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November 27, 2024

Ms. Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-1808-IFC
P.O. Box 8013
Baltimore, MD 21244-8013

Dear Administrator Brooks-LaSure:

RE: CMS–1808–IFC: Medicare Program; Changes to the Fiscal Year 2025 Hospital Inpatient Prospective Payment System (IPPS) Rates Due to Court Decision

The Association of American Medical Colleges (AAMC or the association) welcomes this opportunity to comment on the interim final rule entitled "*Medicare Program; Changes to the Fiscal Year 2025 Hospital Inpatient Prospective Payment System (IPPS) Rates Due to Court Decision*," 89 *Fed. Reg.* 80405 (October 3, 2024), issued by the Centers for Medicare & Medicaid Services (CMS or the agency).

The AAMC (Association of American Medical Colleges) is a nonprofit association dedicated to improving the health of people everywhere through medical education, health care, medical research, and community collaborations. Its members are all 159 U.S. medical schools accredited by the Liaison Committee on Medical Education; 13 accredited Canadian medical schools; nearly 500 academic health systems and teaching hospitals, including Department of Veterans Affairs medical centers; and more than 70 academic societies. Through these institutions and organizations, the AAMC leads and serves America's medical schools, academic health systems and teaching hospitals, and the millions of individuals across academic medicine, including more than 201,000 full-time faculty members, 97,000 medical students, 158,000 resident physicians, and 60,000 graduate students and postdoctoral researchers in the biomedical sciences. Following a 2022 merger, the Alliance of Academic Health Centers International broadened participation in the AAMC by 70 international academic health centers throughout five regional offices across the globe.

MEDICARE WAGE INDEX - LOW WAGE INDEX POLICY

In the fiscal year (FY) 2020 IPPS final rule, CMS first implemented the low wage index policy in an effort to address disparities between high and low wage index hospitals in the current wage index calculation.[1] The finalized low wage index policy directly raised the wage index of the lowest quartile wage index hospitals by half the difference between the 25th percentile wage index value and the hospital's individual wage index. The goal of this policy was to provide an opportunity for these low wage index hospitals to increase employee compensation, which would then be permanently reflected in

[1] 84 FR 42044

future wage index data. However, while this policy raised the wage index values of the bottom quartile hospitals, it did so at the expense of all hospitals nationwide due to a budget neutrality adjustment.

CMS implemented this policy for four years from 2020-2024 to allow low wage index hospitals to raise wages, but due to the impact of the COVID-19 public health emergency, the agency extended this policy, once in FY 2024 and then again in the FY 2025 IPPS final rule for an additional three years. During this time, the low wage index policy and associated budget neutrality adjustment faced multiple legal challenges. [2,3] Prior to the release of the FY 2025 IPPS final rule, the U.S. Court of Appeals for the D.C. Circuit ruled that CMS did not have the authority to implement the low wage index policy or the associated budget neutrality adjustment.[4] Based on the court's July 23 decision in *Bridgeport Hospital v. Becerra*[5], CMS is reversing the continuation of the low wage index policy and associated budget neutrality adjustment for FY 2025. The agency states it is doing so to avoid further confusion for hospitals in the new fiscal year. (P.80408). The AAMC appreciates CMS' swift action to address wage index polices and calculations prior to the start of the 2025 fiscal year to ensure certainty in hospitals' IPPS payments.

Support Low Wage Index Hospitals without Impacting High Wage Index Hospitals Through Budget Neutrality

The interim final rule addresses the court's decision by removing both the low wage index policy and the associated budget neutrality adjustment for FY 2025. The AAMC supports CMS' removal of the budget neutrality adjustment, and the association has historically been critical of implementing the low wage index policy in a budget neutral manner that decreases IPPS payments to all hospitals. However, the AAMC supports CMS' goal to address difficulties faced by low wage index hospitals. In response to the repeal of both the low wage index policy and the associated budget neutrality adjustment, we urge the agency to consider alternative policies that improve the standing of and ensure adequate reimbursement to low wage index hospitals without impacting payment to other hospitals.

