



MISSISSIPPI DIVISION OF

MEDICAID

Public Comments

State Plan Amendment #18-0015

Disproportionate Share Hospital (DSH) Payments

October 29, 2018

Received via Hand Delivery:

Jonathan Werne

Vice President, Legal Counsel

St. Dominic-Jackson Memorial Hospital

RE: Written Comments to the Public Notice of Medicaid State Plan Amendment 18-0015
Disproportionate Share Hospital Payments

Dear Mr. Snyder:

As provided in the Mississippi Division of Medicaid's ("the Division") Public Notice dated September 28, 2018, St. Dominic-Jackson Memorial Hospital ("St. Dominic's") respectfully submits this written comment to the Division's proposed Medicaid State Plan Amendment ("SPA") 18-0015. Specifically, St. Dominic's objects to the Division's proposed additional language to 5-2A of Attachment 4.19-A of the State Plan as summarized in paragraph 1(a)(3) of the Division's Public Notice. The amendment allows the Division to include payments from Medicare and other third-party payers to reduce Medicaid costs in the calculation of Disproportionate Share Hospital ("DSH") Payments. This change also sets a new reduced limit on DSH Payments. The proposed amendment violates state and federal statutes as well as recent case law.

The Mississippi Code provides that the Division "shall make additional reimbursement to hospitals that serve a disproportionate share of low-income patients and that meet the federal requirements for those payments as provided in Section 1923 of the federal Social Security Act." MISS. CODE ANN. § 43-13-117(18)(a). St. Dominic's serves a disproportionate share of low-income patients and meets the federal requirements, and therefore, the Division is obligated pursuant to Mississippi law to make a DSH Payment to St. Dominic's. However, by including payments from Medicare and other third-party payers in the calculation of the DSH Payment, not only does the Division reduce St. Dominic's DSH Payment, but it also lowers the cap on the DSH Payment that St. Dominic's may receive. As a result, St. Dominic's DSH Payment will not

only be inappropriately reduced, but St. Dominic's will also not even receive a DSH Payment because the Division lowered the cap. Both actions by the Division are a direct violation of Mississippi Law and penalize more efficient, lower cost providers such as St. Dominic's.

The Mississippi Code requires DSH Payments to be "subject to OBRA 1993 payment limitations." MISS. CODE ANN. § 43-13-145(10)(b). In other words, even if a hospital qualifies for a DSH Payment, Mississippi law prohibits the Division from making a DSH Payment to the qualifying hospital in excess of the federal OBRA limit (also known as the DSH Limit).

Section 1923 of the Social Security Act defines the DSH Limit and states that the DSH Payment cannot exceed "the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this subchapter, other than under this section, and by uninsured patients) by the hospital to individuals who either are eligible for medical assistance under the State plan or have no health insurance (or other source of third party coverage) for services provided during the year." 42 U.S.C. § 1396r-4(g)(1)(A). Thus, the DSH Limit equals Medicaid and uninsured patient costs minus Medicaid and uninsured payments.

There has been litigation concerning how to determine the DSH Limit, and the District Court for the Southern District of Mississippi recently confirmed that payments from Medicare and private health insurance should not be included in the calculation of the DSH Limit. *Baptist Mem. Hosp.-Golden Triangle, Inc., et al v. Price, et al.*, 3:17-cv-00491-TSL-LRA (S.D. Miss. June 28, 2018). Indeed, the court enjoined the Centers for Medicare & Medicaid Services ("CMS") from requiring the Division to reduce the DSH Limit by payments received from Medicare and private health insurance and ordered CMS to notify the Division that it could not calculate the DSH Limit in this manner. I have included a copy of the Final Judgment from the District Court case for your convenience.

The Division's current definition of the DSH Limit is similar to the federal definition in that it does not allow a DSH Payment to exceed "one hundred percent (100%) of the costs of furnishing hospital services by the hospital to residents who either are eligible for medical assistance under this State Plan or have no health insurance (or other source of third party coverage) for services provided during the year less any payments made by Medicaid, other than for disproportionate share payments, and less any payments made by uninsured patients." State Plan Attachment 4.19A at § 5-2A.

However, the Division seeks to amend that language of the State Plan to include the following language:

For Medicaid DSH payment purposes, Medicaid costs do not include costs associated with services covered by another third-party payer (including Medicare). When Medicaid eligible patients have access to coverage from another party, payments may be used as a proxy for cost offsets when calculating the Medicaid payment shortage or overage.

In other words, the Division is attempting to reduce the DSH Payment by payments received from Medicare or private health insurance which directly contradicts how many Federal Courts have dictated the DSH Limit to be calculated.

Mississippi law requires the Division to calculate the DSH Limit in compliance with federal law.

See MISS. CODE ANN. § 43-13-145(10)(b). The District Court for the Southern District of Mississippi has made clear that federal law does not allow payments from Medicare or private insurance to be deducted from the DSH Limit. If the DSH Payment is calculated pursuant to the Division's amendment, St. Dominic's and other hospitals will be foreclosed from receiving the DSH Payment they are required to receive by statute because the DSH Limit utilized by the Division will be lower than is allowed by Mississippi and federal law.

