| CMS Manual System | **Department of Health & Human Services (DHHS)** |
|---|---|
| Pub 100-20 One-Time Notification | **Centers for Medicare & Medicaid Services (CMS)** |
| **Transmittal 11912** | **Date: March 16, 2023** |
| | **Change Request 12669** |

**SUBJECT: Instructions Relating to the Evaluation of Section 1115 Waiver Days in the Calculation of Disproportionate Share Hospital Reimbursement**

**I. SUMMARY OF CHANGES:** The purpose of this Change Request (CR) is to provide updated direction related to the evaluation of Section 1115 Waiver days in the calculation of Disproportionate Share Hospital (DSH) reimbursement for open cost reports and cost reports currently under administrative appeal.

**EFFECTIVE DATE: April 17, 2023**
**Unless otherwise specified, the effective date is the date of service.*
**IMPLEMENTATION DATE: May 17, 2023**

***Disclaimer for manual changes only: The revision date and transmittal number apply only to red italicized material. Any other material was previously published and remains unchanged. However, if this revision contains a table of contents, you will receive the new/revised information only, and not the entire table of contents.***

**II. CHANGES IN MANUAL INSTRUCTIONS:** (N/A if manual is not updated)
R=REVISED, N=NEW, D=DELETED-*Only One Per Row.*

| R/N/D | CHAPTER / SECTION / SUBSECTION / TITLE |
|---|---|
| N/A | N/A |

**III. FUNDING:**

**For Medicare Administrative Contractors (MACs):**
The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

**IV. ATTACHMENTS:**

**One Time Notification**

# Attachment - One-Time Notification

| Pub. 100-20 | Transmittal: 10912 | Date: March 16, 2023 | Change Request: 12669 |
|---|---|---|---|

**SUBJECT: Instructions Relating to the Evaluation of Section 1115 Waiver Days in the Calculation of Disproportionate Share Hospital Reimbursement**

**EFFECTIVE DATE: April 17, 2023**
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## I. GENERAL INFORMATION

### A. Background: Section 1115 Waiver Days

Section 1115 of the Social Security Act (SSA) gives the Secretary of Health and Human Services (Secretary) authority to approve experimental, pilot, or demonstration projects that are found by the Secretary to be likely to assist in promoting the objectives of the Medicaid program. The purpose of these demonstrations, which give states additional flexibility to design and improve their programs, is to demonstrate and evaluate state-specific policy approaches to better serving Medicaid populations. On August 1, 2003 the Centers for Medicare & Medicaid Services (CMS) clarified that patients must be eligible for medical assistance inpatient hospital benefits under an approved State Medicaid plan (or similar benefits, including inpatient hospital benefits, under a section 1115 demonstration project) in order for their hospital inpatient days to be counted as Medicaid days in the calculation of a hospital's DSH patient percentage (68 FR 45421). CMS's intention in allowing hospitals to include patient days related to section 1115 expansion waiver populations was to include patient days of demonstration populations who receive benefits under the demonstration project that are similar to traditional Medicaid beneficiaries, including inpatient benefits.

Decision in *Bethesda Health Inc v. Azar* (DC Circuit 2020)

In *Bethesda Health Inc v. Azar* (Bethesda), the plaintiff hospitals claimed that days of patients whose inpatient hospital stay is covered through Florida's Low Income Pool (LIP) program, for which the LIP program receives federal Title XIX matching funds through a section 1115 waiver, should be counted in the Medicaid fraction numerator for the DSH patient percentage. The Provider Reimbursement Review Board concluded that the LIP program does not provide benefits to individual patients similar to those of traditional Medicaid, and thus such days should not be counted in the Medicaid fraction numerator for the DSH patient percentage.

In the *Bethesda* district court decision, the district court held that the patients whose inpatient hospital services were covered by the LIP program were "eligible for Medicaid" within the meaning of the regulation, and therefore, the days of those patients should be included in the Medicaid fraction numerator for the DSH patient percentage. The Secretary appealed the district court decision to the Court of Appeals for the DC Circuit. The DC Circuit decision, affirmed the district court's decision, and the Secretary did not seek review by the Supreme Court.

