



Supreme Court Rejects Health and Human Services' 2014 DSH Reimbursement Formula

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With \$4 billion in payments to disproportionate share hospitals (“DSH”) at stake, SCOTUS rejects Health and Human Services’ 2014 Medicare DSH reimbursement formula that included Part C patients. The justices affirmed a 2017 ruling by the D.C. Circuit Court, which found HHS in violation of the Medicare Act for changing the reimbursement formula for DSH payments without going through public notice-and-comment rulemaking. Yesterday’s decision is definitely a win for DSH hospitals but also has huge implications for how CMS manages the Medicare program and how the Department of Justice enforces violations of Medicare rules. Agencies routinely adopt policies without taking comments from stakeholders from the various regulated industries under the interpretive-rule exception. SCOTUS held that under the Medicare Act, interpretive rules and policy statements like HHS’s DSH reimbursement formula are not exempt from notice-and-comment rulemaking.

DSH hospitals serve a “disproportionate share” of low-income individuals and are eligible to receive an upward adjustment to their Medicare rates in their DSH payments. Nine hospitals sued HHS with \$48.5 million in claims. The hospitals claimed, among other things, that the government had violated the Medicare Act’s requirement to provide public notice and a 60-day comment period for any “rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing . . . the payment for services,” §1395hh(a)(2). The Court held that the government had not identified a lawful excuse for neglecting its statutory notice-and-comment obligations and stated the government’s interpretation of the Medicare Act and the Administrative Procedure Act and the use of the word “substantive” was incorrect.

If your hospital's DHS payments were affected by the 2014 DHS reimbursement formula, or if you have any questions about the issues discussed in this Update, please contact [Khaled J. Klele](#) or [Latoya Caprice Dawkins](#).

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