

# Justices Face Tough Question On HHS Hospital Pay Formula

By **Leonard Lipsky, John Herbstritt and Alexandria Foster** (October 30, 2024)

On Nov. 5, the U.S. Supreme Court will hear oral arguments in *Advocate Christ Medical Center v. Becerra*,<sup>[1]</sup> a case that the American Hospital Association estimates potentially affects at least \$1 billion in federal funding per year for hospitals, and affects multiple federal agencies and programs.<sup>[2]</sup>

The U.S. Supreme Court will determine whether the U.S. Department of Health and Human Services properly reimbursed hospitals for providing care to Medicare patients eligible for financial aid from the Supplemental Security Income, or SSI, program.<sup>[3]</sup>

Hospitals benefiting from such Medicare reimbursement adjustments — known as disproportionate-share hospital, or DSH, payments — for treating a higher proportion of low-income Medicare patients should closely monitor this case, as a favorable ruling for the plaintiffs may affect how hospitals are reimbursed for similar claims in the future.

## Background

The *Advocate Christ Medical Center* case concerns how much hospitals can be reimbursed for treating low-income Medicare recipients.<sup>[4]</sup>

HHS makes fixed payments for services provided by hospitals to Medicare Part A beneficiaries and adjusts those payments for hospitals that serve an "unusually high percentage of low-income patients" because these patients generally require more care, as explained by the U.S. Court of Appeals for the D.C. Circuit's ruling in *Advocate Christ Medical Center*.<sup>[5]</sup>

This percentage is expressed in a fraction — known as the Medicare fraction — using data from the Social Security Administration as to which Medicare patients are entitled to SSI benefits.<sup>[6]</sup> DSH payments are then made by HHS to the individual hospitals based, in large part, on the Medicare fraction.<sup>[7]</sup>

The primary SSI program benefit at issue consists of monthly cash payments made to financially needy individuals who are aged, blind or disabled.<sup>[8]</sup>

Individuals who are enrolled in the SSI program must prove eligibility each month to receive cash payments, but remain enrolled in the SSI program even if they do not qualify for cash payments in a particular month.<sup>[9]</sup> Each month, for the purpose of determining the Medicare fraction, HHS counts only those individuals who were entitled to receive cash payments under the SSI program and does not count individuals who were enrolled in the SSI program but were not entitled to receive cash payments.<sup>[10]</sup>

The process for making this determination undergoes several layers of review by federal government agencies.<sup>[11]</sup> The SSA assigns a code to each individual enrolled in the SSI program based on various criteria, including eligibility for cash payments.<sup>[12]</sup> HHS then



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uses the codes to calculate DSH payments, having previously determined which codes correspond to individuals who, under its formulation, should be counted as part of the Medicare fraction.[13]

HHS' position is that the statutory language provides that the Medicare fraction be calculated to include only those individuals actually eligible for cash payments at the time of hospitalization, and not the larger number of individuals who were enrolled in the program, some of whom were not eligible to receive a cash payment during the month in question, usually because their income was above a certain limit during a particular month.[14]

HHS argues that any other benefits to which patients are entitled are irrelevant for the purposes of determining whether a hospital should receive greater DSH payments for such patients because the statutory scheme specifically counts only income-related benefits, such as the cash payments, and not benefits unrelated to income, such as free or discounted job training.[15]

### **The Plaintiff Hospitals' Arguments on Appeal**

In July 2017, the plaintiff hospitals sued HHS, claiming that its formula for determining the Medicare fraction, and thus, the size of DSH payments, was incorrect, and sought proper reimbursement for fiscal years 2006-2009, among other remedies.[16] Their argument turns on the meaning of the word, "entitled" in the context of "entitled to [SSI Program] benefits" in the statute at issue and relies, in large part, on a 2022 Supreme Court case interpreting the same statute, *Becerra v. Empire Health Foundation*.[17]

As explained by the D.C. Circuit's Advocate Christ Medical Center ruling, in *Empire Health*, the court held that "the phrase 'entitled to benefits under Part A,' as used to determine the Medicare fraction, covers patients who meet Part A's requirement of being elderly or disabled, even if Medicare does not pay for specific treatments because of coverage limitations, alternative insurance, or the like." [18]

Similarly, as the D.C. Circuit's opinion explained, the plaintiff hospitals in *Advocate Christ Medical Center* argued that "if the phrase 'entitled to benefits under Part A' covers patients who meet basic eligibility requirements without regard to specific payment decisions, then so too must the adjacent phrase 'entitled to [SSI] benefits.'" [19]

