

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2410961
<b>Decision Date:</b>	08/27/2024	<b>Hearing Date:</b>	07/30/2024
<b>Hearing Officer:</b>	Radha Tilva	<b>Record Open to:</b>	08/23/2024

**Appearances for Appellant:**



**Appearance for MassHealth:**

William Bell, Worcester MEC Rep.



*The Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, Quincy, Massachusetts 02171*

## APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	LTC – disqualifying transfer
<b>Decision Date:</b>	08/27/2024	<b>Hearing Date:</b>	07/30/2024
<b>MassHealth’s Rep.:</b>	William Bell	<b>Appellant’s Reps.:</b>	[REDACTED]
<b>Hearing Location:</b>	Worcester MassHealth Enrollment Center	<b>Aid Pending:</b>	No

### Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

### Jurisdiction

Through a notice dated July 5, 2024, MassHealth determined that appellant made disqualifying transfers resulting in a period of ineligibility from January 19, 2024 through March 19, 2025 (Exhibit 1). The appellant filed this appeal in a timely manner on July 16, 2024 (see 130 CMR 610.015(B) and Exhibit 2). Challenging an eligibility start date is valid grounds for appeal (see 130 CMR 610.032).

### Action Taken by MassHealth

MassHealth determined that appellant made disqualifying transfers resulting in a period of ineligibility from January 19, 2024 through March 19, 2025.

### Issue

The appeal issue is whether MassHealth was correct in determining that appellant made disqualifying transfers resulting in a period of ineligibility from January 19, 2024 through March 19,

2025.

## Summary of Evidence

MassHealth was represented by an eligibility specialist who appeared virtually. On April 22, 2024, a senior application for long-term care was received by MassHealth for the appellant (who is over the age of 65). The application was processed by MassHealth on May 1, 2024. On May 2, 2024 MassHealth sent a request for verifications. Included in the application was a transfer to a pooled special needs trust of \$184,440.79, which was made on January 30, 2024. A transfer penalty was added in accordance with 130 CMR 515.001 and 520.019(D), because the long-term care application was received after March 1, 2024. This was explained by the MassHealth representative to the attorney on May 3, 2024. On July 1, 2024, all of the requested information was received, and by July 5, 2024 all of the verifications were processed. The notice under appeal was issued calculating a penalty period of July 19, 2024 through March 19, 2025 (Exhibit 1).

The MassHealth representative included the Eligibility Operations Memo (23-15), dated May 2023, in his packet (Exhibit 4, p. 25). The memorandum explains the revisions to the regulations at 130 CMR 515.001 and 520.019(D), which were made in order to make MassHealth regulations consistent with CMS guidance and caselaw. The memorandum states that new applications received on or after March 1, 2024, from individuals aged 65 or older, who transferred assets into a pooled trust at age 65 or older within five years of applying for MassHealth, are subject to the penalty period (Exhibit 4, p. 26). Similarly, the memorandum explains that current members who transfer resources into a pooled trust on or after March 1, 2024 will be subject to a penalty period based on the date of transfer or date on which they are otherwise eligible, whichever is later (Exhibit 4, p. 27).

The appellant was represented virtually by his son and an attorney. Following the hearing, the record was held open to allow the attorney time to submit a memorandum of law, which incorporated arguments made at hearing. The arguments set forth at hearing and in the memorandum included the following: the attorney argued that the transfer of funds into a pooled trust was not a disqualifying transfer and was permissible. An instrument of trust assignment was executed on January 10, 2024 creating a pooled trust account at the Plan of MA/RI Pooled Trust. The appellant issued a cashier's check for the trust on January 19, 2024, the date they are seeking coverage, in the amount of \$184,440.79. The Plan of MA/RI Pooled Trust deposited the funds on January 30, 2024 to a bank (which is the processing bank for the PLAN of MA/RI). The bank issued a "transaction inquiry" confirmation as of February 1, 2024. The attorney argued, specifically, that the transfer was a permissible transfer because the transfer satisfies all of the requirements imposed by 130 CMR 520.019(D)(5).

The attorney argued that the regulation has four requirements, all of which the pooled trust meets. First, the regulation requires that the transfer of funds to the pooled trust must take place

before March 1, 2024. The appellant transferred his funds on January 19, 2024. Second, the pooled trust must be a valid qualifying pooled trust under the MassHealth regulations. This is undisputed by MassHealth. Third and fourth, the pooled trust must be for the sole benefit of the permanently and totally disabled nursing-facility resident. It is undisputed that the pooled trust is solely for appellant's benefit. In addition, it is also undisputed that appellant was a permanently and totally disabled nursing facility resident at the time of the transfer to the pooled trust.

The attorney also argued that MassHealth was dissatisfied with the regulation it created a self-serving EOM 23-15 which added a new application filing deadline requirement to the regulations out of thin air. There is no application filing deadline found in the regulation. The attorney argued in his memorandum that EOM 23-15 must be ignored because it is contrary to, entirely inconsistent with, and conflicts with the plain language of 130 CMR 520.019(D)(5), the application filing deadline requirement is invalid because it is arbitrary and unreasonable, it unlawfully attempts to make a regulation retroactive, and because it fails to satisfy the notice, comment, and review requirements of the Administrative Procedures Act. The attorney made a plethora of arguments and outlined case law to support his arguments (see Exhibit 5).

