

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2411121
<b>Decision Date:</b>	9/16/2024	<b>Hearing Date:</b>	08/26/2024
<b>Hearing Officer:</b>	Susan Burgess-Cox	<b>Record Open to:</b>	08/31/2024

**Appearance for Appellant:**



**Appearance for MassHealth:**

Kim McAvinchey



*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>	Eligibility; Long Term Care
<b>Decision Date:</b>	9/16/2024	<b>Hearing Date:</b>	08/26/2024
<b>MassHealth's Rep.:</b>	Kim McAvinchey	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	All Parties Appeared by Telephone	<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 June 24, 2024, MassHealth denied the appellant's application for long-term care services because the appellant had more countable assets than MassHealth benefits allow. (130 CMR 520.000; Exhibit 1). The appellant's attorney-in-fact filed an appeal in a timely manner on July 17, 2024. (130 CMR 610.015(B); Exhibit 2). The Board of Hearings scheduled a hearing for August 2, 2024. (Exhibit 4). Counsel for the appellant submitted a request to reschedule the hearing and the Director determined that there was good cause to reschedule the hearing. (Exhibit 5; Exhibit 6; 130 CMR 610.048). A hearing was held on August 26, 2024.

Denial of assistance is valid grounds for appeal. (130 CMR 610.032).

Upon hearing testimony and reviewing the initial submissions from the parties, the hearing officer determined that initial evidence was necessary including copies of correspondence with the nursing facility that both parties referred to at hearing. The record was held open until Friday, August 31, 2024 for the parties to provide copies of this correspondence. (Exhibit 9). This action resulted in an extension of the decision due date to September 24, 2024.

## **Action Taken by MassHealth**

MassHealth determined that the appellant has more countable assets than MassHealth benefits allow. (130 CMR 520.003; 130 CMR 520.004; 130 CMR 520.006; 130 CMR 520.007)

## **Issue**

Whether MassHealth was correct in determining that the appellant has more countable assets than MassHealth benefits allow.

## **Summary of Evidence**

The MassHealth representative presented documents that were incorporated into the hearing record as Exhibit 7. Counsel for the appellant submitted documents that were incorporated into the hearing record as Exhibit 8.

The appellant submitted an application for MassHealth long-term care seeking coverage as of December 16, 2023. (Testimony; Exhibit 7). MassHealth denied the application due to the appellant having more countable assets than MassHealth benefits allow. (Testimony; Exhibit 1; Exhibit 7). The assets at issue include a bank account with a balance of \$1,909.61 and funds that MassHealth considered as available cash in the amount of \$7,501.92. (Testimony; Exhibit 1; Exhibit 7). The MassHealth representative testified that the appellant overpaid her patient paid amount by \$7,510.92 resulting in cash credit to the appellant which MassHealth considered as a countable asset. (Testimony; Exhibit 7).

The MassHealth representative testified that the appellant paid a total of \$24,626.34 to the facility to apply toward her patient paid amount (PPA) for December 2023 through May 2024. (Testimony; Exhibit 7). The MassHealth representative presented correspondence from the facility showing that the appellant made the following payments:

- [REDACTED] - \$18,012.00 applied to Room & Board for 11/01/23-11/30/23
- [REDACTED] - \$9006.00 applied to Room & Board for 12/01/23-12/15/23
- [REDACTED] - \$4107.10 applied to 12/2023 Applied Income
- [REDACTED] - \$4107.10 applied to 01/24 Applied Income
- [REDACTED] - \$8197.94 applied to 02/24 & 03/24 Applied income
- [REDACTED] \$4107.10 applied to 04/24 Applied income
- [REDACTED] \$4107.10 Applied to 05/24 Applied Income

The records above indicate that the appellant paid for "Room & Board" until the requested coverage start date of December 16, 2024. (Testimony; Exhibit 7). The MassHealth representative testified that the appellant was eligible for short-term coverage for the first six

months of admission. (Testimony; Exhibit 7). This resulted in a deduction of a housing allowance and a patient paid amount of \$2,852.57 from December 2023 through May 2024. (Testimony; Exhibit 7). As noted above, the appellant paid the facility \$4,107.10 for 4 months and \$4,098.97 for 2 months during that period for a total of \$24,626.24. Payments of \$2,852.57 over 6 months would result in a total balance due of \$17,115.42. MassHealth utilized the total payment amount paid [\$24,262.24] and the total due [\$17,115.42] to determine that the appellant had available cash in the amount of \$7,510.92 [\$24,626.34 - \$17,115.42 = \$7,510.92]. (Testimony; Exhibit 7).

