



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm. 7261
Washington, D.C. 20530-0001

MBS:TMorrissey

Tara S. Morrissey
Tara.S.Morrissey@usdoj.gov

Tel: (202) 353-9018
Fax: (202) 514-8151

March 11, 2019

VIA CM/ECF

Michael E. Gans, Clerk of Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, MO 63102

Re: *Missouri Hosp. Ass'n v. Azar*, No. 18-1778

Dear Mr. Gans,

The government writes to inform the Court of a development affecting this litigation and to submit a clarification.

First, on December 30, 2018, the Centers for Medicare & Medicaid Services (CMS) withdrew FAQs 33 and 34, which are the subject of the second issue presented in this appeal. *See* CMS, Medicaid Disproportionate Share Hospital (DSH) Payments, <https://www.medicaid.gov/medicaid/finance/dsh/index.html>. CMS informed the states that “FAQs 33 and 34 are no longer operative,” and that states may submit revised DSH audits that cover hospital services furnished before June 2, 2017. *Id.*

As a result of this announcement, any controversy regarding the validity of FAQs 33 and 34 is moot. In any event, as explained in Part II of our reply brief, the panel’s resolution of the procedural validity of the FAQs would be governed by this Court’s decision in *Children’s Health Care v. CMS*, 900 F.3d 1022 (8th Cir. 2018). CMS’s decision to withdraw the FAQs does not impact the dispute between the parties concerning the validity of the April 2017 final rule, which is addressed in Part I of the government’s briefs.

Second, in our opening brief, we explained that Medicaid “typically pays nothing” for Medicaid patients who have Medicare or private insurance, Br. 23; *see also* Br. 2, 6, 25, and noted that Medicaid “pays only if payments by a private insurer or Medicare are lower than what

Medicaid would have paid,” Br. 2; *see also* Br. 6, 23. We wish to clarify that in the case of Medicaid patients who have Medicare, Medicaid may pay a Medicare deductible or coinsurance. This is not material to the arguments presented in this case, but we write in an abundance of caution to avoid any inaccuracy.

Sincerely,

s/ Tara S. Morrissey
Tara S. Morrissey
Attorney for Appellants

cc: Counsel of Record (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey