

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2412228
<b>Decision Date:</b>	10/21/2024	<b>Hearing Date:</b>	09/05/2024
<b>Hearing Officer:</b>	Mariah Burns		

**Appearance for Appellant:**



**Appearance for MassHealth:**

Yous Khieu, Charlestown MassHealth  
Enrollment Center



*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>	Over 65; Long-Term Care; Eligibility; Transfer of Assets; Pooled Trusts
<b>Decision Date:</b>	10/21/2024	<b>Hearing Date:</b>	09/05/2024
<b>MassHealth's Rep.:</b>	Yous Khieu	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Remote	<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 25, 2024, MassHealth approved the appellant for MassHealth long-term care benefits with a start date of June 28, 2024, imposing a period of ineligibility due to a disqualifying transfer of assets from April 1, 2024, to June 27, 2024. *See* 130 CMR 520.019 and Exhibit 1. The appellant filed this appeal in a timely manner on August 7, 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 approved the appellant's long-term care benefits with a start date of June 28, 2024, after that appellant made disqualifying transfers resulting in a period of ineligibility from April 1, 2024 through June 27, 2024.

### Issue

The appeal issue is whether MassHealth was correct in determining that appellant made

disqualifying transfers resulting in a period of ineligibility from April 1, 2024, through June 27, 2024.

## **Summary of Evidence**

The appellant is an adult over the age of 65 who currently resides in a skilled nursing facility. He was represented at the hearing by an attorney. MassHealth was represented by a worker from the Charlestown MassHealth Enrollment Center. The following is a summary of the testimony and evidence provided:

On May 10, 2024, the appellant submitted an application for MassHealth long-term care benefits, requesting a start date of April 1, 2024. On July 25, 2024, MassHealth approved the appellant's application with an effective start date of June 28, 2024. In calculating that start date for benefits, MassHealth imposed a period of ineligibility from April 1, 2024, to June 27, 2024, on the grounds that the appellant made a disqualifying transfer of assets. That transfer was a \$38,000 check that was deposited into a special needs pooled trust on February 16, 2024, for the appellant's benefit. The MassHealth representative reported that, pursuant to MassHealth Eligibility Operations Memo (EOM) 23-15, that deposit was considered a disqualifying transfer. Based on a public pay rate of \$433 dollars, the total ineligibility period imposed was 88 days.

The appellant agreed that the transfer was made and with MassHealth's calculations. However, he asserted that EOM 23-15 directly contradicts the plain language of 130 CMR 520.019, which states that such a transfer of assets would not be subject to a penalty period. The appellant argued that, although considerable deference must be given to MassHealth's interpretation of its own regulations, when the regulation and an EOM are inconsistent with one another, the plain language of the regulation must control.

## **Findings of Fact**

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

1. The appellant is an adult over the age of 65 who currently resides in a skilled nursing facility. Testimony, Exhibit 4.
2. On May 10, 2024, the appellant submitted an application for MassHealth long-term care benefits, requesting a start date of April 1, 2024. Testimony.
3. On July 25, 2024, MassHealth approved the appellant's application with an effective start date of June 28, 2024, imposing a period of ineligibility for 88 days based on an alleged disqualifying transfer of assets. Exhibit 1.

4. On February 16, 2024, a \$38,000 check was deposited into a special needs pooled trust created for the appellant's benefit. The appellant was over the age of 65 at the time of that deposit. Exhibit 4, Exhibit 5 at 3 to 9, Testimony.

5. The appellant does not challenge MassHealth's calculation of the penalty period, but does argue that no such period should have been imposed at all. Testimony.

## **Analysis and Conclusions of Law**

MassHealth administers and is responsible for delivery of healthcare benefits to MassHealth members. See 130 CMR 515.002. Eligibility for MassHealth benefits differs depending on an applicant's age. 130 CMR 515.000 through 522.000 (referred to as Volume II) provide the requirements for non-institutionalized persons aged 65 or older, institutionalized persons of any age, persons who would be institutionalized without community-based services, and certain Medicare beneficiaries. 130 CMR 515.002(B). As the appellant is over 65 years old and an institutionalized person, he is subject to the requirements of the provisions of Volume II. 130 CMR 515.002.

Long-term care residents are eligible for MassHealth Standard coverage if they meet the following requirements:

- (1) be younger than [REDACTED] or older or, for individuals 21 through 64 years of age meet Title XVI disability standards or be pregnant;
- (2) be determined medically eligible for nursing facility services by the MassHealth agency or its agent as a condition for payment, in accordance with 130 CMR 456.000: Long Term Care Services;
- (3) contribute to the cost of care as defined at 130 CMR 520.026: Long-term-care General Income Deductions;
- (4) have countable assets of \$2,000 or less for an individual and, for married couples where one member of the couple is institutionalized, have assets that are less than or equal to the standards at 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized; and
- (5) not have transferred resources for less than fair market value, as described at 130 CMR 520.018: Transfer of Resources Regardless of Date of Transfer and 520.019: Transfer of Resources Occurring on or after August 11, 1993.

130 CMR 519.006(A).

To determine whether any transfer of resources violates 130 CMR 520.019, MassHealth regulations subject all transfers to a look-back period, which, for this case, would be a period of 60

months “beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard.” 130 CMR 520.019(B). If, during that 60-month look-back period, the applicant or their spouse has made a transfer for less than fair market value (FMV), the applicant, even if “otherwise eligible,” may be subject to a period of disqualification in accordance with MassHealth’s transfer rules at 130 CMR §§520.018 520.019. A period of ineligibility may also be imposed if the applicant or their spouse took any action “to avoid receiving a resource to which the resident or spouse would be entitled if such action had not been taken.” 130 CMR 520.019(C). If it is determined that a resident or spouse made a disqualifying transfer or resources, MassHealth will calculate a period of ineligibility in accordance with the methodology described in 130 CMR 520.019(G).

