

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2024-D02

PROVIDER–
Southwest Consulting Christus

Provider Numbers:
32-0002; 45-0046; 45-0034

vs.

MEDICARE CONTRACTOR –
Novitas Solutions, Inc. (J-H)

RECORD HEARING DATE –
September 8, 2023

Fiscal Years Ending –
June 30, 2009

Case No. –
14-0786GC

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ISSUE STATEMENT

Whether the disproportionate share hospital ("DSH") payments for the fiscal year ending June 30, 2009 ("FY 2009") of each of the Christus Health Providers should be revised to include additional Medicaid labor and delivery room ("LDR") patient days that were excluded from the numerator and denominator of their respective Medicaid fraction?¹

DECISION

After examining Medicare law and regulations, the arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that the FY 2009 DSH payment calculation for each of the Christus Health Providers should be revised to include additional Medicaid-eligible LDR days in its respective Medicaid fraction. Accordingly, the Board remands this appeal to the Medicare Contractor to revise the FY 2009 cost reports for the Christus Health Providers as follows:

1. For St. Vincent Hospital (Prov. No. 32-0002), make the following adjustments to effectively increase its disproportionate share percentage from 13.73 percent to 14.11 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 302 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 502 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.
2. For Christus Hospital (Prov. No. 45-0034), make the following adjustments to effectively increase its disproportionate share percentage from 10.85 percent to 10.91 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 133 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 282 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.
3. For Christus Spohn Hospital (Prov. No. 45-0046), make the following adjustments to effectively increase its disproportionate share percentage from 19.78 percent to 19.86 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 217 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 242 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.

¹ Stipulations and Consent Request for a Hearing on the Record (hereinafter "Stipulations"), ¶ 1 (Aug. 28, 2023).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This common issue related party (“CIRP”) group consists of three participants from Christus Health (collectively the “Christus Health Providers”) and the period at issue is FY 2009. The Christus Health Providers are St. Vincent Hospital, Christus Hospital, and Christus Spohn Hospital and each is an individual acute care hospital paid by Medicare under the inpatient prospective payment system (“IPPS”). The designated Medicare contractor² for the Christus Health Providers is Novitas Solutions (“Medicare Contractor”).³

Each of the Christus Health Providers included a protested item on their as-filed FY 2009 cost report for the inclusion of certain Medicaid LDR days and total LDR days.⁴ The Medicare Contractor issued FY 2009 Notices of Program Reimbursement (“NPRs”) for the Christus Health Providers eliminating both the LDR protested items and, as a result, LDR days were not included in either the numerator *or* the denominator of the Medicaid fraction for each Provider’s respective DSH calculation.⁵ Each of the Christus Health Providers each timely appealed their respective NPRs seeking the inclusion of the Medicaid-eligible labor and delivery room days in the numerator and the inclusion of total LDR days in the denominator of the DSH Medicaid fraction.⁶

On August 28, 2023, the Parties to the appeal filed Stipulations and a Consent for Hearing on the Record.⁷ The Parties stipulated, in relevant part:

6. The parties have now reached an agreement on the cost report adjustments necessary to resolve this appeal. Attached as Exhibits 1-3 to this stipulation are copies of the MAC’s audit adjustment reports reflecting the parties’ agreement for each hospital.⁸
7. For St. Vincent Hospital, the agreed upon adjustments would add 302 Medicaid-eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 502 total labor and delivery room days to the hospital’s count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider’s disproportionate share percentage from 13.73% to 14.11% on Worksheet E, Part A, Line 4.03.⁹

² CMS’s payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries (“FIs”) and these functions are now contracted with organizations known as Medicare administrative contractors (“MACs”). The term “Medicare contractor” refers to both FIs and MACs as appropriate and relevant.

³ Providers’ Final Position Paper at 7 (Jun. 6, 2023) (hereinafter “Providers’ FPP”).

⁴ Exhibit P-2.

⁵ Stipulations at Tabs 1-3 (proposed audit adjustments from the Medicare Contractor confirming neither Medicaid LDR days nor total LDR days were included in the original FY 2009 NPRs for the Christus Health Providers).

⁶ *Id.* at ¶¶ 2-3.