Included in counsel's memoranda and exhibits was a letter from legal counsel for the Plan of MA/RI Pooled Trust which argued that MassHealth's EOM 23-15 violated due process rights as it makes a regulation that is not effective until March 1, 2024, retroactive for five years (Exhibit 6, p. 46).

## **Findings of Fact**

Based on a preponderance of the evidence, I find the following:

1. On April 22, 2024, a senior application for long-term care was received by MassHealth for the appellant, who is over the age of 65.
2. The application was processed by MassHealth on May 1, 2024.
3. On May 2, 2024 a request for verifications was sent. Noted in the application was a transfer to a pooled special needs trust of \$184,440.79, which was made on January 30, 2024.
4. A transfer penalty was assessed in accordance with 130 CMR 515.001 and 520.019(D), as the long-term care application was received after March 1, 2024.
5. On July 5, 2024, MassHealth issued a notice stating that appellant was not eligible for MassHealth long-term care benefits from January 19, 2024 through March 19, 2025.
6. MassHealth issued the Eligibility Operations Memo (23-15), in May 2023, to explain the revisions to the regulations at 130 CMR 515.001 and 520.019(D) which were made in order to

make MassHealth regulations consistent with CMS guidance and caselaw.

7. EOM 23-15 states, specifically, that new applications received on or after March 1, 2024, from individuals aged 65 or older, who transferred assets into a pooled trust at age 65 or older within five years of applying for MassHealth, are subject to the penalty period.
8. Appellant disputes the validity of EOM 23-15.

## Analysis and Conclusions of Law

The sole issue under appeal is whether MassHealth erred in determining that the assets transferred into the pooled trust in January 2023 constituted a disqualifying transfer. 130 CMR 520.019 states that the MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). Appellant's counsel argues that the transfer of \$184,440.79 is permissible as it was a transfer to a qualified pooled trust under 130 CMR 520.019(D)(5).

In May 2023, MassHealth released Eligibility Operations Memo 23-15 (EOM 23-15) in an effort to make MassHealth regulations consistent with CMS guidance and federal law, that permissible transfers into valid pooled trust accounts can only be made before the individual turns 65. The EOM states, specifically, that new applications received on or after March 1, 2024, from individuals age 65 or older, who transferred assets into a pooled trust at age 65 or older within five years of applying for MassHealth, are subject to the penalty period (Exhibit 4, p. 26). Thus, based on the EOM alone, the funds transferred to the pooled trust here would be subject to the penalty period as the application was received by MassHealth on April 22, 2024.

Appellant contends that EOM 23-15 should be given no deference as 130 CMR 520.019(D) conflicts and does not state that the application has to be received before March 1, 2024. Rather, the regulation only specifies that the transfer itself has to occur before that date. 130 CMR 520.019(D) lists which transfers it considers permissible as an agency. 130 CMR 520.019(D)(5) specifically states that effective until sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), the resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident. ***Effective sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), this transfer is no longer permissible.*** (emphasis added)

The end of the maintenance of effort and continuous eligibility provisions of Section 6008 and of the Families First Coronavirus Response Act was December 31, 2023 (EOM 23-15, May 2023). 60 days after December 31, 2023 is March 1, 2024 (Exhibit 5, p. 3). While the regulation does not entirely align with EOM 23-15, a hearing officer **must** give due consideration to Policy Memoranda and any other MassHealth agency representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation (Emphasis added. 130 CMR 610.082(C)(3)). 130 CMR 610.082(C)(3) states “must give due consideration” for a reason and does not give an option for the hearing officer to disregard MassHealth memoranda. Thus, it is beyond the purview of the hearing officer to deem MassHealth policy memorandum like EOM 23-15 invalid. Appellant’s challenge to the legality of EOM 23-15 may be subject to judicial review in accordance with 130 CMR 610.092.

The language of EOM 23-15 is abundantly clear, and states new applications received on or after March 1, 2024, from individuals aged 65 or older, who transferred assets into a pooled trust at age 65 or older within five years of applying for MassHealth, are subject to the penalty period. As appellant’s application was submitted on April 22, 2024, under EOM 23-15, the applicant’s transfer of assets into the pooled trust in January, 2024 is considered a disqualifying transfer and is subject to the penalty period (130 CMR 520.008(I)). Thus, MassHealth did not err in making its determination.

Based on the analysis above, this appeal is DENIED.

## **Order for MassHealth**

None.

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to court in accordance with Chapter

30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

---

Radha Tilva  
Hearing Officer  
Board of Hearings

[REDACTED]

[REDACTED]

MassHealth Representative: Worcester MEC, Attn: Michael Rooney, 55 SW Cutoff, Suite 1A,  
Worcester, MA 01604