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|  | The Providers dispute the disallowance of capital disproportionate share hospital (DSH) payments subsequent to the effective date of its Rural Reclassification. |

**A. Facts**

The Providers included in this group are appealing from their Notices of Program Reimbursement (NPRs) the Capital DSH payments. On page 5 of the Group’s preliminary position paper, the group cites to *Toledo Hospital v Xavier Becerra*, 2021 WL 4502052 (DDC 2021) (*Toledo*) as fully supportive of its position. (**Exhibit C-2**). *Toledo* reached the District Court for the District of Columbia (DDC) through the Board’s granting of Expedited Judicial Review (EJR) issued on October 30, 2019.

In this case, the Providers are:

challenging the application of 42 C.F.R. § 412.320(a)(1)(iii), which states in effect that urban hospitals may qualify for Capital DSH [disproportionate share hospital] payments unless, on or after October 1, 2006, the urban hospital is reclassified as rural. [The Provider contends that] [t]his regulation is inconsistent with [42 U.S.C. § 1395ww(d)(8)(B)] which concerns rural status. [42 U.S.C. § 1395ww(d)(8)(B)] specifically notes that the hospitals that have undergone a rural reclassification are rural only for “purposes of this subsection [1395ww(d)].” (**Exhibit C-3**, **page 1**)

The dispute arose because CMS had taken the position, as explained in Toledo, that an IPPS hospital that makes the decision to be reclassified from urban to rural loses the benefit of Capital DSH as a byproduct of its decision to obtain an otherwise favorable IPPS payment as a rural hospital. The real issue in this Group Appeal is identical to the EJR issue which resulted in the Toledo Memorandum Opinion and supports full relief for the Group. The MAC’s counter is that the Group’s reliance on Toledo is premature.

A neutral review of Toledo is necessary to understand why the Board cannot reinstate the Group Members’ urban status. The rejection of Toledo’s claim for capital DSH is based on 42 C.F.R. § 412.320(a)(1)(iii) which states:

For purposes of this section, the geographic classifications specified under § 412.64 apply, except that, effective for discharges occurring on or after October 1, 2006, for an urban hospital that is reclassified as rural as set forth in § 412.103, the geographic classification is rural. (**Exhibit C-3**, **page 4**)

On its face, the regulation defeats the Group’s claim. Rural hospitals are not eligible for capital DSH.

*Toledo* argued that the denial of Capital DSH violated both prongs of Chevron in that the policy first violated statute on its face. The DDC disagreed. However, the DDC found that the rule was unreasonable (arbitrary and capricious) because of what could be considered a factual deficiency.

The Court found that the policy lacked sufficient factual support:

Because the record does not demonstrate that the Secretary took relative costs into account [between geographic rural and urban hospitals] when considering the Rule, the 2006 rulemaking was arbitrary and capricious. Thus, the rule is unreasonable and cannot be relied upon to deny Toledo Hospital the Capital DSH adjustment. (**Exhibit C-2, page 25**)

Despite the adverse finding, the Court did not award *Toledo* its capital DSH. Instead the Court remanded:

the case to the fiscal intermediary for a redetermination as to *Toledo* Hospital’s eligibility for a capital DSH adjustment.(**Exhibit C-2, page 25**)

The remand has not been concluded, so the question of the Group’s entitlement to capital DSH is still an open question.

**B. Arguments**

The MAC’s argument is a simple one. The Group has elected not to pursue EJR. Instead, it chose to file a Preliminary Position Paper relying on *Toledo.* However, as the *Toledo*remand is still open, as opposed to a final determination in the Plaintiff’s favor, there is no support for a reversal of the denial of Capital DSH. (**Exhibit C-4**)

**C. Conclusion**

As the precedent that the Group has relied upon is still an open matter, the Board has no basis for issuing a 42 C.F.R. §405.1871Decision in the Group’s favor. Should circumstances force the need for such a Decision before the final disposition of *Toledo*, relief must be denied.

**IV. LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS**

Regulations:

**Federal Registers:**

42 C.F.R. § 412.320(a)(1)(iii) Disproportionate Share Adjustment

42 C.F.R. § 405.1871 Board Hearing Decision

**Law:**

*Toledo Hospital v Becerra*, 2021 WL 4502052 (DDC 2021)(*Toledo*)

**Other Sources:**

CMS Administrator Decision in *Toledo Hospital vs Xavier Bercerra* (May 20, 2022)

**V. EXHIBITS**

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| C-1 | Schedule of Providers |
| C-2 | *Toledo Hospital v Xavier Becerra* District Court Decision (September 30, 2021) |
| C-3 | *Toledo Hospital* Expedited Judicial Review Determination (October 30, 2019) |
| C-4 | *Toledo Hospital vs Xavier Bercerra* CMS Order of the Administrator (May 20, 2022) |
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