State of New Jersey
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES
P.O. Box 712
Trenton, NJ 08625-0712

CHRIS CHRISTIE
*Governor*

KIM GUADAGNO
*Lt. Governor*

ELIZABETH CONNOLLY
*Acting Commissioner*

MEGHAN DAVEY
*Director*

**STATE OF NEW JERSEY**
**DEPARTMENT OF HUMAN SERVICES**
**DIVISION OF MEDICAL ASSISTANCE**
**AND HEALTH SERVICES**

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| OUR LADY OF LOURDES HOSPITAL, PETITIONER v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, RESPONDENT. | **ADMINISTRATIVE ACTION**<br>**FINAL AGENCY DECISION**<br>**OAL DKT. NO. HMA 04005-06** |

As Director of the Division of Medical Assistance and Health Services (Division), I have reviewed the record in this matter, consisting of the Initial Decision, the contents of the OAL case file, Petitioner's exceptions to the Initial Decision and Respondents reply. Procedurally, the time period for the Agency Head to render a Final Agency Decision is February 22, 2016 pursuant to an Order of Extension.

I hereby ADOPT the findings, conclusions and recommended decision of the Administrative Law Judge in their entirety and incorporate the same herein by reference. After reviewing the entire record in this matter, I find no reason to disturb his decision. As noted in the Initial Decision, summary disposition may

be entered where there is no genuine issue as to any material fact and where the moving party is entitled to prevail as a matter of law. See Initial Decision at pages 3 and 4, citing N.J.A.C. 1:1-12.5 and Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). Once the moving party has shown competent evidence of the absence of any genuine issue of fact, the non-moving party must do more than simply create some doubts as to the material facts; it must raise a factual issue substantial enough to sustain a reasonable conclusion in the non-moving party's favor. Based upon my review of the record, I agree with the Administrative Law Judge (ALJ) that Petitioners have failed to raise any genuine issue of material fact that would require a hearing in this matter. I also agree that Respondent is entitled to prevail as a matter of law.

This appeal stems from a challenge by Our Lady of Lourdes Hospital to the Division's calculation of its 1995 Medicaid reimbursement rate. The calculation error at issue in this appeal relates to the economic factor, which is used to update rates for inflation. After reviewing the voluminous record in this matter, I FIND that there is ample support in the record for the ALJ's determination that the term "economic factor" as set forth in N.J.A.C. 10:52-5.17(a), now codified at N.J.A.C. 10:52-5.13(a), means the applicable percentage increase under TEFRA[1], and not, as Petitioner contends, the market basket percentage increase. I also agree that the calculation of the economic factor does not include a bonus or incentive payment.[2]

[1] TEFRA refers to the Tax Equity and Fiscal Responsibility Act of 1982.

[2] N.J.A.C. 10:52-5.17(a) stated: "The economic factor calculated by the Department of Health is the measure of the change in the price of goods and services used by New Jersey Hospitals. After the 1993 rate year, the economic factor will be the factor recognized under the TEFRA target limitations."

I am not persuaded that the Exceptions filed by the Petitioner warrant modification of the ALJ's thorough and well-reasoned decision. I disagree with Petitioner's argument that the Division should use the TEFRA rate of increase percentages that were in effect at the time N.J.A.C. 10:52-5.17(a) was first promulgated on May 10, 1993 for the purpose of setting the hospital's 1995 rates. While it is true that at the time of the original adoption of N.J.A.C. 10:52-5.17(a), the market basket percentage increase would have been the applicable percentage increase, Congress enacted subsequent amendments to TEFRA which changed the definition of the applicable percentage increase. I agree that the Division appropriately applied the law currently in effect when setting subsequent rates and specifically, with respect to this case, the Division properly applied the TEFRA rate-of-increase percentage that was in effect for 1995.

