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Hopeful News for Providers on DSH/SSI Issue

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The Federal District Court for the District of Columbia recently issued an order in the *Baystate* disproportionate share hospital (DSH) supplementary security income (SSI) case: (1) vacating the decision of the Administrator below and ordering the Secretary of Health and Human Services (Secretary) to recalculate and pay the hospital further sums consistent with the court's opinions and to pay interest, (2) finding that the earlier ordered further evidentiary hearing and addition explanation by the Secretary are no longer necessary, and (3) denying Baystate's request that the court retain jurisdiction over this case until full resolution. *Baystate Medical Center v. Leavitt*, Civil Action No. 06-1263, DDC, Memorandum Opinion, Nov. 7, 2008.

The court in its recent Memorandum Opinion responded to a motion filed by Baystate for action on the part of the court. The court agreed to explicitly vacate the Administrator's decision below and to more specifically order the Secretary to pay the hospital the additional DSH amount due based on the anticipated corrections to the SSI fraction calculation plus interest as established by statute. The Secretary concurred with this portion of Baystate's request, and the court granted the request.

Second, Baystate asked the court to abandon its earlier order for remand to address whether individuals without Title II numbers were excluded from the match process and why the Secretary believes that social security numbers and other patient identifiers are not the "best available data" to use in the data match process. Baystate requested that such a remand likely would be futile and add unnecessary delay. The Secretary also requested the court to abandon the remand, but its reason for the request was that it intended to abandon use of the old SSI eligibility tapes and use new tapes compiled long after the fiscal years at issue, which would make the remand unnecessary. The court agreed that in light of the Secretary's intended rerun and Baystate's longstanding support of the use of updated SSI data, the earlier ordered remand would no longer be necessary. The court did, however, assert that the Secretary's future explanation in support of the recalculations should describe how the social security numbers and other patient identifiers were incorporated in the match process and address the problem of "missed matches."

Lastly, Baystate requested the court to retain jurisdiction over this case while

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the Secretary recalculates Baystate's DSH payments, to ensure timely action by the Secretary and that the Secretary's errors in past calculations are corrected with the new calculations. The court denied Baystate's request to retain jurisdiction and exercise continuing oversight over the remand process. It found the request "comes perilously close to involving the Court in reviewing non-final agency actions." If Baystate does not believe the Secretary properly recalculates Baystate's DSH SSI, the hospital will need to appeal that recalculation from the bottom up, i.e., beginning at the Provider Reimbursement Review Board (PRRB) once again. The court stated that it expected the Secretary to make "good faith efforts to perform the recalculations consistent with this Court's opinions and develop a complete administrative record."

Ober Kaler's Comment: Although Baystate prevailed in having the Secretary's DSH SSI calculations found by the court to be inadequate, requiring recalculation, it remains to be seen whether the Secretary's new calculations will meet the statutory requisites that the earlier calculations failed to meet. In addition, with no time restrictions on the Secretary to make the recalculations plus the need to address any shortcomings by beginning with a challenge at the PRRB level, it is unknown how long it will be before there is a final resolution of this issue. Providers should continue to protect their interests in this issue by appealing this issue at the PRRB.

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