v. Reinertson, 268 F.3d 955, 963 (10th Cir. 2001) (holding that a federal Medicaid Manual "does not have the force and effect of law, nor is it binding on this court, because it was not promulgated pursuant to the notice and comment requirements" of the federal equivalent of Iowa Code chapter 17A). Because the Manual is not a validly adopted rule and does not have the force of law, it should not be followed if it conflicts with applicable statutes or administrative rules. See Ramey, 268 F.3d at 963 (citing New Mexico Department of Human Services v. Department of Health & Human Services Health Care Finance Administration, 4 F.3d 882, 885 (10th Cir. 1993)).

Not only does the Manual lack the force of law, the statement that any payments made to the trust are for less than fair market value conflicts with or is otherwise not supported by the language of the applicable statutes and

administrative rules. The Department purported to rely upon Iowa Administrative Code sections 441-75.24(3)(c) and Iowa Code sections 633C.1 and 633C.2 for the statement in the Manual that any additions to the trust after age 65 are for less than fair market value. None of these provisions support this summary and per se determination of fair market value. Iowa Administrative Code section 441-75.24(3)(c) identifies the elements required for a pooled special needs trust:

> *c.* A trust containing the assets of an individual who is disabled (as defined in 1614(a)(3) of the Social Security Act) that meets the following conditions:
>
> (1) The trust is established and managed by a nonprofit association.
>
> (2) 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.
>
> (3) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in 1614(a)(3) of the Social Security Act) by the parent, grandparent, or legal guardian of the individuals, by the individuals or by a court.
>
> (4) To the extent that amounts remaining in the beneficiary's account upon death of the beneficiary are not retained by the trust, the trust pays to the state from the remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

Iowa Admin. Code r. 441-75.24(3)(c). Nothing in this provision provides any support for the Manual's statement that a deposit into a pooled trust after

the age of 65 is deemed a transfer below fair market value. Iowa Code section 633C.1 provides the definitions applicable to chapter 633C, which governs Medical Assistance Trusts. However, none of those definitions discuss fair market value or provide an age restriction as to when a deposit is considered to be for fair market value. See Iowa Code § 633C.1. Section 633C.2 simply provides that the addition of assets in such trusts "shall be used in accordance with a standard that is no more restrictive than specified under federal law"[4] and that the Department is to adopt rules regarding the establishment and disposition of such trusts. Id. at 633C.2.

Both federal and state laws require a case-by-case factual analysis of whether a transfer is for fair market value or other valuable consideration, which the Department, its Director and the District Court did not do. 42 U.S.C. § 1396p(c)(2)(C); Iowa Admin. Code r. 441-75.23(5)(c); Hutson v. Mosier, 401 P.3d 673, 681-83 (Kan. Ct. App. 2017) (holding that in order to impose transfer penalty, facts must be shown to support that the transfer was

[4] The federal requirements to establish a pooled trust are identical to the requirements outlined in Iowa Administrative Code section 441-75.24(3)(c), which is set forth above. While another provision of federal law – 42 U.S.C. section 1396p(c)(2)(B)(iv) – provides that assets transferred to such trusts for a person *under* age 65 do not constitute a transfer causing ineligibility, it does not state that transfers by a person over 65 are automatically a transfer causing ineligibility. Rather, transfers of any kind (even if applicable to a pooled trust once a person is over 65) are then subject to the fair market value analysis and do not cause ineligibility if they are for fair market value or other valuable consideration. See 42 U.S.C. § 1396p(c)(2)(C).

not for fair market value and holding that the fair market value determination is a question of fact, not a question of law); App. 324-27, 405, 410 (Tr. 20:21-21:5, 27:10-23), 449-50, 453-54. These provisions provide that if a "satisfactory showing" is made that *one* of the following is true, then the transfer at issue will not cause ineligibility for Medicaid benefits:

> (1) The individual intended to dispose of the assets *either at fair market value, or for other valuable consideration;*
> (2) The assets were transferred exclusively for a purpose other than to qualify for medical assistance.
> (3) All assets transferred for less than fair market value have been returned to the individual.

