

## Hospitals Prevail in Effort to Include Pennsylvania GA Days in the Medicare DSH Calculation

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Mark H. Gallant • 215.665.4136 • [mgallant@cozen.com](mailto:mgallant@cozen.com)

Gregory M. Fliszar • 215.665.7276 • [gfliszar@cozen.com](mailto:gfliszar@cozen.com)

Two of Mercy Health System's hospitals (Nazareth Hospital and the former St. Agnes Medical Center) successfully challenged, before Judge Ludwig of the U.S. District Court for the Eastern District of Pennsylvania, the Secretary of Health and Human Services' exclusion of days of care provided to Pennsylvania's General Assistance (GA) patients in fiscal year 2002 from the formula used to determine the hospitals' Medicare disproportionate share hospital (DSH) payments ([\*Nazareth Hosp. v. Sebelius\*, E.D. Pa. No. 2:10-cv-03513-EL, April 8, 2013](#)). The exclusion resulted in lower Medicare DSH payments.

The Centers for Medicare and Medicaid Services (CMS) refused to count days of care for the plaintiff hospitals' Pennsylvania GA patients on the stated basis that those patients are not "eligible" to receive benefits under the federal Medicaid program. Yet CMS regulations enacted in January 2000 simultaneously and expressly permitted hospitals located in Section 1115 waiver states to count non-Medicaid eligible expansion patients. Patients eligible for benefits in Section 1115 waiver states may have incomes as high of 200 percent of the federal poverty level (FPL). Patients eligible for benefits under the Pennsylvania GA program had incomes below 50 percent of FPL. In both cases, the days are federally funded through payments for inpatient services made through the state medical assistance program. In Pennsylvania, payments for qualifying GA patients equivalent to those provided to "traditional" Medicaid beneficiaries are provided for expressly under Pennsylvania's federally approved state Medicaid plan. Despite these facts CMS allows hospitals in Section 1115

waiver states – such as, for example, in Delaware – to count non-Medicaid eligible waiver patients in their Medicare DSH calculation, resulting in increased Medicare DSH payments, while simultaneously prohibiting Pennsylvania hospitals from counting days for even more impoverished GA patients who are otherwise indistinguishable in their Medicare DSH calculations.

Cozen O'Connor argued on behalf of plaintiff hospitals that it was arbitrary and capricious, and prohibited under both the Administrative Procedures Act (APA) and the Equal Protection clause of the U.S. Constitution, for CMS to treat similarly situated hospitals in this discriminatory manner. The Secretary tried to differentiate non-Medicaid eligible expansion populations and Pennsylvania GA patients based on the assertion that the costs associated with Section 1115 waiver patients were expenditures under the Medicaid program, while Pennsylvania GA patients are "state-only" funded. However, the district court found, based on plaintiffs' expert testimony and the relevant Medicaid state plan provisions, that this distinction was contrary to the record, as the Pennsylvania State Medicaid Plan clearly provides federal funding for inpatient days and individual payments to GA patients who must meet specific eligibility criteria.

Plaintiffs were able to demonstrate to Judge Ludwig that the applicable regulation, as applied in Pennsylvania, created an irrational distinction that was impermissible under the APA and denied plaintiffs and other hospitals in Pennsylvania rights guaranteed by the equal protection clause of the Constitution.

Judge Ludwig also agreed with plaintiffs that the Secretary had disregarded significant rulemaking comments – which were produced only after the court ordered the Secretary over her objection to file the relevant rulemaking record – and made findings in the preamble to the Final Rule that conflicted with the rulemaking record.

Although the government may appeal to the 3rd Circuit, this decision is significant for all Pennsylvania hospitals participating in the Medicare DSH program, especially if Pennsylvania

decides not to proceed with Medicaid Expansion under the Affordable Care Act and cover through Medicaid those patients now receiving services via the GA program.

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*If you have any questions about this decision or wish to discuss it further, please feel free to contact one of the authors, who handled the case on behalf of plaintiffs.*