MEMORANDUM

To: **Medical Services Board**

From: **Conover Law, LLC, as counsel to Colorado Fund for People with Disabilities, Inc.**

Date: **November 5, 2019**

Re: **Opposition to Proposed Rule MSB 18-10-18-A**

Summary/Background

Proposed Rule MSB 18-10-18-A ("Proposed Amendment") is illegal under the Colorado State Administrative Procedure Act, and therefore, if adopted as proposed, will be void and unenforceable.

On October 31, 2019, the Department of Health Care Policy and Finance (the "Department") published to the Colorado Register a notice of proposed rule-making pursuant to which two substantive provisions of 10 C.C.R. 2505-10 § 8.100.7.E.6.c (the "Regulation") would be amended:

1) Individuals 65 and older would be prohibited from establishing or transferring assets to a pooled trust; and,

2) HCPF would be entitled to compensation for Medical Services provided to a beneficiary up to 50% of the balance of an account.

Only the Colorado General Assembly can effectuate the change that the Department seeks. The Proposed Amendment exceeds the Department's authority, conflicts with applicable statutes and, upon examining the underlying purpose and legislative intent underpinning pooled trusts, there is no conflict within the pooled trust statute as alleged by the Department. The regulation is therefore void and if passed, cannot be enforced. C.R.S. § 24-4-103(8)(a); *Cartwright v. State Bd.*

of Accountancy, 796 P.2d 51, 53 (Colo.App. 1990) ("… courts have a duty to invalidate administrative regulations which conflict with the design of a statute.")

I. The Department Cannot Legislate Through the Rule Making Process.

The Proposed Regulation exceeds the Department's rule-making authority and power.

An executive branch agency cannot legislate through the rulemaking process. This principal is expressly codified under the State Administrative Procedure Act, which states that: "[a]ny rule or amendment to an existing rule issued by any agency … which conflicts with a statute shall be void." C.R.S. § 24-4-103(8)(a). There is no presumption that a regulation is consistent with a statute simply because its wording does not expressly contradict the explicit wording of a statute. As stated in Administrative Procedure Act: "[a] rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute." *Id.*

Only the legislature can amend laws and enact statutes. Regulations, properly enacted, ***further*** the will of the General Assembly. A regulation cannot amend, expand, modify or contravene existing statutes. *See Miller International, Inc. v. State Dept. of Revenue*, 646 P.2d 341 (Colo. 1982) (Department of Revenue regulation that attempted to tax certain transactions not enumerated in statute was void for impermissibly amending and expand statute). As noted by the Colorado Supreme Court: "[a]s we have often said, a regulation must further the will of the legislature and may not modify or contravene an existing statute." *Id.*, at p. 344.

Courts have a duty to invalidate administrative regulations that conflict with the design of a statute. *Ettelman v. Colo. State Bd. Of Accountancy*, 849 P.2d 795, 797 (Colo.App. 1992). Because only the General Assembly can amend, expand, modify or contravene existing statutes, a

regulation that attempts to do so will be deemed to exceed an agency's authority, courts will declare it void, and will prohibit its application. *Miller International*, 646 P.2d at 345.

The Proposed Regulation is void because it seeks to amend, expand and/or modify the Colorado Probate Code. With respect to the payback provision, C.R.S. § 15-14-412.9(2)(e) permits retention of trust account balances by charitable pooled trust administrators, at the trustee's discretion, to include as much or as little of the balance as the trustee wishes. The Department lack authority to effectively amend this statute by to impose a restriction, whether that restriction is 50% or 100%. [1] Similarly, C.R.S. § 15-14-412.9(2)(c) does not impose an age restriction on the creation and/or funding of a pooled trust; by seeking to add an age restriction where the General Assembly did *not* is to engage in legislating, not rulemaking. *See Miller International* (voiding rule promulgated under statute where the statute was entirely silent on that issue, and requirement was borrowed from separate act within the C.R.S.)

II. Regulations Must be Consistent with the Colorado Probate Code as a Whole.

A regulation must be considered in light of the entire act under which it is promulgated. *Ettelman v. Colo. State Bd. of Accountancy*, 849 P.2d 795, 797 (Colo.App. 1992). The validity of a regulation is determined by reading and considering a statute as a whole, gleaning the statute's overall scheme and purpose and from that, ascertaining its legislative intent.