Iowa Admin. Code r. 441-75.23(5)(c) (emphasis added); see also 42 U.S.C. § 1396p(c)(2)(C) (providing same). These provisions clearly require a case-by-case analysis of what the individual intended with regard to the transfer. See id. If a case-by-case analysis was not required, there would be no purpose for these provisions. See Miller, 606 N.W.2d at 305 (holding that a statute will not be construed to make any part of it superfluous). Accordingly, the Department's and District Court's summary determinations that every transfer to a pooled trust after a person is 65 years old results in ineligibility is wholly inconsistent with the applicable administrative rules and is an erroneous and illogical interpretation of applicable law. See Iowa Code §§ 17A.19(10)(c), (l), (m), (n).

A Minnesota state court addressed a similar situation and held that the transfer to a pooled trust cannot be a *per se* improper asset transfer. Peittersen v. Minnesota Department of Human Services, Findings of Fact, Conclusions of Law and Order, Case No. 19HA-CV-11-5630 (Minn. 1st Judicial District, Oct. 2, 2012), App. 329-36. Rather, the Court held that a factual analysis must be conducted to determine if the transfer was for less than fair market value. Id. at ¶¶ 7-9, App. 331.

Additional cases from Minnesota further support the conclusion that a case specific fair market value analysis must be done and/or that Edward and Susan's deposits into the trust do not delay their eligibility for Medicaid. In a recent case from Minnesota, a judge held that a transfer by a 77 year old into a pooled trust was for fair market value, because she "gained an immediate vested equitable interest in the trust assets, the value of which roughly equaled the value of appellant's interest." Doe (Redacted) v. Winona County Dept. of Human Services, Decision of State Agency on Appeal, Docket No. 186029, at p. 9 (Minn. Dept. of Human Services March 13, 2017), App. 128. In support of this finding, the judge cited to the articles of the trust that required the assets in the trust to be used for the appellant's supplemental needs and to be used for the appellant's sole benefit and not to reduce or substitute government assistance. Id. Similar provisions exist in

Edward and Susan's pooled trusts. App. 227, 229, 230-32, 234 (at §§ 1.1, 2.11, 3.1, 5.1, 5.2, 5.7), 244 (at § 2.04), 271 (at § 2.04). The judge also recognized the ridiculousness of requiring the appellant to "immediately spend-down all assets" transferred into the trust to establish that cash or other valuable consideration had been provided in exchange and stated that "such compensation may be received before, at or after the actual time of transfer, and appellant provided sufficient evidence…of [her] expected use of these funds to meet her supplemental needs over a future period…." Doe (Redacted), Decision of State Agency on Appeal, p. 9, App. 128. Prior cases from Minnesota District Courts made similar conclusions. See Dziuk v. Minnesota Dept. of Human Services, Findings of Fact, Conclusions of Law, Order for Judgment and Judgment, File No. 21-CV-09-1074 (7th Judicial District Minn. Feb. 7, 2012), App. 131-35 (holding that the state failed to provide any analysis that transfer into the pooled trust was not for fair market value); Beinke v. Minnesota Dept. of Human Services, Order, File No. CV-14-271 (5th Judicial District Minn. June 24, 2014), App. 136-45 (holding that appellant received not only fair market value for items already purchased, but also "the value of an equitable interest in the remaining trust assets" as well as the value of the trustee managing and investing assets for her benefit). An administrative law judge in Colorado also held similarly in

2015. Doe (Redacted) v. El Paso County Dept. of Human Services, Initial Decision, Case No. SHP 2014-0929 (Colorado Office of Administrative Courts Jan. 28, 2015), App. 146-58 (holding that a 98 year old's deposit of funds into a pooled trust was for fair market value and relying upon the fact that funds could only be used for her supplemental needs and the spending plan submitted for future purchases from the trust).