The transfer provisions have several exceptions to the general rule governing disposition of assets, which are detailed in § 520.019(D) (permissible transfers), § 520.019(K) (exempted transfers), and § 520.019(F) (exemptions based on intent). See 130 CMR 520.019(C). In the instant case, the only applicable exception, and the sole regulatory exception raised by Appellant at hearing, is found at 130 CMR 520.019(D)(5), which provides as follows:

(5) 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.<sup>1,2</sup>

In May 2023, MassHealth released Eligibility Operations Memo 23-15 (EOM 23-15) which, in an effort to make MassHealth regulations consistent with Centers for Medicare & Medicaid Services (CMS) guidance and federal law, reports that permissible transfers into valid pooled trust accounts can only be made before the individual turns 65. It was published in contemplation of a “First Circuit Court of Appeals...decision affirming that such transfers are subject to a period of ineligibility,” a decision which MassHealth interprets as being binding on the Agency.<sup>3</sup> 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.

An appellant bears the burden of proof at fair hearings “to demonstrate the invalidity of the

---

<sup>1</sup> These regulations were last revised on January 6, 2023.

<sup>2</sup> The parties agree that the effective date is March 1, 2024.

<sup>3</sup> See generally, *Maine Pooled Disability Trust v. Hamilton*, 927 F. 3d. 52, 62 (1st Cir. 2019) (Transfers of assets by individuals age 65 or older into pooled special needs trust count against eligibility for Medicaid long-term care benefits.).

administrative determination.” *Andrews v. Division of Medical Assistance*, 68 Mass. App. Ct. 228, 231 (2006). The fair hearing decision, established by a preponderance of evidence, is based upon “evidence, testimony, materials, and legal rules, presented at hearing, including the MassHealth agency’s interpretation of its rules, policies and regulations.” 130 CMR 610.085(A). In reaching a decision, the “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.” *Id.* at 610.085(C)(3). Further, the MassHealth Fair Hearing Rules that a hearing officer must render a decision in accordance with the law, including specifically:

...[T]he hearing officer must not render a decision regarding the legality of federal or state law including, but not limited to, the MassHealth regulations. If the legality of such law or regulations is raised by the appellant, the hearing officer must render a decision based on the applicable law or regulation as interpreted by the MassHealth agency. Such decision must include a statement that the hearing officer cannot rule on the legality of such law or regulation and must be subject to judicial review in accordance with 130 CMR 610.092.

*Id.* at 610.085(C)(2).

The appellant contends that the procedures established by EOM 23-15 directly contradict the plain language of 130 CMR 520. 520.019(D)(5), and thereby argues that the regulation must control in this case. MassHealth asserts that it must abide by its guidance provided through EOM 23-15. For the reasons stated herein, I find that, as a hearing officer, I have no authority to render a decision regarding the legality of a MassHealth regulation, nor its written interpretive guidance of a regulation. Thus, I deny the appeal and state that the appellant’s argument is a question that must be settled by the courts.

Little, if any, guidance through statute or case law has been given to interpret the meaning of “due consideration” within the confines of 130 CMR 610.082(C)(3). The appellant suggests that a hearing officer has the authority to overrule MassHealth’s interpretation of its regulations if they are “arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself.” *Warcewicz v. Department of Environmental Protection*, 410 Mass. 548, 550 (1991), *see also Theophilopoulos v. Board of Health of Salem*, 85 Mass. App. Ct. 90, 100 (2013) (“An agency’s interpretation of its own regulations is entitled to ‘considerable deference’ and must be upheld unless it is inconsistent with the plain language of the regulation or otherwise arbitrary or unreasonable.”). However, *Warcewicz* and *Theophilopoulos* both discuss the authority of the court over a governmental agency, not that of an administrative law body such as the Board of Hearings. The MassHealth Fair Hearing rules make clear that, even in the instance where the legality of a law or regulation is raised by the appellant, a hearing officer’s decision must still be based on the “regulation as interpreted by the MassHealth agency.” 130 CMR 610.082(C)(2). Ergo, it matters

not whether I agree with MassHealth's interpretation of its own regulation; I have no authority to rule on the matter.

Thus, I must render a decision in accordance with EOM 23-15. The language of that EOM is abundantly clear, and states 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. As the appellant's application was submitted on May 10, 2024, the transfer of assets into the pooled trust on February 16, 2024, (at which point the appellant was over the age of 65) is considered a disqualifying transfer and is subject to the penalty period (130 CMR 520.008(I)). Thus, I find that MassHealth did not err in making its determination in its July 25, 2024, notice approving the appellant for long-term care benefits with a start date of June 28, 2024, after imposing a period of ineligibility from April 1, 2024, to June 27, 2024.

For the foregoing reasons, the appeal is hereby DENIED. The appellant's challenge to the legality of EOM 23-15 may be subject to judicial review in accordance with 130 CMR 610.092.

## **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.

---

Mariah Burns  
Hearing Officer  
Board of Hearings

cc:

MassHealth Representative: Nga Tran, Charlestown MassHealth Enrollment Center