Counsel for the appellant argued that the funds paid to the facility were still in the hands of the facility so inaccessible. Documents presented by counsel for the appellant include copies of regulations governing ownership and accessibility of funds in a bank account, lump sum payments, and deductions for maintenance of a former home. (Exhibit 8). The documents also include copies of electronic mail correspondence between counsel for the appellant's office, MassHealth and a representative from the nursing facility. (Exhibit 8). Included in this correspondence is a message from the MassHealth representative to a representative at the nursing facility asking if the facility will return funds to the appellant. (Exhibit 8). This message was copied to a representative from counsel for the appellant's office. MassHealth received a response from counsel for the appellant's office stating "She cannot return the funds to the applicant until we are approved for benefits. Once approved, the facility adjusts the PPA in their system." (Exhibit 8). The only message from the representative from the nursing facility presented at hearing was an inquiry into the status of the application. (Exhibit 8). The representative from the nursing facility did not speak to a refusal or reluctance to return funds to the appellant. (Exhibit 8). At hearing, a representative from counsel for the appellant's office testified that the facility has not been directly asked to return the funds to the appellant. Additionally, a representative from counsel for the appellant's office stated that in similar circumstances, MassHealth has determined an applicant as eligible with a start date and the applicant then spends down the funds as they wish.

Correspondence submitted by counsel for the appellant prior to the hearing includes references to the Social Security Administration's Program Operations Manual System (SSA POMS) regarding MassHealth's decision in counting overpayments made to the facility as an asset. (Exhibit 8). The first message states that MassHealth should not consider the funds as an asset in the first month that they are available allowing the appellant the opportunity to spend down the assets as she chooses once the funds are returned. (Exhibit 8). The MassHealth representative responded that the policies cited by the appellant's representative were not those of MassHealth and as such MassHealth's decision remained unchanged. (Exhibit 8). The MassHealth representative stated that the agency did not consider the funds inaccessible. (Exhibit 8).

Subsequent correspondence from counsel for the appellant's office refers to a decision issued by the [REDACTED] regarding the consultation of federal rules such as the SSA POMS if a definition under the state regulations is unclear. (Exhibit 8). A response from the MassHealth representative notes that the decision cited by counsel for the appellant's office relates to real estate and MassHealth did not believe that the regulations governing non-countable assets were unclear. (Exhibit 8). In response, an attorney from counsel for the appellant's office cites 42 CFR

601(d)(2) which allow states to apply income and resources standards that are less restrictive, but no more restrictive (except in States using more restrictive requirements than SSI), than:

- (i) For groups of aged, blind, and disabled individuals, the SSI methodologies; or
- (ii) For all other groups, the methodologies under the State plan most closely categorically related to the individual's status.

The message acknowledges that the appellant overpaid the facility noting again that any returned funds cannot be considered income under the SSA POMS. (Exhibit 8). The messages also states that the SSA POMS states that cash paid by a recognized medical or social services program is not a resource for one calendar month following its receipt<sup>1</sup>. (Exhibit 8). The message asks that MassHealth not consider the funds paid to the facility as a resource for one calendar month following the return of the funds to the appellant. (Exhibit 8). The MassHealth representative responded to this message stating that the funds in question are a countable asset and a start date is determined by controlling application date, the excess asset amount as of the request date and the subsequent spenddown of those funds. (Exhibit 8).

Both parties cited to other correspondence between one another and the nursing facility and not all of it appeared to be included in the documents submitted prior to the hearing. Therefore, the record was held open for the parties to submit copies of this correspondence. (Exhibit 9).

Correspondence submitted by MassHealth and a summary argument is incorporated into the hearing record as Exhibit 10. The correspondence includes a question from a nursing facility representative noting “confusion about private pay” and seeking a status on the application approval. (Exhibit 10). The MassHealth representative responded to this message asking if the facility was going to return the excess PPA funds to the appellant and, as noted above, received a response from counsel for the appellant’s office regarding the need for an approval of benefits before they can return the funds. (Exhibit 10).

In their summary argument, the MassHealth representative states that no evidence has been provided to indicate the funds held by the facility (that are not attributed to either private pay or patient paid amounts) are non-countable or inaccessible under MassHealth

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<sup>1</sup> The SSA POMS section cited by counsel for the appellant continues to say that it is not a resource provided the cash is: not income under SI 00815.050 and not repayment for a bill already paid. The funds being returned to the appellant would be being returned as a refund for a bill overpaid. Additionally, the section of the SSA POMS that counsel cites to regarding “Specific Assets That Are Not Resources” (SI 0110.115) refers to another section of SSA POMS regarding Certain Cash to Purchase Medical or Social Services (SI 01120.110) which states that a cash payment for medical or social services that is not income under [SI 00815.050](#), also is not a resource for one calendar month following the month of receipt. The policy goes on to state that this rule “does not apply to cash received as repayment for medical or social services bills an individual has already paid. Even though not income, such cash is a resource and, if retained, is subject to resource-counting rules as of the first moment of the month following receipt. (SI 01120.110).

regulations. (Exhibit 10). The MassHealth representative notes a process of a facility attributing funds to a private pay or patient paid amount and then providing MassHealth with an accurate request date and breakdown of monies received and how attributed. (Exhibit 10). Once an applicant is asset eligible, MassHealth will then determine the eligibility start date and calculate the patient paid amount. (Exhibit 10). The MassHealth representative noted that counsel for the appellant appeared to equate monies held by a facility to a bank account to which an individual has limited access. (Exhibit 10). The MassHealth representative argued that funds held by the facility “are better equated with funds held by an attorney in an IOLTA which are fully countable to applicants until disbursed for services rendered [or] expenses incurred”. (Exhibit 10).

