

# PUBLICATION

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## Court Grants Unexpected Victory to Providers on Medicare DSH Adjustment [Ober|Kaler]

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The United States District Court for the Eastern District of Pennsylvania's opinion in *Nazareth Hosp. v. Sebelius*, slip op. no. 10-3513 furnished a surprising victory to two providers that challenged the calculation of the Medicare DSH calculation. At issue in the case was CMS's exclusion of days associated with general assistance (GA) patients from the Medicaid Fraction of the Medicare DSH calculation. The decision in favor of the providers was unexpected, as the Court of Appeals for the Third Circuit had previously agreed with CMS's position that it may exclude GA days from the Medicaid Fraction.

The controversy in *Nazareth* concerned whether GA days may be excluded from the Medicaid fraction of the Medicare DSH calculation, a question that courts have ultimately decided in CMS's favor with unanimity up to this point. Hospitals are reimbursed for GA days under state Medicaid plans with states using Medicaid funds, including federal financial participation. The plaintiffs in *Nazareth* argued that CMS may not simultaneously exclude GA days from the Medicaid fraction and include days associated with patients enrolled in waiver programs under Section 1115 of the Social Security Act. More specifically, the plaintiffs asserted that since Section 1115 waiver programs treat populations that are similar or identical to GA patient populations, and may be funded by diversion of funds that would otherwise reimburse treatment of GA patients, the distinction between the two types of patient days is impermissible under both the Administrative Procedure Act (APA) and the Equal Protection clause of the Constitution.

The court agreed that the distinction between GA days and Section 1115 waiver days was impermissible. Although the Third Circuit's prior decision in *Cooper Univ. Hosp. v. Sebelius* upheld CMS's interpretation of the DSH statute, the appropriate interpretation of the DSH statute was not an issue in the *Nazareth* case. Rather, the hospitals challenged the Secretary's disparate treatment of two groups of hospitals – hospitals in Pennsylvania that serve GA inpatients versus hospitals in other states that also serve non-Medicaid-eligible, low income patients under a Section 1115 waiver. The court examined CMS's justifications for singling out Section 1115 waiver days for inclusion in the Medicaid fraction and determined that there was no difference between the favored programs and state reimbursement for GA days. Given its finding that the government's position lacked a rational basis, the court determined that both the APA and Equal Protection clause supported the providers' position.

### Ober|Kaler's Comments

The ruling in *Nazareth* marks a welcome departure from the lockstep approach that courts have taken on the treatment of GA days with respect to the Medicare DSH calculation. The question is whether it will be short-lived. The government will almost certainly pursue an appeal, and it is often difficult to overcome the deference enjoyed by CMS on such matters. Given that the exclusion of GA days has previously been upheld in the Third Circuit – albeit on different grounds – the plaintiffs may face an uphill climb.