⁷ *Id.* at ¶ 1.

⁸ *Id.* at ¶ 6.

⁹ *Id.* at ¶ 7.

8. For Christus Hospital, the agreed upon adjustments would add 133 Medicaid-eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 282 total labor and delivery room days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider's disproportionate share percentage from 10.85% to 10.91% on Worksheet E, Part A, Line 4.03.¹⁰
9. For Christus Spohn Hospital Corpus Christi, the agreed upon adjustments would add 217 Medicaid-eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 242 total labor and delivery room days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider's disproportionate share percentage from 19.78% to 19.86% on Worksheet E, Part A, Line 4.03.¹¹
10. Notwithstanding the agreement on the necessary adjustments, the MAC is unable to enter into an administrative resolution at this time due to binding instructions from CMS precluding any MAC adjustment to the Provider's Disproportionate Patient Percentage or DSH payment calculations for periods prior to October 1, 2013.¹²
11. Because the MAC and Provider are therefore unable to resolve this appeal through an administrative resolution at this time, the parties request a hearing on the record and confirm that upon the submission of these stipulations the record is complete.¹³

Each Provider in the Southwest Consulting Christus Group met the jurisdictional requirements for a hearing and the Board approved the Record Hearing Request. Accordingly, the Board issued a Notice of Hearing on the Record on September 8, 2023.

STATUTORY AND REGULATORY BACKGROUND: MEDICARE DSH PAYMENT

Part A of the Medicare Act covers "inpatient hospital services." Since 1983, the Medicare program has paid most hospitals for the operating costs of inpatient hospital services under IPPS.¹⁴ Under IPPS, Medicare pays predetermined, standardized amounts per discharge, subject to certain payment adjustments.¹⁵

¹⁰ *Id.* at ¶ 8.

¹¹ *Id.* at ¶ 9.

¹² *Id.* at ¶ 10.

¹³ *Id.* at ¶ 11.

¹⁴ See 42 U.S.C. § 1395ww(d)(1)-(5); 42 C.F.R. Part 412.

¹⁵ See 42 U.S.C. § 1395ww(d)(1)-(5); 42 C.F.R. Part 412.

The IPPS statute contains several provisions that adjust reimbursement based on hospital-specific factors.¹⁶ This case involves the hospital-specific DSH adjustment, which requires the Secretary to provide increased PPS payments to hospitals that serve a significantly disproportionate number of low-income patients.¹⁷

A hospital may qualify for a DSH adjustment based on its disproportionate patient percentage (“DPP”).¹⁸ As a proxy for utilization by low-income patients, the DPP determines a hospital's qualification as a DSH, and it also determines the amount of the DSH payment that should be paid to a qualifying hospital.¹⁹ The DPP is defined as the sum of two fractions expressed as percentages.²⁰ Those two fractions are referred to as the “Medicare/SSI” fraction and the “Medicaid” fraction. Both fractions consider whether a patient was “entitled to benefits under part A” relative to each day of the patient’s hospital stay.²¹

The Medicaid fraction is the fraction at issue in this case and it is defined as follows at 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II):

[T]he fraction (expressed as a percentage), the numerator of which is the number of the hospital's patient days for such period which consist of patients who (for such days) were eligible for medical assistance under a State plan approved under subchapter XIX [the Medicaid program], but who were *not entitled to benefits under part A of this subchapter*, and the denominator of which is the total number of the hospital's patient days for such period.²²

The DSH regulation at 42 C.F.R. § 412.106(b)(4) (2009) specifies that Medicare contractors calculate the Medicaid fraction for a hospital’s cost reporting period by “determin[ing] . . . the number of the hospital’s patient days of service for which patients were eligible for Medicaid but not entitled to Medicare Part A and divides that number by the total number of patient days in the same period.”