The requirement that transfers like those by Edward and Susan must be separately assessed to determine whether they are for fair market value or other consideration is also supported by decisions from the Macomb County Circuit Court in Michigan. See Estate of Wierzbinski, Opinion and Order, App. 367-71; Masters v. State of Michigan, Department of Human Services, Opinion and Order, Case No. 2011-5372-AA (Macomb County Cir. Ct., Aug. 9, 2012), App. 372-79; Masters, Opinion and Order (on Motion for Reconsideration), App. 380-83.

The Department and the District Court relied upon an Eighth Circuit Court of Appeals decision to support the finding that the transfers at issue were automatically for less than fair market value. App. 163-64, 422, 449, 453. The Department and the District Court, however, completely ignored the facts of the Eighth Circuit case and the language used in that decision. In that case, the Court held that "a disabled individual over 65 may establish

a type "C" pooled trust, but *may* be subject to a delay in Medicaid benefits." Center for Special Needs Trust Administration, Inc. v. Olson, 676 F.3d 688 (8th Cir. 2012) (emphasis added).[5] By using the term "may" (and not "shall"), the Court clearly held that not all transfers after the age of 65 automatically result in a delay of Medicaid benefits. Id. Although the Court stated that Congress intended to wholly exempt transfers by persons under the age of 65, the Court did not address the issue of whether the transfers at issue in the case could also be exempt as fair market value transfers. Id. While a deposit into a pooled trust by a person under age 65 is specifically exempt, the reverse (all deposits by persons over age 65 result in a penalty) is not automatically true. Federal and state law clearly provides that transfers can be exempt for reasons other than the age of the transferee. See Iowa Admin. Code r. 441-75.23(5)(c); 42 U.S.C. § 1396p(c)(2)(C). Because the Eighth Circuit Court did not reach this issue, the decision in Center for

[5] The District Court also relied upon a statement from the Social Security Administration's Program Operations Manual System. App. 165-66. Statements from the Program Operations Manual System are only guidelines that do not have the force and effect of law. 1 Social Security Law & Practice, § 1.28. Furthermore, this statement, like the Court in Olson, simply provides that there *may* be a transfer penalty when transfers to a trust occur for an individual over 65. App. 166 (citing Program Operations Manual System, § SI 01120.203, available at https://secure.ssa.gov/poms.nsf/lnx/0501120203 (last updated May 14, 2013)). Accordingly, it does not support the per se determination made by the Department regarding Edward and Susan's penalty periods.

Special Needs Trust Administration, Inc. v. Olson has no applicability. The Department and the District Court's reliance on it is erroneous, illogical and unreasonable. App. 422, 449, 453.

The District Court also relied upon In re Pooled Advocate Trust, 813 N.W.2d 130 (S.D. 2012) in its Ruling and Order. App. 164-65. Like Olson, this case is distinguishable from the issue at hand. The South Dakota Supreme Court held that the individuals at issue had not shown any purchases by the trust and more importantly, the trust document did not guarantee "that a beneficiary's transfer will be used to benefit that beneficiary." Id. at 147. That is very different from here where both Edward and Susan's trust documents specifically provide that the pooled trust funds can *only* be used for Edward and Susan's respective care. App. 227, 229 (at §§ 1.1, 2.9), 244 (at § 2.04), 271 (at § 2.04), 415 (Tr. 34:3-13).

The District Court's reliance on a 2008 Memorandum from the Centers for Medicare and Medicaid Services suffers the same fate as the Manual and cases relied upon by the District Court. App. 159-69. The Memorandum, which was not part of the record in this case, is not a validly adopted rule, lacks the force of law and should not be followed if it conflicts with applicable statutes or administrative rules. See Ramey, 268 F.3d at 963; see also 1 Social Security Law & Practice, § 1.30 (stating that like

Manuals, interpretive policy statements that "merely set forth CMS's interpretation of the law and regulations" do not make new law). The Memorandum, which was not relied upon by the Department in making its determination, states that placing funds in a pooled trust *may be* or *usually* is a transfer for less than fair market value. App. 164-65 (citing 2008 Memorandum). This Memorandum does not create a per se rule regarding transfers into the trust, because it does not state that *every* transfer into a trust is for less than fair market value. App. 164-65. As set forth above, Edward and Susan are asking that such fair market analysis be done, like so many other courts have agreed is required under the same federal law.