Beyond the IPPS, CMS addressed the low wage index policy in the calendar year (CY) 2025 Outpatient Prospective Payment System (OPPS) final rule. In contrast to the interim final rule for the IPPS, under OPPS the agency will use the FY 2025 IPPS final rule (not the interim final rule) wage index values inclusive of the low wage-index policy and the associated budget neutrality adjustment.[6] This is a major shift from CMS' historical policy of aligning the wage index values between IPPS and OPPS. The AAMC is concerned that this deviation creates confusion for hospitals leading to uncertainty in their expected payment for services in the upcoming calendar year. As CMS outlined in the interim final rule, one of the main drivers for addressing the low wage index policy and budget neutrality adjustment following the court's decision in IPPS was to eliminate confusion and ensure hospitals' certainty in payment. (P. 80408). To maintain this same level of certainty in OPPS, the AAMC urges the agency to follow the historical precedent of aligning wage index values in IPPS and OPPS in FY and CY 2025.

[2] *Bridgeport Hosp. v. Becerra, 589 F. Supp. 3d 1 (D.D.C. 2022)*
[3] *Kaweah Delta Health Care Dist. v. Becerra*, 1:21-cv-01422 AWI SKO (E.D. Cal. Sep. 22, 2021)
[4] *Bridgeport Hosp. v. Becerra, No. 22-5249 (D.C. Cir. Jul. 23, 2024)*
[5] *Id.*
[6] 89 FR 93912

Ensure the Reversal and Potential Remedy of the Low Wage Index Policy Has Minimal Harm for Low Wage Index Hospitals

Further, under the IPPS, CMS is implementing a one-time transitional exception policy for low wage index hospitals negatively impacted by the reversal of this policy. The transitional policy is separate from, and does not count toward, the budget neutrality adjustment associated with the permanent five percent cap on year-over-year wage index changes that has been in place since FY 2023. (P. 80407). Low wage index hospitals that benefited from the FY 2024 low wage index policy will be eligible for the transitional exception policy if they experience a reduction in their FY 2025 wage index that is more than five percent of their FY 2024 wage index. These eligible hospitals will receive a payment amount under IPPS as if their FY 2025 wage index was equivalent to 95 percent of their FY 2024 wage index. (P.80408) The AAMC appreciates CMS' efforts to ensure there is a transitional policy in place for affected hospitals without impacting the payment or wage index of the non-eligible hospitals. The AAMC supports CMS' underlying goal of addressing financial difficulties faced by low wage index hospitals. Therefore, we urge the agency to move forward with this transitional policy and continue to ensure there are limited negative impacts due to the removal of this policy.

The court's decision on this policy also has the potential to result in a remedy policy similar to the remedy for 340B hospitals announced in 2023.[7] The remedy for the 340B case addressed CMS' policy to reduce payments for 340B acquired drugs, which the Supreme Court found to be contrary to law, by providing lump sum payments to hospitals negatively impacted by the reduction in payment through a budget neutral manner by reducing the OPPS payment update by 0.5 percent over an estimated 16 years.[8] However, the case of the low wage index policy can be distinguished from the 340B case in that the plaintiffs in *Bridgeport Hospital v. Becerra* were harmed by the reductions applied for budget neutrality, not the application of the low-wage index policy. Nevertheless, the Court vacated both the low wage index policy and the budget neutrality adjustment in *Bridgeport Hospital v. Becerra*, leaving an issue for how CMS will apply a remedy for FY 2020 through FY 2024 for all hospitals, including those affected by the budget neutrality adjustment and the 25 percent of hospitals receiving a higher wage index under the low wage index policy. CMS does not address this issue in the interim final rule.

It seems clear that a remedy for hospitals harmed by the budget neutrality adjustment will be a refund of the amounts by which all hospitals were underpaid analogous to the lump sum payment that was made to 340B hospitals. However, the AAMC remains concerned that CMS may recoup the additional amounts paid to low wage hospitals during that five-year period. CMS is using its authority under section 1886(d)(5)(I)(i) of the Act to create a narrow transitional exception to the calculation of FY 2025 IPPS payments for low wage index hospitals significantly impacted by the removal of the low wage index hospital policy.[9] Section 1886(d)(5)(I)(i) of the Act provides authority for the Secretary to "provide by regulation for such other exceptions and adjustments to such payment amounts under this subsection as the Secretary deems appropriate." This "subsection" is a reference to IPPS payments made under subsection (d) of section 1886 of the Act and the authority is broad as it allows for adjustments that the

