

Medicaid beneficiaries, including inpatient benefits. Because of the differences between expansion populations in these limited benefit demonstrations and traditional Medicaid beneficiaries, in the May 19, 2003 proposed rule, we proposed that the Medicare DSH calculation should exclude from treatment as Medicaid patient days those patient days attributable to limited benefit section 1115 expansion waiver populations (proposed § 412.106(b)(4)(i)).

For example, a State may extend a family planning benefit to an individual for 2 years after she has received the 60-day postpartum benefit under Medicaid, or a State may choose to provide a family planning benefit to all individuals below a certain income level, regardless of having previously received the Medicaid postpartum benefit. This is a limited, temporary benefit that is generally administered in a clinic setting (see section 1905(a)(4)(C) of the Act). Also, a number of States are developing demonstrations that are limited to providing beneficiaries an outpatient prescription drug benefit. Generally, these limited benefits under a demonstration project do not include inpatient benefits. If a hospital were to include the days attributable to patients receiving benefits under such a limited benefit, the hospital would be able to receive higher DSH payments, perhaps substantially, for patients who may otherwise be insured for inpatient care. For example, these limited demonstrations provide benefits that may be needed to supplement private insurance coverage for individuals who do not have incomes low enough to qualify for Medicaid under the State plan. We do not believe such patients should be counted in the DSH patient percentage as eligible for title XIX.

As we have noted previously, at the time the Congress enacted the Medicare DSH adjustment provision (which was added to the law by section 9105 of COBRA and was effective for discharges occurring on or after May 1, 1986), there were no approved section 1115 demonstration projects involving expansion populations and the statute does not address the treatment of these days. Although we did not initially include patient days for individuals who receive extended benefits only under a section 1115 demonstration project, we nevertheless expanded our policy in the January 20, 2000 revision to these rules to include such patient days. We now believe that this reading is warranted only to the extent that those individuals receive inpatient benefits under the section 1115 demonstration project.

Therefore, we proposed to revise § 412.106(b)(4)(i) to clarify 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. Under the proposed clarification, hospital inpatient days attributed to patients who do not receive coverage for inpatient hospital benefits either under the approved State plan or through a section 1115 demonstration would not be counted in the calculation of Medicaid days for purposes of determining a hospital's DSH patient percentage.

Under this reading, in the examples given above, the days associated with a hospital inpatient who receives coverage of prescription drugs or family planning services on an outpatient basis, but no inpatient hospital coverage, through either a Medicaid State plan or a section 1115 demonstration, would not be counted as Medicaid days for purposes of determining the DSH patient percentage.

The proposed revision addressed an unintended potential consequence of our interpretation that hospitals may include in the DSH calculation patient days associated with section 1115 demonstration populations (65 FR 3136). As discussed above, that interpretation was based on our finding that individuals receiving a comprehensive benefit package under a section 1115 demonstration project could appropriately be included in the numerator of the Medicaid fraction (even though the statute does not require such an inclusion), but did not address individuals who were receiving limited benefit packages under a section 1115 demonstration project.

*Comment:* Some commenters questioned our authority to require a patient obtain to covered inpatient benefits under either a Medicaid State plan or a section 1115 demonstration, in order to be included in the numerator of the Medicaid ratio for the DSH computation. One commenter pointed out that there are many circumstances under which an individual may have income low enough to qualify for Medicaid but still not qualify due to other qualifying criteria, and requested that all patient days of such individuals be counted as Medicaid-eligible.

*Response:* As stated above and in the proposed rule, we do not believe patients covered under limited-benefit

section 1115 demonstration projects that are so limited that they are not similar to the medical assistance available under a Medicaid State plan should not be included in the count of Medicaid-eligible patients.

Under a traditional State Medicaid program, States are required to offer inpatient benefits to all eligible beneficiaries (see section 1902(a)(10)(A) of the Act). However, under the 1115 demonstration authority, the Secretary has permitted coverage for a limited set of services, such as pharmaceuticals or family planning services, and thus inpatient hospital services may be excluded for expansion populations under some of the section 1115 demonstration programs.

Our 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.

*Comment:* One commenter requested that the effective date of the proposed change be delayed until January 1, 2004, to allow fiscal intermediaries to contact States and identify specific coverage for their various section 1115 waiver populations.

*Response:* Because the DSH adjustment is reconciled when hospitals' cost reports are settled, we do not believe it is necessary to delay the implementation of this policy until January 1, 2004. Furthermore, although we believe it would have been reasonable for hospitals or fiscal intermediaries to have applied this interpretation of our policy regarding the inclusion of section 1115 waiver days prior to this clarification, we recognize that there may be situations in which this policy was not already applied. Therefore, we are making this change and the regulation at § 412.106(b)(4)(i) will be effective for discharges occurring on or after October 1, 2003.

## 7. Dual-Eligible Patient Days

We are still reviewing the large number of comments received on the proposed provision relating to dual-eligible patient days in the May 19, 2003. Due to the number and nature of the comments we received on our proposed policies, we are addressing the public comments in a separate document. We refer individuals who are interested in reviewing the background information and discussions regarding this policy to the May 19, 2003 proposed rule (68 FR 27207–27208).