The Department's "per se ineligibility" finding and the District Court's approval of such finding are also inconsistent with the supplemental provisions of the Iowa Code and Iowa Administrative Code. Under the supplementation provisions, a Medicaid recipient is allowed to supplement or use his/her own funds (or the funds of a relative) to pay for certain specified items. See Iowa Code § 249A.4(10); Iowa Admin. Code r. 441-81.10(5); see also 42 C.F.R. § 483.10(c)(8)(ii). These statutory and administrative code provisions generally allow for a Medicaid recipient to directly pay (either from their own resources or from family resources) for the following items:

1. Additional expenses relative to having a private room in a nursing facility;
2. Telephone;
3. Television/radio for personal use;
4. Personal comfort items, including smoking materials, notions and novelties, and confections;
5. Cosmetic and grooming items and services in excess of those for which payment is made under Medicaid or Medicare;
6. Personal clothing;
7. Personal reading matter;
8. Gifts purchased on behalf of a resident;
9. Flowers and plants;
10. Social events and entertainment offered outside the scope of the activities program;
11. Noncovered special care services such as privately hired nurses or aides;
12. Specially prepared or alternative food requested instead of the food generally prepared by the facility.

See Iowa Code § 249A.4(10); Iowa Admin. Code r. 441-81.10(5); 42 C.F.R. § 483.10(f)(11)(ii). The simple existence of these provisions recognizes that a Medicaid recipient may have funds available to him or her to pay for such items, without being deemed ineligible for Medicaid. Furthermore, if the funds in a pooled trust are intended to cover these types of expenses, it is clearly a supplementation that is allowed and as described more fully below, one that can be for fair market value or for other valuable consideration. See Iowa Admin. Code r. 441-75.23(5)(c); 42 U.S.C. § 1396p(c)(2)(C).

Finally, the Department and the District Court also failed to consider that upon the death of the beneficiary, pooled trusts are required to "pay to

the state the remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary" to the extent such funds are not retained by the trust. Iowa Admin. Code 441-75.24(3)(c)(4); 42 U.S.C. § 1396p(d)(4)(C)(iv); see App. 234-35 (at §§ 6.1-6.3) (providing how distributions would be paid at Beneficiary's death in accordance with these requirements). This requirement that the state receive funds that are not retained by the trust at the time of the beneficiary's death clearly supports the notion that the existence of funds in such trust – regardless of when they were transferred – will not make the beneficiary per se ineligible for benefits until those transfers are wholly depleted. If the beneficiary – such as Edward or Susan – were per se ineligible until such funds were utilized, then there would be no funds left to transfer to the State upon their death and thus, no reason for this provision. See Miller, 606 N.W.2d at 305 (quoting Civil Service Commission v. Iowa Civil Rights Commission, 522 N.W.2d 82, 86 (Iowa 1994); George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 500 (Iowa 1983), overruled on other grounds by Henriksen v. Younglov Construction, 540 N.W.2d 254, 258 (Iowa 1995)) (stating that a statute will not be construed "to make any part of it superfluous unless no other construction is reasonably possible" and that it is

presumed that "the legislature included every part of a statute for a purpose and intended each part be given effect").

The Department's and District Court's summary determinations that Edward and Susan's deposits into the pooled trusts after the age of 65 made them ineligible for Medicaid is not supported by the applicable statutes or rules. Application of the provisions of the Manual are inconsistent with the law and not enforceable. Such determinations are in violation of numerous provisions of Iowa Code section 17A.19(10) and thus, should be reversed. See Iowa Code §§ 17A.19(10)(c), (g), (i), (l), (m), (n) (providing that agency action should be reversed if it is based upon an erroneous interpretation of the law, action other than a rule that is inconsistent with the rule of an agency, the product of reasoning that is so illogical as to render it wholly irrational, based upon an irrational, illogical or wholly unjustifiable interpretation of law or application of law to fact, and/or is unreasonable, arbitrary, capricious or an abuse of discretion).