When viewed in light of the Colorado Probate Code as a whole, the Proposed Regulation clearly constitutes an impermissible amendment, modification, and/or expansion of the Probate Code. With respect to age limits, it is not in dispute that the Probate Code *expressly* imposes an

[1] The Department's lack of authority to propose the payback rule in the Proposed Regulation is evidenced in its own *Notice of Proposed Rule Making*. In the Notice, the Department stated it considered a 100% payback provision, but graciously declined to do so only because of "certain charitable purposes" that pooled trust administrators engage in. *See* Notice at ¶ 6. Thus, per the Department's reasoning, it could – next year, or 5 years from now – within its discretion, require 100% payback. It cannot, only the General Assembly can do so.

age limit on the formation of, and contributions to, individual disability trusts. C.R.S. § 15-14-412.8(1). Conversely, it is similarly clear that the Probate Code ***never*** imposes an age limit on the formation of, and/or contributions to, a pooled trust. *See* C.R.S. 15-14-412.9. With respect to payback provisions, ***neither*** income trusts nor disability trusts contain a provision permitting a trustee to retain the balance upon termination. *See* C.R.S. 15-14-412.7 & 412.8. In contrast, the General Assembly ***expressly*** permitted pooled trust administrators to retain remaining balances in pooled trusts without limitation. C.R.S. 15-14-412.9(1)(e).

Where specific language is included in one section of a statute, but omitted in another section of the same statute, the exclusion is presumed to be intentional. *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009). Courts have repeatedly rejected attempts to graft statutory language from one section of a statute into another section in the name of "statutory interpretation." *See, e.g., Abu-Nantambue-El v. State*, 433 P.3d 101 (Colo.App 2018) (under compensation statute for wrongful convictions, use of term "all convictions" in one provision necessarily includes misdemeanor convictions where statute elsewhere expressly references only "felony convictions"); *Airth v. Zurich* 2018 COA 9, ¶28 (Colo.App. 2018) (rejecting plaintiff's attempt to require express written rejection of ***additional*** un/underinsured motorist insurance, where statute only requires written rejection of ***minimum*** un/underinsured motorist insurance); *Beeghly v. Mack*, 20 P.3d 610 (Colo. 2001) (where certain provisions under the Forcible Entry and Detainer statute expressly permit default judgments, silence regarding default judgment in other provisions of FED statute must be construed as intentional.) Thus, the absence of specific provisions or language in a statute can as loudly as an express inclusion. *See Romer v. Bd. Of County Commissioners of Pueblo*, 956 P.2d 566, 567 (Colo. 1998).

Viewing the Probate Code as a whole, it is clear that the omission of both an age limit and restrictions on retention of trust balances with respect to pooled trusts was intentional. The General Assembly knew how to impose age restrictions on Medicaid Trusts: it did so, on both income trusts and disability trusts. The General Assembly knew how to require the payback of trust balances to the State upon termination of a Medicaid Trust: it did so, without qualification, for both income trusts and disability trusts. Yet, with respect to Pooled Trusts, no age limit was imposed, and trustees were given unfettered discretion to retain balances on termination. By promulgating the Proposed Regulation, the Department necessarily ignores the choices made by the General Assembly; because the Department lacks authority to do so, the Proposed Regulation exceeds its authority and is therefore void.

III. There is no Conflict between C.R.S. § 15-14-412.9(c) and (e).

The Department's proposed payback requirement is premised on both a faulty reading of C.R.S. 15-14-412.9 and a lack of understanding of the legislative intent underpinning the statute. When properly read and properly understood, there is no statutory "inconsistency" within C.R.S. § 15-14-412.9(2). Subsections (2)(c) and (2)(e) address different issues and questions, employ distinct language, and are in fact part of a consistent statutory scheme designed to effectuate the legislative intent underpinning Medicaid Trusts.

Among their many functions, pooled trusts effectuate two legislative goals: (1) preventing the heirs of Medicaid recipients from inheriting wealth; and, (2) furthering the charitable purpose of pooled trust administrators, that must necessarily be charitable organizations. Therefore, C.R.S. § 15-14-412.9(2)(c) prohibits all ***payments*** upon termination or death of the beneficiary, which prevents enrichment of trust beneficiaries' heirs. C.R.S. § 15-14-412.9(2)(e) speaks to ***retention*** of the account balance by a trustee upon termination or death of the beneficiary, thereby furthering

the charitable purposes of pooled trust administrators. As explained by one federal court analyzing pooled trusts and the interplay between these two aims:

> Retaining the residual enables the trust to cover administrative fees and other overhead without increasing charges on accounts of living beneficiaries. At the same time, should the trust attempt to pass the money to the deceased's estate, this provision acts as a safeguard to ensure that the State gets repaid.

Lewis v. Alexander, 685 F.3d 325, 347 (3d. Cir. 2012).

Accordingly, the Department is incorrect that there is a conflict: subsection (2)(c) prevents paying trust assets to beneficiaries' heirs, while subsection (2)(e) furthers the charitable purposes of pooled trust administrators.