### B. Policy: Updated Audit Guidance for Section 1115 Days for Open Cost Reports and Pending Appeals for Providers Not Included in the *Bethesda* Case

Each provider with an approved Section 1115 waiver program has a method for identifying the days that are applicable to such waiver for reimbursement from the Medicaid program. As such, the provider is responsible for maintaining the appropriate supporting documentation for the accrual of the days associated with Section 1115 waiver reimbursements. Providers typically keep this information in the form of a listing

of specific patient accounts for each individual acute hospital stay (Section 1115 log) that is subject to Section 1115 reimbursement. This Section 1115 log is similar to a provider's DSH Medicaid eligible days listing. For providers that have not yet received an initial Notice of Program Reimbursement, the MAC will incorporate any necessary review of Section 1115 days into their normal DSH portion of the Uniform Desk Review. No new steps for the Uniform Desk Review are being included. This guidance is solely for review of accounts when additional review is warranted based on the determination of the existing steps of the Uniform Desk Review. For cost reports that are open via a Provider Reimbursement Review Board (PRRB) appeal that has not yet been heard before the PRRB, Section 1115 days will be reviewed through the normal Administrative Resolution process within 24 months of the CR implementation date. In order for the Medicare Administrative Contractor (MAC) to consider the providers' Section 1115 days in recalculation of the Medicaid fraction, the following review shall take place, only as deemed necessary by the Uniform Desk Review process or Administrative Resolution process:

1. For providers with patients whose inpatient stay is covered by a Section 1115 waiver program funding pool, which pays health care providers that provide uncompensated care to patients who are uninsured or underinsured and is matched by Title XIX federal funds, the MAC shall review the State's Section 1115 program documents to determine the method by which the provider identifies eligible inpatient stay days.

2. The MAC shall select a sample of accounts from the provider's submitted Section 1115 log for further review.

3. The MAC shall request documentation from the provider for the selected sample and review the documentation to ensure that: a) the provider has accurately included the inpatient stay in the Section 1115 waiver program for reimbursement through the funding pool based on the provider's Section 1115 approved program documents; and b) has accurately included the inpatient stay on the Section 1115 log.

4. The MAC shall review the provider's applicable documentation that details the patient's length of stay and the acute-care unit that the patient's stay occurred to verify the patient's length of stay in an inpatient acute section of the hospital.

Additional Guidance for Implementing the *Bethesda* Decision

For providers and cost years included in the *Bethesda* case on Attachment A and any jurisdictionally valid pending open PRRB appeals for the providers included on Attachment A related to the Section 1115 waiver program where a funding pool was used to support health care providers' reimbursement, the provider shall complete the following instructions within 6 months of the implementation of this Change Request. Note: Jackson Memorial Hospital, while originally a plaintiff in the *Bethesda* case, is not included in Attachment A due to having withdrawn from the case prior to the Court issuing its Opinion. The providers and cost years included in Attachment A shall be completed first by their applicable MAC prior to addressing any remaining impacted providers.

The MAC shall request the applicable log of Section 1115 Waiver days from the provider and complete the review of the Section 1115 logs as identified in Steps 1-4 of the previous section.

Additional Guidance for Section 1115 Days for Open Cost Reports and Pending Appeals for Providers with Other Section 1115 Waiver Programs Not Identified Above

In addition to the type of Section 1115 Waivers noted above, states have also been granted waivers under Section 1115 authority to expand Medicaid to provide assistance to uninsured and underinsured patients in paying their health insurance premiums, or other similar waiver programs. For open cost reports and pending appeals for providers that identify patients that utilized this type of Medicaid assistance, the MAC shall review the Section 1115 log in the same manner as identified in Steps 1-4 above. For any questions

related to a state's specific Section 1115 waiver program and the auditing of such program, the MAC shall email Barb Shadle at Barbara.Shadle@cms.hhs.gov for additional instructions.