The MassHealth representative argued that the funds in question are not inaccessible, are available to pay for appellant’s care based on MassHealth regulations and are therefore a countable asset. (Exhibit 10). The MassHealth representative argues that the regulation governing countable assets at 130 CMR 520.007 is supportive of MassHealth’s position as the assets are those to which the appellant would be entitled whether or not they are actually received when the failure to receive the assets results from the action or inaction of the applicant, members, spouse or person acting on his or her behalf. (Exhibit 10). The MassHealth representative notes that counsel for the appellant cites 130 CMR 520.009 in the original submission and argues that this regulation is not relevant to the matter on appeal as it involves countable income from a lump sum payment. (Exhibit 10). The MassHealth representative notes that counsel for the appellant cites 130 CMR 520.026 in the original submission and argues that this regulation is not relevant to the matter on appeal as it involves income deductions which are attributed to calculating a patient paid amount, not countable assets. (Exhibit 10).

Documents submitted by counsel for the appellant are incorporated into the hearing record as Exhibit 11. Included in this submission are electronic mail messages referred to above, one where MassHealth asks a representative from the nursing facility how the excess funds will be distributed as the appellant overpaid the “December to May PPA”. (Exhibit 11). The individual from the nursing facility acknowledged that the appellant overpaid stating that they were using “information provided by the attorney as to what the PPA would be”. (Exhibit 11). In the messages submitted by counsel for the appellant, the individual from the facility makes inquiries into the eligibility decision, the denial notice, asks for written proof of filing a request for hearing, information on the scheduled hearing date and status updates on the appeal. (Exhibit 11). The representative from the facility does not note any intent to retain the appellant’s funds. (Exhibit 11).

Counsel for the appellant argues that the appellant does not have ownership and access to the funds in question as they are in an account owned and controlled by the facility. (Exhibit 11). Counsel argues that as owner of the account in question, the facility alone, dictates when and how the money will be distributed. (Exhibit 11). Counsel argues that until the facility distributes the money, the appellant has neither ownership nor control over the account. (Exhibit 11). Counsel notes that the appellant can request the funds and argue what they should be applied to but the

facility owns the bank account in which the funds sit and it alone can distribute the funds or not. (Exhibit 11). Counsel argues that any finding that the appellant owns “this account” would be arbitrary and capricious. Counsel continues to refer to an account of the facility rather than the funds of the appellant. (Exhibit 11). Counsel states that “the overpayment can simply be returned by the facility and appropriately spent down by the applicant (or be applied by the facility to room and board)”. (Exhibit 11). Counsel argues that is an aside as the real issue is that the funds are those of the facility and not the appellant as the facility owns and controls the money in their account and has refused to distribute it. (Exhibit 11). As noted above, the parties acknowledged that there has been no direct request to return the funds. Counsel concludes by stating that the evidence reflects that “the account in question” is owned by and controlled by the facility making “the account” non-countable and the appellant under the asset limit. (Exhibit 11).

## Findings of Fact

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

1. The appellant submitted an application for MassHealth long-term care seeking coverage as of December 16, 2023.
2. MassHealth denied the application due to the appellant having more countable assets than MassHealth benefits allow.
3. MassHealth considered the following as countable assets: a bank account balance of \$1,909.61 and available cash in the amount of \$7,501.92.
4. The appellant made the following payments to the nursing facility:
  - a. [REDACTED] - \$18,012.00 applied to Room & Board for 11/01/23-11/30/23
  - b. [REDACTED] - \$9006.00 applied to Room & Board for 12/01/23-12/15/23
  - c. [REDACTED] - \$4107.10 applied to 12/2023 Applied Income
  - d. [REDACTED] - \$4107.10 applied to 01/24 Applied Income
  - e. [REDACTED] - \$8197.94 applied to 02/24 & 03/24 Applied income
  - f. [REDACTED] \$4107.10 applied to 04/24 Applied income
  - g. [REDACTED] \$4107.10 Applied to 05/24 Applied Income
5. The appellant paid for “Room & Board” until the requested coverage start date of December 16, 2024.
6. The appellant was eligible for short-term coverage for the first six months of admission resulting in a patient paid amount of \$2,852.57 from December 2023 through May 2024.
7. The appellant paid the facility a total of \$24,626.24 from November 2023 through May

2024.