Essentially, the plaintiffs argued that *Empire Health* directed HHS to interpret the word "entitled" more expansively as applied to Medicare Part A and, thus, the same expansive interpretation should apply to SSI program benefits because the same word should carry the same meaning when applied in the same statute.[20]

The plaintiff hospitals also argued that individuals who qualified for ancillary benefits under the SSI program while being treated by a hospital, but did not qualify for cash payments, should be counted in the Medicare fraction because such individuals qualified for benefits due to their enrollment in the SSI program.[21] Under this formulation, more individuals would be counted in the Medicare fraction and, thus, hospitals would receive greater DSH payments for such patients.[22]

### **Appellate Court's Holding and Remaining Question for SCOTUS**

In ruling for HHS, the D.C. Circuit affirmed the U.S. District Court for the District of Columbia, which found that HHS' interpretation of the Medicare fraction calculation was consistent with the statutory language, which directs the calculation of the Medicare fraction

to include only individuals eligible to receive the monthly cash payment from the SSI program.[23]

According to the court, even if SSI program enrollees became eligible for ancillary benefits because of their enrollment in the SSI program, those benefits did not qualify them to be counted in the Medicare fraction.[24]

The U.S. Supreme Court granted certiorari on June 10, 2024, on the question of whether the phrase "entitled to ... benefits" includes all those individuals enrolled in the SSI program and not solely those qualifying for cash payments.[25] The Solicitor General's Office submitted a brief in support of the lower court's decision, writing that it was consistent with the long-standing interpretation of the statute and with decisions of other courts.[26]

### **What to Watch For**

The U.S. Supreme Court's decision is likely to have a significant impact on hospitals' ability to seek higher Medicare reimbursement for low-income patients. Absent future legislative changes, a ruling for the plaintiff hospitals would increase the amount of DSH payments made to hospitals going forward because more individuals would be counted in the numerator of the Medicare fraction.

Further, if the need to differentiate between SSI program enrollees and the subset of those enrollees who are entitled to a cash payment in a particular month is obviated because all enrollees are counted, a significant administrative burden may lift from HHS because calculating the Medicare fraction will become significantly simpler, streamlining the DSH payment process going forward.

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[1] 80 F.4th 346 (D.C. Cir. 2023); Supreme Court of the United States, Order List: 602 U.S. (June 10, 2024), [https://www.supremecourt.gov/orders/courtorders/061024zor\\_d18f.pdf](https://www.supremecourt.gov/orders/courtorders/061024zor_d18f.pdf).

[2] Brief for the American Hospital Association as Amicus Curiae, p. 3, Advocate Christ Medical Center v. Becerra, Docket No. 23-715 (Oral argument scheduled Nov. 5, 2024).

[3] 80 F.4th 346, 349.

[4] 80 F.4th 346, 349.

[5] Advocate Christ Medical Center v. Becerra, 80 F.4th 346, 349, citing Cape Cod Hosp. v. Sebelius, 630 F.3d 203, 205 (D.C. Cir. 2011).

[6] 80 F.4th 346 at 349-50.

[7] Id.

[8] Id. at 350, citing 42 U.S.C. § 1382(a).

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id. at 350.

[15] Id. at 352.

[16] Id. at 351.

[17] *Becerra v. Empire Health Foundation*, 142 S. Ct. 2354; 42 U.S.C. §1395ww(d)(5)(F)(vi)(I).

[18] *Advocate Christ Medical Center*, 80 F.4th at 353, citing *Empire Health*, 142 S. Ct. at 2364.

[19] 80 F.4th at 353.

[20] Id.

[21] Id. at 352. Individuals who are enrolled in the SSI Program also become eligible to apply for Medicare Part D prescription-drug benefits, and some may also apply for vocational rehabilitation services. Id. at 349. Individuals who remain enrolled in the SSI Program, but were not eligible to receive Cash Payments in a particular month, are still able to access these other benefits because of their status as SSI Program enrollees. Id.

[22] Id. at 350.

[23] Id. at 353.

[24] Id. at 352.

[25] "High Court Agrees to Revisit 2022 Medicare Payment Ruling" by Tony Pugh, *Bloomberg Law* (June 10, 2024) ([https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XFFMM4R8000000?bna\\_news\\_filter=health-law-and-business#jcite](https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XFFMM4R8000000?bna_news_filter=health-law-and-business#jcite)).

[26] Brief for the Respondent, p. 11 *Christ Medical Center v. Becerra*, No. 23-715 (2024).