3. The deposits made by Edward and Susan were for fair market value or other valuable consideration and thus, are not improper asset transfers causing ineligibility for Medicaid benefits.

Because the Department held that the transfers by Edward and Susan after age 65 were per se improper transfers causing ineligibility (at least as to those funds not actually used prior to the penalty date), it failed to conduct

any case-by-case analysis as to whether the deposits were for fair market value or other valuable consideration. App. 324-27, 405-08, 410 (Tr. 20:21-21:1, 23:16-24:20, 27:3-23), 423-24, 449-50, 453-54. Although the District Court claimed the Director conducted such analysis in the Final Decision, the only factor utilized was the timing of the payments made from the trust. App. 167. The Director's statement was simply another way to make the same statement made by the Manual – that money spent before the penalty period starts can be deducted from the calculation, but money spent after the penalty period starts is not deducted from the penalty calculation. App. 449, 453. As set forth above, the Department is clearly required to conduct such analysis to determine whether the deposits made by Edward and Susan into the pooled trusts were for fair market value or other valuable consideration. See Argument, § I.C.2 herein (citing Iowa Admin. Code r. 441-75.23(5)(c); 42 U.S.C. § 1396p(c)(2)(C)). If the Department had done this analysis, it would be clear that there is no evidence – let alone substantial evidence – to support such determination. In fact, both Department witnesses admitted that they had no evidence to dispute the following: (1) that the funds in Edward and Susan's respective pooled trusts would be used to purchase or pay for items or services that are at fair market value; and (2) that the funds placed in Edward and Susan's respective pooled trusts would not be used to

purchase or pay for items were not made for other valuable consideration. App. 408, 410 (Tr. 24:11-20, 27:3-17).

The Department and District Court's lack of factual analysis and over-emphasis on the Manual and similar policy statements is inconsistent with the law and with other courts who have addressed the concept of fair market value transfers into a pooled trust. Notably, the Department provided no contrary cases or analysis, and neither the Department[6] nor the District Court attempted to address or differentiate the cases that clearly support Edward and Susan's position. App. 416-27, 449, 453.[7]

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[6] The Final Decision simply held that these cases were not binding since they were from other states. App. 449, 453. The Department's reluctance to even try to differentiate these cases – all of which rely upon the same federal law underlying the Department's regulations and actions – is indicative of its inability to do so.

[7] The District Court cites to a July, 2008 letter from CMS Associate Regional Administrator Verlon Johnson in its Ruling and Order. App. 165. This letter was not part of the record submitted in this case, but rather a portion of it was cited by the South Dakota Supreme Court in In re Pooled Advocate Trust. Even if this letter were considered to be part of the record in this case, the statement relied upon by the District Court is not detrimental to Edward and Susan's argument. That portion of the letter simply provides that the states must follow the transfer of asset provisions relating to pooled trusts. App. 165. Edward and Susan's entire argument is based upon an analysis of the federal statute and the Iowa rules that are related to it. See Argument herein. Edward and Susan have not asked this Court or the District Court to ignore such law or rules. Rather, Edward and Susan have asked this Court and the District Court to construe, interpret and apply the law and rules, albeit in a different manner than the Department has done. Certainly, Edward and Susan's assertions regarding the transfer of asset law rules at issue have been accepted by numerous courts in other states, as more

In Peittersen v. Minnesota Department of Human Services, a Minnesota court deferred to the administrative judge's factual finding regarding whether Peittersen's transfers to the pooled trust after age 65 were for fair market value:

> The articles of the amended pooled trust agreement provide that the assets in [Ms. Peittersen's] sub-account can and must be used to meet [Ms. Peittersen's] supplemental needs to promote her comfort and well-being. Distributions are for her sole benefit to enhance the quality of her life so long as they do not replace, reduce or substitute government assistance. Inasmuch as the value of assets in [Ms. Peittersen's] LSS pooled trust sub-account had an equal value of the assets transferred into the account, and the corpus of the trust as well as the income on the corpus may only be used to benefit [her], *it cannot be determined that the transfer was for less than fair market value.*

Peittersen, Findings of Fact, Conclusions of Law and Order, p. 7, App. 335 (emphasis in original). Similarly here, the pooled trusts into which Edward and Susan deposited funds have and will be used for their own respective supplemental needs and care. App. 229 (at § 2.11) (defining "supplemental care" and "supplemental needs" as "care that is not provided, or needs that are not met, by any private assistance or government assistance that may be available to a Beneficiary"); App. 230 (at § 3.1) (stating that the assets held in sub-accounts are "not intended for the primary support of the

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fully described in this section, all of whom would be subject to the same federal requirements.

Beneficiaries and shall only be used for their supplemental care and/or supplemental needs"); App. 232 (at § 5.1) (stating that the Trustee shall pay or apply for the supplemental care or supplemental needs of each Beneficiary); App. 232 (at § 5.2) (stating that distributions from the trust should not be made to or for the benefit of a Beneficiary if the effect of such distribution is to replace or to disqualify a Beneficiary from receiving government assistance); App. 234 (at § 5.7) (stating that it is the "absolute duty" of the Trustee to make no disbursements or distributions that would cause the Beneficiary to become ineligible for government assistance). The corpus and the income of the trust can only be utilized for Edward and Susan's own respective benefit and at the discretion of the Trustee. App. 227 (at § 1.1) (stating that the amount in the trust is to be made available for the "sole benefit of the Beneficiaries hereunder"); App. 230 (at § 3.1) (holding that the right to the corpus or income is subject to the Trustee's "sole, complete, absolute and unfettered discretion"); App. 244, 271 (at § 2.02) (stating that the Beneficiary's sub-account "is established and shall be administered solely for the benefit of the Beneficiary"); App. 244, 271 (at § 2.04).

A Tennessee Court similarly held that the transfer to a pooled trust by a Medicaid applicant after he was over 65 was not a disqualifying transfer.

Beach, Memorandum and Order, App. 337-66. In support of this finding the Court cited to the following argument from the petitioner's brief:

> A penalty period is imposed when an individual has given away assets and has not received adequate consideration in return. However a disabled person who funds a pooled trust for her sole benefit during her lifetime has not made a disqualifying transfer because the individual has received fair market value for the transfer. As the beneficiary of a self-settled trust, Mrs. Beach has merely exchanged legal ownership for equitable ownership. As a matter of law, 42 U.S.C. § 1396p(d) and the *State Medicaid Manual*, she retains equitable ownership of the assets and therefore received fair value in return. The disabled beneficiary receives the benefit of goods and services purchased by the trust.

Id. at 29, App. 365. Under this analysis and the Court's reading of the applicable statues (the same federal statutes that are applicable herein), it reversed the agency's determination that the transfer of funds into the pooled trust made the Medicaid applicant ineligible. Id. at 30; App. 366.

A Michigan Court addressed a very similar situation in two different cases. Estate of Wierzbinski, Opinion and Order, App. 367-71; Masters, Opinion and Order, App. 372-79; Masters, Opinion and Order (on Motion for Reconsideration), App. 380-83. In these matters, the Court overturned an administrative law judge's holding that the applicants were ineligible for Medicaid for a certain period of time due to transfers into pooled trusts. App. 367-83. The Court stated the following to support its holding that the transfer into the pooled trust was not for less than fair market value:

> As noted, Wierzbinski transferred $284,663.59 in cash to the trust. The trust held this specific amount in an individual account for his benefit, establishing the transfer resulted in the acquisition of an asset with equal value. The record is devoid of any evidence suggesting Wierzbinski received less value for this resource than any other trust offered in the open market…. As noted, all of the trust principal and/or income could be paid to Wierzbinski. As a result, the funding of the trust with the cash was not a transfer for less than fair market value….

Estate of Wierzbinski, Opinion and Order, p. 5, App. 371; see also Masters, Opinion and Order, p. 6, App. 378 (holding that the record was devoid of any evidence establishing that Masters' funding of the trust with cash was a transfer for less than fair market value); Masters, Opinion and Order (on Motion for Reconsideration, p. 3, App. 382 ("Masters received a trust worth $22,072.92 for $22,072.92 in cash. Hence, the transfer was not for less than fair market value….Under the trust, the trustee can pay any portion of the trust principal and/or income for Masters' benefit at any time and without any monetary limitation. Consequently, the transfer was not for less than fair market value…."). Here, the amounts in Edward and Susan's pooled trust accounts are held for their benefit and there is no evidence that either Edward or Susan received less value for the trust than any other trust offered on the open market. App. 227 (at § 1.1), 244, 271 (at §§ 2.02, 2.04). Thus, the cases from Michigan wholly support a finding that Edward and Susan's

deposits into their respective pooled trusts were not for less than fair market value.

Although not in the context of Medicaid eligibility, a nearby bankruptcy court also assessed the transfer of assets to a special needs trust. See In re Schultz, 368 B.R. 832 (Bankr. D. Minn. 2007). In that case, the bankruptcy trustee attempted to set aside such transfer as a fraudulent transfer, which requires proof that the transfer was "not in exchange for reasonable equivalent value". Id. at 833, 836. In assessing the "reasonable equivalent value" of the transfer – a concept that is essentially identical to the "fair market value or other valuable consideration" standard at issue here – the Court stated that the whole transaction and all the benefits, whether direct or indirect, must be examined. Id. at 836. The Court further held that a '"determination of reasonable equivalent value is 'fundamentally one of common sense, measured against market reality.'" Id. (quoting In re Lindell, 334 B.R. 249, 256 (Bankr. D. Minn. 2005) (citing, in turn, In re Northgate Computer Systems, Inc., 240 B.R. 328 (Bankr. D. Minn. 1999)). Ultimately, the Court held that the debtor's transfer of funds received as a result of inheritance into a special needs trust was not a fraudulent transfer. Id. at 837. The Court specifically recognized that the debtor had limited access to the trust and that the funds could only be used for "special medical

care, equipment dental care, personal supervision, companion services, private room changes, counseling and treatment not covered by public funds." Id. at 835. Similarly here, the deposits made by Edward and Susan into the pooled trusts can only be used for supplemental care or supplemental needs, which is defined as care that is not provided, or needs that are not met, by any private assistance or government assistance that may be available. App. 229 (at § 2.11). Like Schultz, Edward and Susan also have limited access to the funds in the pooled special needs trusts, because the Trustee has the sole, absolute and complete discretion over the right to the corpus or income. App. 230 (at § 3.1).

There is no evidence – let alone substantial evidence – that the expenses or items that are intended to be purchased or have been purchased for the benefit of Edward or Susan from their respective pooled trusts were not for fair market value or other valuable consideration. App. 408, 410 (Tr. 24:11-20, 27:3-17). In fact, all such evidence actually supports the finding that the expenses or items purchased or intended to be purchased are for fair market value or for other valuable consideration.

The trust documents specifically provide that any purchases of items and/or services for the Beneficiary *shall be* at fair market value. App. 244, 271 (at § 2.03). The trust documents also make clear that the Trustee has no

authority to "purchase, exchange or otherwise deal with or dispose of the assets of any Trust sub-account for less than adequate or full consideration in money or money's worth, or to enable any person to borrow the assets of any Trust sub-account, directly or indirectly, without adequate interest or security." App. 237-38 (at § 8.8). The trust documents specifically prohibit the Trustee from using the funds for anything less than adequate or full consideration or for items that would create Medicaid ineligibility. App. 234, 237-38 (at §§ 5.7, 8.8). As an example, if the Trustee releases funds from Edward's trust to purchase a pair of shoes, that purchase would be for fair market value or other valuable consideration. The pair of shoes is an item of clothing that is not covered by Medicaid and thus, an item that Medicaid recipients are allowed to purchase under the supplementation statute and rules. Iowa Code § 249A.4(10); Iowa Admin. Code r. 441-81.10(5); 42 C.F.R. § 483.10(f)(11)(ii); App. 229, 230-32, 234 (at §§ 2.11, 3.1, 5.1, 5.2, 5.7) (provisions providing that funds in a trust sub-account can only be used for Beneficiary's supplemental care and supplemental needs and in such a way that does not disqualify the Beneficiary from receiving government assistance). Edward would likely purchase that pair of shoes from a retailer, which would certainly be for fair market value. Thus, the funds deposited into the pooled trust are being used to purchase an item (in

this case, a pair of shoes) for fair market value. Because the funds deposited in the pooled trust are intended to be used for only these purposes, then all funds used from the trust for these allowable purchases are, in fact, for fair market value. App. 229, 230, 232, 234 (at §§ 2.11, 3.1, 5.1, 5.2, 5.7).

The intended use of the funds is set forth in the Budget/Financial Plan for each beneficiary. App. 307-20. These Plans indicate that the funds for Edward and Susan are only intended to be used for items allowed under Iowa's supplementation statute. App. 307-20; Iowa Code § 249A.4(10) (citing to 42 C.F.R. § 483.10(f)(11)(ii)). For example, the funds in Edward's pooled trust are intended to be used for non-covered medical expenses, personal entertainment and cable/internet for his personal use. App. 310. The funds in Susan's pooled trust are intended to be used similarly as well as for personal comfort items and personal clothing. App. 317. This intent is further supported by the documents completed by Edward and Susan indicating the items for which they would like to see the funds utilized. App. 289, 295. In addition, all the evidence showed that the funds in Edward and Susan's pooled trusts have only been used for their respective supplemental care.[8] App. 304-06.

[8] Due to the denial of Medicaid benefits, Edward and Susan's pooled trusts have had to make the monthly payment to Westview Care Center in order to allow them to stay at the facility. This exhibits Edward and Susan's

Even after Edward and Susan's deaths, the funds in the pooled trusts will be used for fair market value or other valuable consideration. If the funds are not retained by the trust and money remains in the trust after the beneficiary (Edward or Susan) dies, then those funds will be paid to the state to reimburse it for amounts it paid under Medicaid for that respective beneficiary. See Iowa Admin. Code r. 441-75.24(3)(c)(4); App. 234-35 (at § 6.1-6.3), 245, 272 (at §§ 3:01-3:02). This "Medicaid payback" provision is one of the fundamental reasons that such pooled trusts and transfers into those pooled trusts are exempted from the general rule that trusts are a countable resource. See Scott G.G., 659 N.W.2d at 441-42.

Accordingly, the Department's determination and the District Court's Ruling and Order that Edward and Susan's deposits to their respective pooled trusts disqualified them for Medicaid is not supported by substantial evidence and completely ignores relevant and important information set forth in the trust documents and in the budget and financial plans. Because the Final and Proposed Decisions and the District Court's approval of the

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argument that they are in effect being denied Medicaid benefits – despite the fact that the creation of the pooled trust is not supposed to prohibit such benefits – and that the pooled trust funds will be depleted before either Edward or Susan are eligible for Medicaid benefits. The payments made to Westview Care Center are on average between $6,600 and $6,800 per month for each of them. App. 304-06. The statewide average cost used to determine the period of ineligibility was $5,407.24. App. 321-23.

decision to delay Edward and Susan's eligibility for Medicaid benefits was based upon a determination that is not supported by any evidence and ignored important information that would lead to the opposite conclusion, such decision must be reversed. See Iowa Code §§ 17A.19(10)(f), (j).

CONCLUSION

WHEREFORE for all the reasons stated herein, Appellants, Edward A. Cox and Susan E. Cox, respectfully request the Court reverse the Department's decision and find that Appellants were eligible for Medicaid as of the date of his or her application for such benefits, along with any allowable period of retroactivity. Appellants further respectfully request the costs of this action and any other order or relief as is allowed by law.

REQUEST FOR ORAL SUBMISSION

Pursuant to Iowa Rule of Appellate Procedure 6.908, Appellants request oral argument in this matter.

/s/ *Rebecca A. Brommel*
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 2, 2018, I electronically filed this Brief in accordance with Chapter 16 of the Iowa Rules of Court, which will electronically serve the following attorneys of record:

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/s/ *Rebecca A. Brommel* *May 2, 2018*

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