8. Payments of \$2,852.57 over 6 months would result in a total balance due of \$17,115.42.
9. MassHealth utilized the total payment amount paid [\$24,262.24] and the total due [\$17,115.42] to determine that the appellant had available cash in the amount of \$7,510.92 [ $\$24,626.34 - \$17,115.42 = \$7,510.92$ ].
10. At the time of the hearing the facility still held the funds.
11. As of the close of the record open period, neither the appellant nor the representatives asked the facility to return the excess funds.
12. Prior to the hearing, the MassHealth representative asked a representative at the nursing facility if they will return the funds to the appellant.
13. The representative from the nursing facility did not respond to this message.
14. A representative from counsel for the appellant's office responded to MassHealth's inquiry stating that the facility "cannot return the funds to the applicant until we are approved for benefits. Once approved, the facility adjusts the PPA in their system."
15. A representative from the facility acknowledged that the appellant overpaid the PPA stating they used "information provided by the attorney as to what the PPA would be".

## **Analysis and Conclusions of Law**

MassHealth administers and is responsible for the delivery of health-care services to MassHealth members. (130 CMR 515.002). The regulations governing MassHealth at 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for noninstitutionalized persons aged [REDACTED] or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, as defined by Title XIX of the Social Security Act and authorized by M.G.L. c. 118E, and certain Medicare beneficiaries. (130 CMR 515.002). The appellant in this case is an institutionalized person. Therefore, the regulations at 130 CMR 515.000 through 522.000 apply to this case. (130 CMR 515.002).

Countable assets are all assets that must be included in the determination of eligibility. (130 CMR 520.007). Countable assets include assets to which the applicant or member or his or her spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. (130 CMR 520.007). In determining whether or not failure to receive such assets is reasonably considered to result from such action or inaction, the



MassHealth agency considers the specific circumstances involved. (130 CMR 520.007). In this case, failure to directly ask the facility to return the assets makes them countable. A statement from counsel for the appellant's office that the facility "cannot return the funds to the applicant until we are approved for benefits" does not constitute an action by the appellant to receive the funds. Instead, it appears that the appellant took action to overpay the facility and has not taken any action to retrieve the funds from the facility. The funds in question are those of the appellant.

Counsel argues that the assets are inaccessible to the appellant. The regulations define an inaccessible asset as an asset to which the applicant or member has no legal access. (130 CMR 520.006(A)). The regulations provide examples of inaccessible assets as including, but not limited to:

- (1) property, the ownership of which is the subject of legal proceedings (for example, probate and divorce suits); and
- (2) the cash-surrender value of life-insurance policies when the policy has been assigned to the issuing company for adjustment. (130 CMR 520.006(B)).

MassHealth considers accessible to the applicant or member all assets to which the applicant or member is legally entitled:

- (1) from the date of application or acquisition, whichever is later, if the applicant or member does not meet the conditions of 130 CMR 520.006(C)(2)(a) or (b); or
- (2) from the period beginning six months after the date of application or acquisition, whichever is later, if
  - (a) the applicant or member cannot competently represent his or her interests, has no guardian or conservator capable of representing his or her interests, and the authorized representative (which may include a provider) of such applicant or member is making a good-faith effort to secure the appointment of a competent guardian or conservator; or
  - (b) the sole trustee of a Medicaid Qualifying Trust, under 130 CMR 520.022(B), is one whose whereabouts are unknown or who is incapable of competently fulfilling his or her fiduciary duties, and the applicant or member, directly or through an authorized representative (which may include a provider), is making a good-faith effort to contact the missing trustee or to secure the appointment of a competent trustee. (130 CMR 520.006(C)).

Counsel for the appellant's argument regarding the accessibility of the assets is flawed in that it is the failure of the appellant or those acting on her behalf that prevents the appellant from receiving the funds from the facility rather than her being unable to access a bank account.

Counsel repeatedly refers to “the account”. The account that counsel refers to is that of the facility which likely holds far more than what MassHealth is considering as assets of the appellant. The agency is not expecting the appellant to have direct access to a particular account, the regulations just require members to take action to receive funds to which they are entitled and those assets are countable when failure to receive the funds results from the action or inaction of the applicant, member, spouse or person acting on his or her behalf. (130 CMR 520.007). In this case, that is exactly what is occurring. The appellant is entitled to the funds held by the facility and counsel for the appellant has only demonstrated that the appellant has failed to act to receive the funds from the facility. This inaction makes the funds countable. (130 CMR 520.007).

The decision made by MassHealth was correct.

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.

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Susan Burgess-Cox  
Hearing Officer  
Board of Hearings

cc:

[REDACTED]

MassHealth Representative: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East Street, Tewksbury, MA 01876-1957, 978-863-9290