The definition of inpatient days, for DSH purposes, is addressed in 42 C.F.R. § 412.106(a)(1)(ii). In general, the regulation provides that days in IPPS areas of a hospital should be counted. CMS generally has defined an “inpatient” as a patient admitted with an expectation of an overnight stay. In 2003, however, CMS amended the DSH regulation to “clarify” that a patient day should not be counted for a patient who is in an ancillary labor/delivery room at the census taking hour unless the patient had previously occupied a routine bed since admission.²³ In making the 2003 revision, CMS stated that, in order to appropriately track days in a labor delivery recovery and postpartum room, days must be allocated between labor and delivery time and recovery time.²⁴

¹⁶ See e.g. 42 U.S.C. § 1395ww(d)(5).

¹⁷ See 42 U.S.C. § 1395ww(d)(5)(F)(i)(I); 42 C.F.R. § 412.106.

¹⁸ See 42 U.S.C. § 1395ww(d)(5)(F)(v); 42 C.F.R. § 412.106(c)(1).

¹⁹ See 42 U.S.C. § 1395ww(d)(5)(F)(iv), (vii)-(xiii); 42 C.F.R. § 412.106(d).

²⁰ See 42 U.S.C. § 1395ww(d)(5)(F)(vi).

²¹ See, e.g., 42 C.F.R. § 412.106(b)(3), (4).

²² (Emphasis added.)

²³ 42 C.F.R. § 412.106(a)(1)(ii)(B); 68 Fed. Reg. 45346, 45419-20 (Aug. 1, 2003).

²⁴ 68 Fed. Reg. at 45419-20.

In 2009, CMS amended the DSH regulation to include all LDR days for patients admitted as inpatients in the patient days used to calculate the DSH payment.²⁵ That rule was made effective only prospectively for cost reporting periods *beginning on or after* October 1, 2009. However, on April 28, 2010, CMS issued CMS Ruling 1498-R. This Ruling requires CMS to count *all* LDR days for admitted patients as patient days in the DSH calculation for cost reporting periods *beginning before October 1, 2009* that are either not yet settled in a notice of program reimbursement or have a jurisdictionally proper appeal pending on this issue. *Accordingly, for the period at issue in this appeal, CMS Ruling 1498-R requires all LDR days to be used as patient days in the DSH calculation.*

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

As previously stated, the issue in this appeal is whether the providers in the Southwest Consulting Christus Group's DSH payment for the FY 2009 period should be adjusted to include additional patient days that were excluded from the Medicaid fraction. To resolve this issue, the Parties agree to the following cost report adjustments:

7. For St. Vincent Hospital, the agreed upon adjustments would add 302 Medicaid- eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 502 total labor and delivery room days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider's disproportionate share percentage from 13.73% to 14.11% on Worksheet E, Part A, Line 4.03.²⁶
8. For Christus Hospital, the agreed upon adjustments would add 133 Medicaid- eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 282 total labor and delivery room days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider's disproportionate share percentage from 10.85% to 10.91% on Worksheet E, Part A, Line 4.03.²⁷
9. For Christus Spohn Hospital Corpus Christi, the agreed upon adjustments would add 217 Medicaid-eligible labor and delivery room days to the number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, line 29. In addition, the agreed upon adjustments would add 242 total labor and delivery room days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments would increase the Provider's disproportionate share percentage from 19.78% to 19.86% on Worksheet E, Part A, Line 4.03.²⁸

²⁵ 74 Fed. Reg. 43753, 43899-901 (Aug. 27, 2009)

²⁶ Stipulations at ¶ 7.

²⁷ *Id.* at ¶ 8.

²⁸ *Id.* at ¶ 9.

However, the Medicare Contractor contends that it is “unable to enter into an administrative resolution at this time due to binding instructions from CMS precluding any MAC adjustment to the Provider’s Disproportionate Patient Percentage or DSH payment calculations for periods prior to October 1, 2013.”²⁹

Consistent with *CMS Ruling 1498-R* and 42 C.F.R. § 412.106(b)(4), *and* based on the Parties’ stipulations, the Parties’ agreement to conduct a hearing on the record, *and* the record before the Board, the Board accepts the data in ¶¶ 7-9 of the Stipulations and finds that the LDR days at issue for each participant in this group must be included in their respective FY 2009 DSH calculations as follows:

