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Court Rules Dual Eligible Days Properly Included in Medicaid Fraction of Medicare DSH Calculation

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The United States District Court for the District of Columbia Circuit recently handed providers a victory in [Catholic Health Initiatives – Iowa v. Sebelius, No. 10-cv-411 \(D.D.C. Jan. 30, 2012\) \[PDF\]](#), ruling that CMS used an impermissibly retroactive policy when it calculated the provider's Medicare disproportionate share hospital (DSH) adjustment. This case follows in the footsteps of last year's decision by the U.S. Court of Appeals for the District of Columbia in [Northeast Hospital v. Sebelius \[PDF\]](#), which addressed a similar issue regarding the inclusion of days associated with dually eligible Medicare M+C patients in the Medicaid versus the Medicare Fraction. We previously discussed [Northeast Hospital](#) [here](#).

The DSH calculation measures the number of patient days associated with low income patients using two fractions: (1) the Medicare fraction, which includes only days associated patients that are "entitled to benefits under Medicare Part A," and (2) the Medicaid fraction, which excludes days associated with patients who are "entitled to benefits under Medicare Part A." The issue in *CHI – Iowa* was the proper treatment of patient days associated with beneficiaries who were eligible for Medicaid, and who had exhausted their entitlement to benefits under Medicare Part A. Inclusion of days associated with such patients in the Medicare fraction, as opposed to the Medicaid fraction, significantly diminishes reimbursement under the DSH adjustment.

The court held that the decision by the Secretary of Health and Human Services (Secretary) to exclude the patient days at issue from the Medicaid fraction was not consistent with her prior policy. In particular, the court noted several Federal Register preambles from 1995 and 1996 in which the Secretary stated that only days associated with Medicare-paid hospital stays should be included in the

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Medicare fraction (and thus excluded from the more provider-friendly Medicaid fraction). The court also observed that the CMS Administrator's 1996 decision in *Presbyterian Med. Ctr. of Philadelphia v. Aetna Life Ins.* addressed the precise matter at issue in the *CHI – Iowa* case, and that the Administrator had included the dual eligible days in the Medicaid fraction in that case. The court therefore concluded that the application of the revised policy to 1996 and 1997, the fiscal years at issue, constituted impermissible retroactive rulemaking.

Ober|Kaler's Comments

The *CHI – Iowa* case represents a clear victory for the provider on retroactivity grounds, but leaves for another day the issue, also raised by the provider, of whether the Secretary's present interpretation would be consistent with the Medicare statute if applied on a prospective basis (i.e., after the policy was announced in 2000 by the CMS Administrator in its decision in *Edgewater Med. Ctr. v. Blue Cross Blue Shield Ass'n*). In this regard, the *CHI – Iowa* decision is more restrained than the D.C. Court of Appeals' *Northeast Hospital* decision, which included extensive analysis of the Secretary's position under the Chevron test. In *Northeast Hospital*, the court also ruled in the provider's favor on retroactivity grounds, thus arguably rendering the court's *Chevron* analysis – applicable to later years – *dicta*.