[7] 88 FR 77150
[8] 88 FR 77150. Historically, CMS has applied budget neutrality as prospective adjustment to offset increases or decreases in payment being made for the next fiscal or calendar year and has not applied budget neutrality prospectively for past additional spending unless explicitly authorized by statute.
[9] 89 FR 80408

"Secretary deems appropriate." Further, CMS makes clear that section 1886(d)(5)(I)(i) "lacks any general budget neutrality requirement."[10]

CMS is invoking this "exceptions and adjustments" authority for the FY 2025 IPPS to mitigate the decrease in the wage index for low wage hospitals through the non-budget neutral transitional exception in FY 2025. This policy is justified on the basis that it will:

> …promote certainty regarding FY 2025 IPPS payments in light of the reasoning of *Bridgeport* and its application to the low wage index hospital policy in FY 2025, which would create ongoing confusion for hospitals extending into FY 2025 about the amount of their IPPS payments…[11]

The AAMC strongly urges CMS to avoid recouping five years of payments made to low wage index hospitals under the low wage index policy. The concerns about payment certainty and confusion apply equally to FY 2020 to FY 2024 hospital payments as they do to FY 2025 payments. CMS notes in the IFC that there is minimal scope and magnitude associated with the transitional policy compared with the low wage index policy, as the agency estimates only 113 hospitals under IPPS would receive transitional exception payments for a total payment impact of $41 million. (P. 80408). In *Bridgeport Hospital v. Becerra*, the Court indicated the low wage index policy redistributes $245 million in Medicare funding,[12] an annual figure for 2020 only. Over a period of 5 years, low wage hospitals may have received upwards of $1.2 billion in additional IPPS payments through no action of their own. As CMS is rightly concerned about uncertainty and confusion over $41 million in payment, it logically follows CMS should be even more concerned about requiring low wage index hospitals to refund more than 30 times this amount for past years. For this reason, the AAMC requests that in crafting a remedy, CMS not require low wage hospitals to refund payments they received based on CMS' regulatory changes later found to be inconsistent with the law as an "adjustment the Secretary deems appropriate" under section 1886(d)(5)(I)(i).

As a potential consequence of remedy policies, any additional reductions to Medicare payment for affected hospitals pose the risk of exacerbating current financial challenges. This is especially true for hospitals in rural areas and specific regions such as the East South Central region, which were found to be negatively impacted by these policy changes at a higher rate. (P. 80417). Rural hospitals face many challenges to ensure sustainability, function, and access. One of these challenges is financial with 55% of independent rural hospitals and 42% of health system-affiliated rural hospitals operating at a loss.[13] These added financial pressures have led to additional unit and hospital closures resulting in reduced access to care and a greater strain on the healthcare system overall. Since 2005, 108 rural hospitals have completely closed while another 86 have experienced converted closures, meaning that they no longer provide inpatient services.[14] Ensuing the financial stability of low and high wage index hospitals is imperative to maintaining patient access to care in both rural and urban areas.

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[10] 89 FR 80407
[11] 89 FR 80408
[12] *Bridgeport Hosp*., page 13.
[13] Chartis. Unrelenting Pressure Pushes Rural Safety Net Crisis into Uncharted Territory. (2024) https://www.chartis.com/sites/default/files/documents/chartis_rural_study_pressure_pushes_rural_safety_net_crisis_into_uncharted_territory_feb_15_2024_fnl.pdf
[14] Cecil G. Sheps Center for Health Services Research. Rural Hospital Closures. (2024) https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/

CONCLUSION

Thank you for the opportunity to comment on this interim final rule. To summarize, the AAMC is pleased to see CMS remove the application of the associated budget neutrality adjustment which negatively impacts all hospitals. However, we urge the agency to continue to explore new policy options in future rulemaking to bolster low wage index hospitals without harming the financial standing of other hospitals. Additionally, the AAMC requests if the agency were to craft a remedy, CMS not require low wage hospitals to refund payments they received based on CMS' regulatory changes later found to be inconsistent with the law. We would be happy to work with CMS on any of the issues discussed or other topics that involve the academic community. If you have questions regarding our comments, please feel free to contact my colleague Katie Gaynor (kgaynor@aamc.org).

Sincerely,

Jonathan Jaffery, M.D., M.S., M.M.M., F.A.C.P.
Chief, Health Care Affairs

cc: David Skorton, M.D., AAMC President and Chief Executive Officer