## II. BUSINESS REQUIREMENTS TABLE

*"Shall" denotes a mandatory requirement, and "should" denotes an optional requirement.*

| Number | Requirement | Responsibility | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | A/B MAC | | | DME | Shared-System Maintainers | | | | Other |
| | | A | B | HHH | MAC | FISS | MCS | VMS | CWF | |
| 12669.1 | The MAC shall review the State's Section 1115 waiver program documents to determine the method in which the provider identifies eligible inpatient stays for providers and cost years included on Attachment A. | X | | | | | | | | |
| 12669.1.1 | The MAC shall select a sample of accounts from the provider's submitted Section 1115 log. | X | | | | | | | | |
| 12669.1.2 | The MAC shall review provider submitted documentation that ensures the account was accurately included in the Section 1115 log, per the State's program documents. | X | | | | | | | | |
| 12669.1.3 | The MAC shall review the provider's submitted patient detail documentation for each sample account to verify the claimed length of stay in an acute portion of the hospital within 6 months of the CR implementation date. | X | | | | | | | | |
| 12669.2 | For open cost reports where the Uniform Desk Review has not yet begun, the MAC shall accept additional Section 1115 days to be included in the cost report only through an amended cost report submitted by the provider through their normal business practices. | X | | | | | | | | |
| 12669.2.1 | For cost reports where the Uniform Desk Review has been started, the MAC shall | X | | | | | | | | |

| Number | Requirement | Responsibility | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | A/B MAC | | | DME | Shared-System Maintainers | | | | Other |
| | | A | B | HHH | MAC | FISS | MCS | VMS | CWF | |
| | accept the amended cost report if the provider's amended cost report is solely to include Section 1115 days in the provider's Medicaid fraction of the DSH Reimbursement. | | | | | | | | | |
| 12669.2.2 | The MAC shall issue a tentative settlement for any amended cost report received to include Section 1115 days, unless NPR will be issued within 90 days of acceptance of the amended cost report. | X | | | | | | | | |
| 12669.3 | For pending Section 1115 Bethesda-like appeals, the MAC shall review jurisdiction for each case. | X | | | | | | | | |
| 12669.3.1 | For jurisdictionally valid pending Section 1115 Bethesda-like appeals, the MAC shall perform BR 12669.1-12669.1.3. | X | | | | | | | | |
| 12669.3.2 | The MAC shall complete an Administrative Resolution within 24 months for applicable pending Section 1115 Bethesda-like appeals that are able to be resolved. | X | | | | | | | | |
| 12669.4 | For open cost reports with Other Section 1115 waivers that provide assistance not otherwise noted above, the MAC shall perform BR 12669.1-12669.1.3. | X | | | | | | | | |
| 12669.4.1 | For pending appeals with Other Section 1115 waivers that provide assistance not otherwise noted above, the MAC shall perform BR 12669.1-12669.1.3. | X | | | | | | | | |
| 12669.4.2 | The MAC shall send any questions relating to Other Section 1115 waivers to Barb Shadle at | X | | | | | | | | |

| Number | Requirement | Responsibility | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | A/B MAC | | | DME MAC | Shared-System Maintainers | | | | Other |
| | | A | B | HHH | | FISS | MCS | VMS | CWF | |
| | Barbara.Shadle@cms.hhs.gov. | | | | | | | | | |
| 12669.5 | For Open Cost Reports that have not received an initial NPR, the provider shall submit an amended cost report to include their Section 1115 days to the cost report along with the appropriate supporting listing of days. | X | | | | | | | | |
| 12669.5.1 | The MACs shall accept the provider's amended cost reports to include their Section 1115 days for the purposes of calculating their DSH reimbursement amount. | X | | | | | | | | |
| 12669.5.2 | The providers shall keep their listing of Section 1115 waiver days on a separate log from their traditionally accepted Medicaid Eligible day logs in order to assist in the efficiency of review. | X | | | | | | | | |

