

Par.1. **Material Transmitted and Purpose** – Transmitted with this Manual Letter are changes to Service Chapter 510

Par. 2. **Effective Date** – Changes included in this manual letter are effective on or after December 1, 2023 unless otherwise indicated.

Penalty Periods 510-05-80-15

510-05-80-15 Penalty Periods policy was updated based on clarification from CMS. Medicaid cannot create retroactive disqualifying transfer (DQT). For ongoing eligible individuals where a DQT has been discovered, the DQT period will start the first of the month following a proper notice of adverse action. Also removed transfers made before February 8, 2006 example.

Penalty Periods 510-05-80-15

1. The number of months and days of ineligibility for an individual shall be equal to the total uncompensated value of all income and assets transferred by the individual, or individual's spouse, on or after the look-back date, divided by the average monthly [cost, or daily cost as appropriate, of nursing facility care](#) in North Dakota at the time of the individual's application during which the disqualifying transfer was determined.

The following example demonstrates how the monthly and daily period of ineligibility is calculated:

Example: Mr. Brown applied for Medicaid December 10, 2011 and it was determined Mr. Brown made a disqualifying transfer of \$70,000 in November 2010. The December 2011 application was denied.

Mr. Brown re- applied for Medicaid on July 18, 2013. The average cost of nursing facility care at the time the disqualifying transfer was determined (12-2011) is \$6,238 per month and \$205.07 per

day. \$70,000 divided by \$6,238 is 11.22 months. Eleven months at \$6,238 per month is \$68,618, leaving \$1,382 to which the daily rate is applied. \$1,382 divided by \$205.07 is 6.73 days. Mr. Brown's penalty period is 11 months and 7 days (partial days are rounded up).

~~2. For transfers made before February 8, 2006:~~

- ~~a. The period of ineligibility begins the first day of the month in which the income or assets were transferred for less than fair market value, or if that day is within any other period of ineligibility under this chapter, the first day thereafter that is not in such a period of ineligibility.~~

~~**For Example:** Mr. Smith made a disqualifying transfer in January 2005 that resulted in a ten-month period of ineligibility. The period begins the first day of the month of transfer, January 2005, and goes through October 2005. In July 2005, he made a second disqualifying transfer that resulted in a 12-month period of ineligibility. Because the month of transfer, July 2005, was already within a period of ineligibility, the 12-month period from the second transfer only begins in November 2005, and goes through October 2006.~~

- ~~b. Separate transfers made within the same month may be combined as one transfer. Separate penalty periods must be established for transfers made in separate months.~~

~~2. Transfers-Period of Ineligibility For transfers made on or after February 8, 2006:~~

- a. The period of ineligibility begins on the latest of:
- i. The first day of the month in which the income or assets were transferred for less than fair market value;
 - ii. The first day on which the individual is receiving nursing care services and is "otherwise eligible" for Medicaid (per subsection 4); ~~or~~

- i. The first day thereafter which is not in such a period of ineligibility; or
 - ii. The first day of the month following the notice of adverse action for ongoing eligible individuals.
- b. Separate transfers for which a penalty period has not yet been created, regardless of whether made in separate months, may be combined into one larger transfer for processing purposes.

3. When determining if an individual is “otherwise eligible” for Medicaid:

- a. The individual must have applied for Medicaid and must meet all nonfinancial eligibility criteria;
- b. Countable assets must be within appropriate Medicaid asset levels; and
- c. The monthly cost of nursing care and other medical care the individual is responsible for must be equal to or greater than the individual’s client share (recipient liability).

This “otherwise eligible” determination is used to establish whether an individual would be eligible for Medicaid if they were not subject to a penalty period. If so, the “otherwise eligible” determination is used to establish the penalty period start.

An applicant who is determined to be “otherwise eligible” does not mean that the applicant is actually eligible for Medicaid. Since Medicaid is prohibited from paying any nursing care services during a penalty period, these nursing care expenses are not allowed as a deduction in the Post Eligibility Treatment of Income (510-05-85-25(3)). As a result, an individual who made a disqualifying transfer may be “otherwise eligible” for penalty period start purposes, but the individual is not approved for Medicaid because there is no medical need per 510-05-35-35.

Example 1: Mr. Brown made a disqualifying transfer in March ~~2023~~ ~~2006~~ that results in a 6-month penalty period. He entered the nursing home in May ~~2023~~ ~~2006~~ and used his remaining

assets to cover his cost of care. In September ~~2023~~ ~~2006~~ his assets were under \$3000 and he applied for Medicaid. In determining when Mr. Brown's penalty period begins it is necessary to establish when he is "otherwise eligible" for Medicaid. First, he meets all nonfinancial criteria. Second, his assets are within the appropriate level beginning September ~~2023~~ ~~2006~~. Third, he has income of \$~~1900.00~~ per month; he is allowed the \$~~10050~~ income level; and he pays a Medicare premium of \$~~88.50~~ ~~164.90~~ per month. This leaves him with a client share of \$~~1635.10~~ ~~761.50~~ per month. He has actual nursing care costs of \$~~10,000~~ ~~4820~~ per month and other medical expenses of \$150 per month for total medical costs of \$~~10150~~ ~~4970~~ per month. These medical costs exceed his client share. He meets all of the criteria to be "otherwise eligible" so his penalty period starts September 1, ~~2023~~ ~~2006~~.

His application for Medicaid is still denied because in determining medical need, his other medical expenses of \$150, excluding the nursing care costs, do not exceed his client share.

