



D.C. Circuit Court of Appeals Reinstates 2017 DSH Rule to Include Third Party Payments in DSH Calculation

Publication:

Riker Danzig Health Care Client Alert August 30, 2019

The debate over the methodology to calculate Disproportionate Share Hospital (DSH) reimbursement to hospitals continues. In June, we updated you on [Azar v. Allina Health Services](#) when the Supreme Court vacated an HHS policy requiring DSH hospitals to include Medicare Part C enrollees in their Medicare fraction because HHS did so without going through the notice and comment period set by the Medicare Act for a substantive legal change.

On August 13, 2019, in [Children's Hospital Association of Texas, et al. v. Azar](#), the U.S. Court of Appeals for the District of Columbia Circuit overturned a district court ruling that CMS's DSH 2017 final rule (the "2017 final rule") on the Medicaid DSH program limit calculation violated the Medicaid Act. The 2017 final rule requires hospitals to exclude Medicare and private insurers payments they receive from their calculations of DSH payment caps. DSH hospitals serve a "disproportionate share" of low-income individuals and receive an upward adjustment to their Medicare rates in their DSH payments.

As noted above, the district court initially vacated the 2017 final rule, but the U.S. Court of Appeals reversed the district court's decision. The end result - this ruling will lower the cap on DSH payments and cause some hospitals, such as safety net providers like children's hospitals, to receive less DSH payments.

The Court opined that Congress "did not intend to exclude Medicare and private insurance payments" from the methodology used and expressed concern over "double dipping" if hospitals receive DSH payments and reimbursement from Medicare or private insurers for the dual-eligible patients. "[B]y requiring the inclusion of payments by Medicare and private insurers, the 2017 Final Rule ensures that DSH payments will go to hospitals that

have been compensated least and are thus most in need," the Court wrote. We will continue to update you on this issue.

If you have any questions, please contact [Khaled J. Klele](#) or [Latoya Caprice Dawkins](#).

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