## III. PROVIDER EDUCATION TABLE

| Number | Requirement | Responsibility | | | | |
|---|---|---|---|---|---|---|
| | | A/B MAC | | | DME MAC | CEDI |
| | | A | B | HHH | | |
| 12669.6 | CR as Provider Education: Contractors shall post this entire instruction, or a direct link to this instruction, on their Web sites and include information about it in a listserv message within 5 business days after receipt of the notification from CMS announcing the availability of the article. In addition, the entire instruction must be included in the contractor's next regularly scheduled bulletin. Contractors are free to supplement it with localized information that would benefit their provider community in billing and administering the Medicare program correctly. | X | | | | |

## IV. SUPPORTING INFORMATION

**Section A: Recommendations and supporting information associated with listed requirements:** N/A

*"Should" denotes a recommendation.*

| X-Ref Requirement Number | Recommendations or other supporting information: |
|---|---|

**Section B: All other recommendations and supporting information:** N/A

## V. CONTACTS

**Pre-Implementation Contact(s):** Barbara Shadle, 410-786-6475 or barbara.shadle@cms.hhs.gov

**Post-Implementation Contact(s):** Contact your Contracting Officer's Representative (COR).

## VI. FUNDING

**Section A: For Medicare Administrative Contractors (MACs):**
The Medicare Administrative Contractor is hereby advised that this constitutes technical direction as defined in your contract. CMS does not construe this as a change to the MAC Statement of Work. The contractor is not obligated to incur costs in excess of the amounts allotted in your contract unless and until specifically authorized by the Contracting Officer. If the contractor considers anything provided, as described above, to be outside the current scope of work, the contractor shall withhold performance on the part(s) in question and immediately notify the Contracting Officer, in writing or by e-mail, and request formal directions regarding continued performance requirements.

**ATTACHMENTS: 1**

| MAC | Provider Name | Provider # | FYE |
|---|---|---|---|
| JN | Bethesda Memorial Hospital | 10-0002 | 09/30/2008 |
| | | | 09/30/2009 |
| | | | 09/30/2010 |
| | | | 09/30/2011 |
| JN | Halifax Health | 10-0017 | 09/30/2007 |
| | | | 09/30/2008 |
| | | | 09/30/2011 |
| JN | Indian River Medical Center | 10-0105 | 09/30/2008 |
| JN | Lakeland Regional Medical Center | 10-0157 | 09/30/2007 |
| | | | 09/30/2008 |
| JN | LHP Hospital Group | 10-0026 | 09/30/2008 |
| JN | Martin Memorial Medical Center | 10-0044 | 09/30/2007 |
| | | | 09/30/2008 |
| JN | Naples Community Hospital | 10-0018 | 09/30/2007 |
| | | | 09/30/2008 |
| JN | Parrish Medical Center | 10-0028 | 09/30/2008 |
| JN | Sarasota Memorial Hospital | 10-0087 | 09/30/2007 |
| | | | 09/30/2008 |
| JN | Memorial Hospital Miramar | 10-0285 | 04/30/2007 |
| | | | 04/30/2008 |
| | | | 04/30/2009 |
| | | | 04/30/2011 |
| | | | 04/30/2013 |
| JN | Memorial Regional Pembroke | 10-0230 | 04/30/2007 |
| | | | 04/30/2008 |
| | | | 04/30/2009 |
| | | | 04/30/2011 |
| | | | 04/30/2013 |
| JN | Memorial Hospital West | 10-0281 | 04/30/2007 |
| | | | 04/30/2008 |
| | | | 04/30/2009 |
| | | | 04/30/2011 |
| | | | 04/30/2013 |
| JN | Memorial Regional Hospital | 10-0038 | 04/30/2007 |
| | | | 04/30/2008 |
| | | | 04/30/2009 |
| | | | 04/30/2011 |
| | | | 04/30/2013 |