For Participant 1 - The Board finds that the FY 2009 DSH calculation should be adjusted for St. Vincent Hospital by revising its FY 2009 cost report to: (1) add 302 Medicaid-eligible labor and delivery room days to the Provider’s number of Medicaid-eligible days on Worksheet S-3, Part I, Column 5, Line 29; and (2) add 502 total labor and delivery room days to the hospital’s count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments are expected to increase St. Vincent Hospital’s disproportionate share percentage from 13.73 percent to 14.11 percent on Worksheet E, Part A, Line 4.03.³⁰

For Participant 2 - The Board finds that the 2009 DSH calculation should be adjusted for Christus Hospital by revising its FY 2009 cost report to: (1) add 133 Medicaid-eligible labor and delivery room days to the Provider’s number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, Line 29; and (2) add 282 total labor and delivery room days to the hospital’s count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments are expected to increase Christus Hospital’s disproportionate share percentage from 10.85 percent to 10.91 percent on Worksheet E, Part A, Line 4.03.³¹

For Participant 3 - The Board finds that the 2009 DSH calculation should be adjusted for Christus Spohn Hospital by revising its FY 2009 cost report to: (1) add 217 Medicaid-eligible labor and delivery room days to the Provider’s number of Medicaid-eligible labor and delivery room days on Worksheet S-3, Part I, Column 5, Line 29; and (2) add 242 total labor and delivery room days to the hospital’s count of total days on Worksheet S-3, Part I, Column 6, Line 29. These adjustments are expected to increase Christus Spohn Hospital’s disproportionate share percentage from 19.78 percent to 19.86 percent on Worksheet E, Part A, Line 4.03.³²

²⁹ *Id.* at ¶ 10.

³⁰ *Id.* at ¶ 7. The agreed-upon changes to LDR days for this Provider are consistent with but less than the number of LDR days included on the Provider’s FY cost report in the DSH protested item for this issue. *See* Ex. P-2 at P006 (asserting that an adjustment should be made to include 352 LDR Medicaid days and 564 LDR total days).

³¹ Stipulations at ¶ 8. The agreed-upon changes to LDR days for this Provider are consistent with but less than the number of LDR days included on the Provider’s FY cost report in the DSH protested item for this issue. *See* Ex. P-2 at P009 (asserting that an adjustment should be made to include 219 LDR Medicaid days and 382 LDR total days).

³² Stipulations at ¶ 9. The agreed-upon changes to LDR days for this Provider are consistent with but less than the number of LDR days included on the Provider’s FY cost report in the DSH protested item for this issue. *See* Ex. P-2 at P013 (asserting that an adjustment should be made to include 718 LDR Medicaid days and 1,019 LDR total days).

DECISION AND ORDER

After considering Medicare law and regulations, the arguments presented, and the evidence admitted, the Board finds that the FY 2009 DSH payment calculation for each of the Christus Health Providers should be revised to include additional Medicaid-eligible LDR days in the numerator of its respective Medicaid fraction and to include additional total LDR days in the denominator of that same fraction. Accordingly, the Board remands this appeal to the Medicare Contractor to revise the FY 2009 cost reports for each of the Christus Health Providers as follows:

1. For St. Vincent Hospital (Prov. No. 32-0002), make the following adjustments to effectively increase its disproportionate share percentage from 13.73 percent to 14.11 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 302 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 502 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.

2. For Christus Hospital (Prov. No. 45-0034), make the following adjustments to effectively increase its disproportionate share percentage from 10.85 percent to 10.91 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 133 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 282 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.

3. For Christus Spohn Hospital (Prov. No. 45-0046), make the following adjustments to effectively increase its disproportionate share percentage from 19.78 percent to 19.86 percent on Worksheet E, Part A, Line 4.03:
 - Add an additional 217 Medicaid-eligible LDR days to the number of Medicaid-eligible LDR days on Worksheet S-3, Part I, Column 5, Line 29; and
 - Add 242 total LDR days to the hospital's count of total days on Worksheet S-3, Part I, Column 6, Line 29.

Board Members Participating:

Clayton J. Nix, Esq.
 Robert A. Evarts, Esq.
 Kevin D. Smith, CPA
 Ratina Kelly, CPA

For the Board:

10/23/2023

X Clayton J. Nix

Clayton J. Nix, Esq.

Chair

Signed by: PIV