

# PUBLICATION

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## D.C. Court of Appeals Permits Hospitals to Include Inpatient Section 1115 Days in the Medicaid Fraction of the Medicare Disproportionate Share Hospital Calculation

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The United States Court of Appeals for the District of Columbia recently ruled that a hospital's Medicaid eligible days in its Medicare disproportionate share hospital (DSH) calculation should include patients who receive inpatient care through a Section 1115 demonstration project. *Bethesda Health, Inc. v. Azar*, No. 19-5260 (D.C. Cir. 11/13/20), *aff'g*, 389 F.Supp.3d 32 (D.D.C. 2019). This ruling settles the issue nationally for hospitals since all hospitals can take their DSH appeals to this court.

### Background

Hospitals that treat a significant number of low-income patients receive an add-on payment known as the DSH adjustment. 42 U.S.C. § 1395ww(d)(5)(F). One component in that calculation is the Medicaid fraction, which includes total patient days attributed to Medicaid eligible patients. For years hospitals have litigated the issue of what days can be included as Medicaid eligible days. The statute permits the Secretary of Health and Human Services (Secretary) to include patient days as Medicaid eligible even if the patients are not Medicaid eligible, if they are regarded as such because they receive benefits under a demonstration project approved under subchapter XI of the Social Security Act. *Id.*

The Medicare DSH regulations were amended in 2000, to permit hospitals to "include all days attributable to populations eligible for Title XIX matching payments through a waiver approved under Section 1115 of the Social Security Act." 42 C.F.R. § 412.106(b)(4)(ii). The Secretary further amended the DSH regulations in 2006, to clarify that to be included the patient must be eligible for inpatient hospital services under either a Medicaid plan or Section 1115 waiver. 42 C.F.R. § 412.106(b)(4)(i).

### Case Discussion

The Florida Medicaid program operated a demonstration project authorized pursuant to a Section 1115 waiver, which included the creation of a Low Income Pool (LIP). The LIP was used to pay for health care services to Medicaid, underinsured and uninsured populations, and was jointly reimbursed by the State of Florida and the federal government.

While the hospitals wanted to include the LIP days as Medicaid eligible days in the DSH calculation, the Secretary argued that the days should not be included because the patients were treated out of charity rather than as specific beneficiaries of the demonstration project. Both the district court and the appellate court found that the regulation does not require that the demonstration project entitle specific patients to specific benefit packages. Rather, the regulation requires only that a patient be eligible for inpatient services, which requires only that the demonstration project enable the patient to receive inpatient services regardless of whether the project gave the patient a right to these services or allowed enrollment in a plan that provided these services. Both courts found it clear that the patients at issue were uninsured and underinsured patients who received inpatient services and that LIP funds were used to reimburse the hospitals for these services.

The courts concluded that the DSH regulation requires that the days at issue be included as Medicaid eligible days in the Medicare DSH calculation. This decision is similar to recent decisions of the Fifth Circuit in *Forrest*

*Gen. Hosp. v. Azar*, 926 F.3d 221 (5<sup>th</sup> Cir. 2019) and the D. C. District Court in *HealthAlliance Hosps., Inc. v. Azar*, 346 F.Supp.3d 43 (D.D.C. 2018).

### **Take Aways**

Unless the Secretary files for and receives rehearing before the circuit court or files for and is granted certiorari review by the United State Supreme Court, this decision is the final word on this subject for all providers. All providers with this issue are permitted to dispute their DSH payments with appeal rights to this same court, the United States Court of Appeals for the District of Columbia. Thus, the court's decision is controlling.

Providers should examine whether they have any Section 1115 demonstration project inpatient days that have not been included as Medicaid eligible days in their DSH calculations and pursue inclusion of those days going forward. To the extent Medicare contractors do not permit their inclusion, the issue should be protected through an appeal to the Provider Reimbursement Review Board.

For further information, please contact any member of [Baker Donelson's Reimbursement Team](#).