Example 2: Mr. White made a disqualifying transfer in March ~~2023~~ ~~2006~~, entered the nursing home in May ~~2023~~ ~~2006~~, and used his remaining assets to cover his cost of care. In September ~~2023~~ ~~2006~~ his assets were under \$3000 and he applied for Medicaid. In determining whether Mr. White is "otherwise eligible" for Medicaid, it is first established that he meets all nonfinancial criteria. Second, his assets are within the appropriate level beginning September ~~2023~~ ~~2006~~. Third, he has income of \$~~1500~~ ~~2500~~ per month; he is allowed the \$~~10050~~ income level; and he pays a Medicare premium of \$~~164.90~~ ~~88.50~~ per month. This leaves him with a client share of \$~~1361.50~~ ~~2235.10~~ per month. He has actual nursing care costs of \$~~9500~~ ~~3520~~ per month, and he has nursing home insurance that pays \$~~75-250~~ per day (\$~~2250-7500~~ in a 30-day month). As a result, the nursing care costs that he is responsible for (\$~~1270~~ ~~2000~~) does NOT exceed his client share, and he is not "otherwise eligible." His penalty period would not start and his application for Medicaid is denied for no medical need.

If at a later date his nursing care costs increase, or his insurance ends, causing his nursing care costs to exceed his client share, he would become "otherwise eligible," and his penalty period would only start at that time.

4. If a transfer results in a period of ineligibility for an individual receiving nursing care services, and the individual's spouse begins receiving nursing care services and is "otherwise eligible" (per subsection 4) for Medicaid, the remaining period of ineligibility shall be apportioned equally between the spouses if the transfer was made on or after the individual's spouse's look-back date. Any months remaining in the period of ineligibility must be assigned or reassigned to the spouse who continues to receive the nursing care services if one spouse dies or stops receiving nursing care services.

Example: Mr. and Mrs. White make a disqualifying transfer in January ~~2023~~2004. Mrs. White enters LTC in February ~~2023~~ 2004 and is informed that the transfer in January will cause her to be ineligible for Medicaid coverage of her nursing care services until June 30, ~~2025~~2006. On March 1, ~~2024~~2005, Mr. White also enters LTC and is otherwise eligible for Medicaid. There are still 16 months of the penalty period remaining, which is divided between them. They will both be ineligible for eight months, or through October ~~2024~~2005.

If Mr. White left LTC on June 20, ~~2024~~ 2005, his remaining four months and ten days from his ineligibility period must be given back to Mrs. White, extending her period of ineligibility through February 10, ~~2025~~2006.

Example: Mr. and Mrs. Brown make a large disqualifying transfer that causes 70 months of ineligibility. At the same time, Mr. Brown enters LTC, applies for Medicaid, and is ineligible because the disqualifying transfer was made on or after his look-back date. Mrs. Brown enters LTC ~~48~~62 months later and applies for Medicaid. The disqualifying transfer was made prior to her look-

back date (~~36-60~~ months) so none of Mr. Brown's remaining ~~22~~ 8 months of penalty period is assigned to Mrs. Brown.

5. As with any adverse action, proper notice is required before the adverse action can be taken. On an application, proper notice is given in the approval or denial notice. In an ongoing case, even though the penalty period should have already begun, it cannot be imposed until an advance notice is provided to the recipient. The penalty period will begin the first of the month following the proper notice of adverse action. ~~For the period of time from when the penalty period should have started through the date it is imposed following advance notice, an overpayment must be processed (manually).~~

Example: Ms. Green is a current Medicaid recipient receiving HCBS. On November 2 she made a disqualifying transfer of her home and reported it to the zone office ~~county~~ on December 5. The zone worker processes the penalty in the system December 7th. ~~The county determines a penalty period will begin January 1, the first month following the advance notice to decrease benefits. from November 1 through September 15 of the next year. An advance notice is sent to Ms. Green informing her that Medicaid will stop paying her HCBS services from December 16 through September 15 of next year. A manual overpayment is established for HCBS payments made by Medicaid for the period of November 1 through December 15.~~

Example: Mr. Brown is a current Medicaid recipient in a long-term care facility. On March 28 of last year he made a disqualifying transfer of an inheritance, but did not report it until January 15th of this year. The zone office processes the case entering the disqualifying transfer information on January 27th. Since there is not enough time to provide an advance notice of decrease for February, the penalty period will begin March 1st. ~~county determines a penalty period from March 1 of last year through December 17 of last year. Since the penalty period has elapsed, and the county cannot give a 10 day notice, the penalty period will not be imposed, however, an overpayment in the amount of the long-term care benefits paid for Mr. Brown from March 1 to December 17 of last year is established.~~

~~7. Overpayment caused by disqualifying transfer.~~

~~a. If the disqualifying transfer period has not yet expired, send a notice informing the Medicaid Unit, they are no longer eligible for nursing care services.~~

~~• The amount of the overpayment will be the lesser of:~~

- ~~○ The amount of the disqualifying transfer; or~~
- ~~○ The amount of Medicaid payments paid in error on behalf of the individual, for nursing services.~~

~~b. If the disqualifying transfer has expired.~~

~~• The amount of the overpayment will be the lesser of:~~

- ~~○ The amount of the disqualifying transfer; or~~
- ~~○ The amount of Medicaid payments paid in error on behalf of the individual, for nursing care services.~~

~~If there is a suspicion of fraud, follow the policy at 510-05-10-25. If it has been determined that there is not a suspicion of fraud, the Eligibility Worker must send the information on what months are considered overpayments to SURS at medicaidfraud@nd.gov to determine the amount of the overpayment. SURS will send the letter to the client informing the client of the amount of the overpayment. The SURS unit will need to send the notice of overpayment to the client.~~