Additionally, as a condition of receiving federal funds for the DSH Payment, the Division must submit an independent certified audit verifying that only the uncompensated costs of providing services to Medicaid and uninsured patients are included in the calculation of the DSH Limit. 42 U.S.C. § 1396r-4(j)(2). Again, the Division will violate federal law if it includes payments from Medicare or other third-party payers in the calculation of the DSH Limit.

The limits setting forth the calculation of the DSH Payment should be the same as the calculation of the DSH Limit set forth in federal law. Indeed, if the Division reduces St. Dominic's DSH Limit when calculating the DSH Payment by payments received from Medicare and private insurance, then when the Division audits St. Dominic's DSH Payment using the appropriate DSH Limit that does not take into account these payments, the audit will reveal that the Division failed to pay St. Dominic's the DSH Payment that it was statutorily due. The use of two different limits creates confusion and is inconsistent with Federal Courts' recent definition of "Medicaid costs."

Thank you for the opportunity to submit this written comment to the Division's proposed Medicaid State Plan Amendment 18-0015. Should have any questions or need anything further, please do not hesitate to contact me.

October 29, 2018

Received via Federal Express:
Bruce J. Toppin
Chief Legal Officer
North Mississippi Health Services

RE: Comment to Proposed State Plan Amendment (SPA) 18-0015

Dear Mr. Snyder:

North Mississippi Health Services, Inc. ("NMHS"), on behalf of its six (6) affiliated hospitals, including North Mississippi Medical Center ("NMMC"), submits the following written comment formally opposing the Mississippi Division of Medicaid's ("the Division") proposed adoption of the Medicaid State Health Plan Amendment 18-0015 ("SPA"). As a hospital provider participating in the Medicaid Disproportionate Share (DSH) program that treats a significant volume of Medicaid patients, we respectfully request reconsideration of the aforementioned SPA, specifically with respect to the supposed "clarification" of the definition of "Medicaid costs" for DSH payment purposes in Section 5.2.A of the SPA.

The Mississippi Code provides that the Division "shall make additional reimbursement to hospitals that serve a disproportionate share of low-income patients and that meet the federal

requirements for those payments as provided in Section 1923 of the federal Social Security Act." Miss. Code Section 43-13-117(18)(a). Mississippi law further provides that DSH payments shall be "subject to the [Omnibus Budget Reconciliation Act ("OBRA")] 1993 limits." Mississippi Code Section 43-13- 145(10)(b).

As you are aware, the determination of the appropriate hospital specific DSH or OBRA limit has been an area of significant confusion and litigation for the provider community across the nation. The recent Mississippi federal court ruling in *Baptist Memorial Hospital-Golden Triangle, Inc. et al. v. Azar*¹ ("*Baptist*"), as well as other decisions across the country have brought clarity and consistency to the appropriate definition of Medicaid costs for purposes of calculating the hospital-specific OBRA limit and have held that Medicaid costs must be determined without respect to payments received by Medicare or other third-party payors. However, in the proposed SPA, the Division attempts to define "Medicaid costs" for "Medicaid DSH payment purposes" to "not include costs associated with services covered by another third-party payer (including Medicare)" and states that "[third party] payments may be used as a proxy for cost offsets when calculating the Medicaid payment shortage or overage."

The proposed SPA creates confusion where there otherwise should be none by defining "Medicaid costs" in one sense for Medicaid audit purposes pursuant to the *Baptist* federal decision and creating another totally different definition for DSH payment purposes. This undermines the reasoning of Judge Lee's ruling in the *Baptist* case as well as inhibits provider compliance by creating two competing definitions of "Medicaid costs." To promote clarity and consistency, the Division of Medicaid should use a consistent definition of "Medicaid costs" for both DSH payment and audit purposes.

Moreover, the adoption of this proposed definition of "Medicaid costs" for DSH payment purposes disproportionately benefits less efficient, higher cost providers and could prevent more efficient providers such as NMMC from obtaining their rightful share of DSH payments. The Division of Medicaid should adopt rules which encourage the efficient provision of healthcare to Medicaid beneficiaries rather than promulgate rules which would disproportionately reallocate these funds to less cost efficient providers.

Considering that health care reform efforts consistently encourage and incentivize efficiency, it is perplexing as to why the Division would promote a payment policy that would do exactly the opposite. In order to transform the healthcare industry to the degree necessary to ensure sustainability, the Division's policy should promote similar incentives to those being advanced by the marketplace. By promoting undesirable cost outcomes, this proposed SPA results in a disservice not only to efficient providers, but ultimately to all patients they serve as well as to the taxpayers of this State. For these reasons, NMHS opposes the adoption of the SPA.

We appreciate the Division's time and consideration of our comments.

¹Civil Action No. 3:17-CV-491-TSL-LRA, 2018 WL 3118703 (S.D. Miss. June 25, 2018).