I find Petitioner's argument that it is inappropriate to look beyond the language of N.J.A.C 10:52-5.17(a) to be unpersuasive, "particularly in the context of complex Medicaid law". See Respondent's reply to Exceptions at p. 2. Rather, as the ALJ aptly notes, the task in statutory interpretation is to determine and effectuate legislative intent by examining the regulation in the context of the overall scheme in which it operates. Initial Decision at pg. 21, citing to N.J. Dep't of Envtl. Prot. v. Huber, 213 N.J. at 365.and Merin v. Maglaki, 126 N.J. 430, 436.

Petitioner contends that where a statute or regulation incorporates another by reference, without reference to future amendments to the incorporated statute, subsequent modifications to the incorporated statute are not included. In other words, Petitioner argues that, because the Division incorporated the "applicable percentage increase" under TEFRA into N.J.A.C.

10:52-5.17(a) by specific reference, without reference to future amendments to the TEFRA statute, it incorporated only the version of TEFRA which was in existence at the time that N.J.A.C 10:52-5.17(a) was adopted. See Petitioner's exceptions #4 and 5, citing to Hasset v. Welch 303 U.S. 303, 314 (1938) and N.J.A.C. 1:30-2.2(c). However, Petitioner's argument ignores the actual text of the regulation and the context in which the Division adopted the regulations, both of which were thoroughly addressed by the ALJ. Indeed, N.J.A.C. 10:52-5.17(a) specifically provides "after the 1993 rate year, the economic factor **will be** the factor recognized under the TEFRA target limitations". (Emphasis added). Moreover, contrary to Petitioner's assertions, N.J.A.C. 10:52-5.17(a) does not specifically incorporate another statute or regulation; rather it incorporates a TEFRA rate of increase percentage, a rate which measures inflation and is adjusted periodically by Congress. I agree with the ALJ that by its plain terms, N.J.A.C 10:52-5.17(a) is forward-looking and incorporates whatever the factor under the TEFRA target limitations "will be". Thus, as appropriately noted by the ALJ, the TEFRA target update factor can only be the inflation factor in existence at the time of the Medicaid rate determination. In any given rate year, the hospital inpatient rate update factor is the inflation factor recognized under the TEFRA target limitations. Initial Decision at p. 20.

Moreover, as further stated in the Initial Decision, 42 CFR §447.272 "set forth an upper payment limit based on the aggregate for inpatient hospital services that could be paid under Medicare principles of reimbursement. In effect, payments under the Medicaid program could not exceed those under Medicare." Initial Decision at p.13. Clearly, Federal law required that payments

under Medicaid cannot go beyond those under Medicare. 42 CFR §447.253(b). Moreover, a response to a comment to the rule adoption stated that the State Medicaid agency is expected to provide upper payment limit assurances based upon Medicare reasonable cost principles to Medicaid costs in a base year and adjusted by the rate of increase limits. 52 Fed Reg 28141 (July 28, 1987). The Division was also clear in its own rule adoption and amendment responses in 1993 and 1995 that it planned to use the TEFRA allowable increase as a reasonable inflation factor to move the current rate year into future rate years and to comply with upper the payment limit requirements set forth in Federal law. 25 N.J.R. 2560(a) and 27 N.J.R. 908(a). Thus, the intent of the regulation was to create an inflation adjustment in which the Division planned on utilizing the TEFRA allowable increase to move the current rate year into future years while providing assurances that Medicaid payments would not exceed those paid under Medicare. Initial Decision at p. 29.

I am also not persuaded with Petitioner's exception that there is a genuine issue of fact concerning a bonus payment. Petitioner contends that the Audited 1990 Medicaid Cost Report's inclusion of a calculation of an incentive bonus payment provides a sufficient basis to reopen the issue of whether N.J.A.C 10:52-5.17(a) provides for such a bonus payment. I disagree. There is simply no mention of a cost-based incentive payment in the Division's reimbursement rules and any further discovery cannot change that fact. Thus, I agree with the ALJ that bonus payments are not part of the reimbursement due to Petitioner.

THEREFORE, it is on this 18th day of February 2016,

ORDERED:

That the recommended decision granting Respondent's motion for summary decision is hereby ADOPTED.

Meghan Davey, Director
Division of Medical Assistance
and Health Services