Whether the Medicaid eligible days in the DSH calculation are properly stated based on the MAC’s sampling.

# Facts

This is a group appeal with 2 participating providers (“the Providers”) with a fiscal year end of 04/30/2010 (*see* **Exhibit C-1**). The Providers in this group appeal are challenging the Medicaid fraction of the DSH calculation. The Providers filed the appeal based on their original NPRs.

In the Providers’ appeal request dated February 27, 2014, the issue description reads as follows:

This group appeal concerns the determination of the Providers’ Medicare disproportionate share hospital (“DSH”) adjustment payments under the prospective payment system (“PPS”) for operating and capital-related costs of inpatient hospital services. The common issue relates to the Intermediary’s statistical sampling process used in adjusting Medicaid eligible days in determining the Providers’ disproportionate patient percentages (“DPP”) for the purpose of the Medicare DSH adjustment. The common issue is whether in determining the Providers’ DPP, the Intermediary used a valid statistical sampling approach that provides reasonable certainty that the audit sample results are representative of the universe. The Providers challenge the Intermediary’s exclusion of Medicaid eligible days from the Medicaid percentage pursuant to 42 U.S.C. §1395ww(d)(5)(F)(vi)(II) based on its audit sample results in the determination of their DSH adjustment payments. Further, the Providers contend that the Intermediary’s statistical approach was not consistent with generally accepted statistical procedures as recommended by CMS and as used by the DHHS Office of the Inspector General.

The Providers’ preliminary and final position papers identify the issue as follows:

The Providers in this group appeal challenge adjustments that First Coast Service Options (the “MAC”) made to their DSH payments. First, the MAC disallowed some of the Medicaid eligible days claimed by the Providers based on its analysis of statistical samplings of those days. But the MAC’s statistical samplings were flawed for two reasons. First, the MAC did not afford the Providers an opportunity to present 100% support for all their Medicaid days in lieu of extrapolation. Had the MAC offered this, the Providers would have been able to claim additional Medicaid eligible days. Second, the MAC’s analysis did not account for the Section 1115 days that the Provider claimed in the cost report. The MAC simply disallowed all Section 1115 days without including them in the universe of sampled days. And the MAC’s errors did not end there. The MAC also manually entered the wrong DSH adjustment percentage for both providers. The DSH adjustments that the MAC used erroneously excluded the sampled Medicaid eligible days that the MAC had extrapolated for its review. As a result, the Providers’ DSH payments were understated. The Providers ask that the Board reverse the MAC’s adjustments with respect to the (1) traditional Medicaid eligible days were disallowed as a result of the statistical sampling analysis, (2) the Section 1115 days that were disallowed wholesale without any even being reviewed, and (3) the MAC’s erroneous adjustment to the Providers’ DSH adjustment percentages.

The MAC contends that the Providers are attempting to add the issue of Section 1115 waiver days, which was not identified as an issue in the original appeal request.

B. Arguments

The Providers initially filed this group appeal to challenge the statistical sampling of the Medicaid eligible days used to calculate the DSH percentage. The MAC contends that this case never should have been filed as a group appeal. According to 42 CFR § 405.1837(a)(2), the issue in a group appeal should involve “a single question of fact or interpretation of law, regulations, or CMS Rulings that is common to each provider in the group.” The issue of statistical sampling and extrapolating results may be a similar issue with the two providers in this group appeal, but it is not a common legal issue. Each sample is unique, and a uniform decision may not be appropriate. Therefore, this never should have been initiated as a group appeal, which the MAC mentioned in its original Rule 15 letter. Now the Providers are attempting to add an additional issue to the group appeal through its position paper over 9 years after the initial appeal filing. The MAC has filed a jurisdictional challenge regarding the Providers’ attempt to include Section 1115 waiver days within the scope of the appeal.

Regarding the issue of statistical sampling, the Providers do not offer an argument to support their position, and no documentation has been provided in an attempt to resolve the issue.

The Providers’ position paper argues (page 8): “The Providers contend that the statistical sampling analyses that the MAC used to adjust their traditional Medicaid eligible days were not based on a representative sampling of those days. And as a result, the extrapolated adjustment was overstated. This could have been avoided had the MAC afforded the Providers the opportunity to present 100% support for all the Medicaid eligible days in their cost report. The Providers are prepared to present 100% support for all their Medicaid eligible days.”

In a separate section, the Providers’ position paper argues (pages 9 and 10): “The Providers also contend that the DSH adjustment factors that the MAC manually entered in their cost reports are erroneous. The factors do not correspond to the number of Medicaid eligible days that the MAC allowed the Providers to include in their cost reports after completing its audit. Rather, the DSH adjustment factors that the MAC used appear to be calculated after deducting the days that the MAC identified for sampling–including the days that were allowed and disallowed as a result of that sampling analysis. The MAC has offered no explanation for these obvious errors.”

These two small sections are the entire argument presented for the issue of statistical sampling. The rest of the Providers’ position paper deals with a background of how DSH is calculated and the Section 1115 waiver days. The MAC contends that the Providers have filed an incomplete position paper. The Providers did not submit any supporting documentation, nor did they even offer an explanation on where they disagree, other than in general terms. The Providers complain that they were not afforded the opportunity to present 100% support for all the Medicaid eligible days. The appeal is now over 9 years old. Why are the Providers not presenting the “100% support for all their Medicaid eligible days” at this point in time? That is supposed to be the purpose of an appeal – i.e., to explain your position and provide support for that position.

The MAC is not able to effectively respond with any specifics on the issue with the passage of 9 years because the Providers have not specifically stated their objection to the adjustments. If the Providers are trying to support the days that were disallowed, then they should have already submitted this support. If the Providers seek to expand the original sample or propose a different method of extrapolation, this should have been explained in its position paper.

With respect to position papers, the regulation at 42 C.F.R. § 405.1853(b)(2) states in part: “Each position paper must set forth the relevant facts and arguments regarding the Board’s jurisdiction over each remaining matter at issue in the appeal (as described in § 405.1840 of this subpart), and the merits of the provider’s Medicare payment claims for each remaining issue.”

The MAC contends that the Providers have violated the regulations and Board Rule 25 because the Providers’ preliminary and final position papers did not set forth the relevant facts and arguments regarding the merits of the Providers’ claims and failed to include all supporting documentation or properly identify unavailable/ missing documentation, explain why they are missing, and explain the efforts to obtain them. The MAC contends that this case should be dismissed.

# C. Conclusion

The Providers are attempting to untimely add the issue of Section 1115 wavier days to the appeal. The MAC has challenged jurisdiction. For the issue of statistical sampling, the Providers have not submitted any documentation or even argued the merits of its position. The MAC has challenged jurisdiction on this issue as well, as the Providers have failed to file a complete position paper in accordance with Board rules.

IV. LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS

Law:

#### 42 CFR § 405.1837(a)(2);42 C.F.R. § 405.1853(b);42 C.F.R. § 412.106;42 U.S.C. § 1395ww(d)(5)

V. EXHIBITS

C-1 – Schedule of Providers (OH CDMS Extract)