

Health Headlines

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DC Court Issues Latest DSH Decision

On January 30, the D.C. District Court issued the latest ruling relating to the proper calculation of hospitals' disproportionate share hospital ("DSH") payment. *See Catholic Health Initiatives - Iowa Corp. d/b/a Mercy Medical Center - Des Moines v. Sebelius*, Case 1:10-cv-00411-RCL (Jan. 30, 2012), available [here](#). The question in this case was whether the Secretary's exclusion of dual-eligible (*i.e.*, Medicare and Medicaid-eligible) patient days for which a patient's Medicare Part A benefits have been exhausted from the Medicaid Fraction component of the DSH calculation was permissible. The case involved the hospital's 1997 fiscal year. Among other arguments, the hospital argued that under the DSH statute, which defines the Medicaid Fraction as containing patient days for "patients who (for such days) were eligible for medical assistance under [Medicaid] but who were not entitled to benefits under part A of [Medicare]," dual-eligible Part A exhausted days belong in the Medicaid Fraction. The theory behind this argument is that "entitlement" to Part A benefits is synonymous with "payment"—if a day is not paid by Part A because the patient's Part A benefits are exhausted, then the patient was not "entitled to benefits under Part A" for that day.

The court did not reach the merits of the hospital's statutory arguments, which would have involved the application of *Chevron* analysis. Instead, the court analyzed CMS's historic policy with respect to the DSH treatment of Part A Exhausted days and found that the agency's original policy was to include these days in the Medicaid Fraction. The court further found that the earliest possible iteration of the agency's current policy (that "entitlement" does not equal "payment," and that Part A benefits exhausted days must be excluded from the Medicaid Fraction) was made in 2000, with a CMS Administrator Decision, which was followed by a more official statement in a 2004 preamble discussion. As a result, the court held that the prohibition against retroactive rulemaking prevented the Secretary from applying its policy change to the hospital's fiscal year 1997, and that dual-eligible, Part A benefits exhausted days must be included in the Medicaid Fraction component of the hospital's DSH calculation.

Although favorable to the hospital, this decision is of limited application because it only applies to appeals of this issue for fiscal years prior to 2004. Furthermore, because the court avoided the statutory question—whether the phrase "entitled to benefits under Part A" necessarily means entitled to *payment* under Part A—by deciding on the basis of prohibited retroactive application, providers with pending DSH appeals on issues involving the interpretation of this statutory phrase will find no additional support in this decision.

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