IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRVIEW HOSPITAL
18101 Lorain Avenue
Cleveland, OH 44111

EUCLID HOSPITAL
18901 Lakeshore Blvd.
Euclid, OH 44119

LUTHERAN HOSPITAL
1730 West 25th Street
Cleveland, OH 44113

SOUTH POINTE HOSPITAL
20000 Harvard Road
Warrensville Heights, OH 44128

THE CLEVELAND CLINIC
9500 Euclid Avenue
Cleveland, OH 44195

LAKEWOOD HOSPITAL
14519 Detroit Avenue
Lakewood, OH 44107

HILLCREST HOSPITAL
6780 Mayfield Road
Mayfield Heights, OH 44124,

Plaintiffs,

v.

NORRIS COCHRAN, ACTING SECRETARY,
UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES
200 Independence Avenue, S.W.
Washington, D.C. 20201,

Defendant.

Case No.

COMPLAINT FOR JUDICIAL REVIEW AND DECLARATORY AND INJUCTIVE RELIEF UNDER THE MEDICARE ACT

NATUIRE OF ACTION

1. Plaintiffs Fairview Hospital et al. (the "Hospitals"), by and through the undersigned legal counsel, challenge the Secretary of Health and Human Services' (the "Secretary") computation of the Medicare disproportionate share hospital ("DSH") adjustment relating to inpatients enrolled in a Medicare Advantage plan under Part C of the Medicare Act (sometimes referred to here as the "DSH Part C Policy"). The Hospitals filed a jurisdictionally proper appeal challenging the DSH Part C Policy with the Provider Reimbursement Review Board ("Board" or "PRRB") fully in compliance with the governing statute, 42 U.S.C. § 1395oo(a). The Secretary seeks to thwart this appeal. First, the Secretary persists in applying the DSH Part C Policy although the Court of Appeals and the Supreme Court have invalidated it. Second, through unauthorized administrative action based on a mere proposed rule the Secretary deprives the Hospitals of the statutory appeal rights to which they are entitled The Court should find this action prototypically "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

2. The Hospitals' challenge to the DSH Part C Policy is definitively supported by decisions of the Court of Appeals and the Supreme Court. *See Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16–17 (D.C. Cir. 2011) (application of 2004 rule to prior periods impermissibly retroactive); *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) ("*Allina I*") (vacating 2004 rule as not a logical outgrowth of proposed rule); *Allina Health Servs. v. Price*, 863 F.3d 937, 943–44 (D.C. Cir. 2017) ("*Allina II*") (agency required to conduct notice-and-comment rulemaking before the policy of the 2004 vacated rule can take effect); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (affirming *Allina II*).

3. Apparently undaunted by these judicial decisions, the Secretary, through the Centers for Medicare & Medicaid Services ("CMS") continues to apply the DSH Part C Policy adopted in the now-vacated 2004 rule. The Court should find that the application of the DSH Part C Policy unlawful because it is procedurally invalid, as the Court of Appeals has now twice ruled (and as the Supreme Court has affirmed), fails any test of reasoned decision-making, and is inconsistent with congressional intent in adopting the Medicare DSH statute.

4. As part of its apparent "denial" of the *Allina I* and *Allina II*, on August 6, 2020 CMS published in the Federal Register a notice of proposed rulemaking announcing a proposal to adopt retroactively for periods prior to October 1, 2013 (and even prior to the vacated 2004 rule) the same DSH Part C Policy previously vacated in *Allina I* and *Allina II*. 85 Fed. Reg. 47,723 (the "Proposed Rule"). (Exhibit 2) The Proposed Rule posits that, due to the vacatur of the 2004 rule, the agency has no rule governing the treatment of Part C days and must, under the Supreme Court decision in *Allina II* requiring notice-and-comment rulemaking, engage in retroactive rulemaking. *Id.* at 47,724. The Proposed Rule erroneously relies on two bases for its use of retroactivity: (1) that retroactive rulemaking is necessary to comply with the statutory requirement to calculate Medicare DSH payments, and (2) that retroactive rulemaking is in the "public interest" because, absent retroactive rulemaking, the agency "would be unable to calculate and confirm proper DSH payments for the time periods before FY 2014 . . . ." *Id.* Remarkably, CMS states in the preamble to the Proposed Rule "[w]e do not expect this proposal to have an effect on payments as payments previously made reflect the proposed policy." *Id*. at 47726.

5. On August 17, 2020 CMS then issued CMS Ruling 1739-R (the "Ruling") (Exhibit 3), purporting to deprive the PRRB of jurisdiction over any pending jurisdictionally proper administrative appeals "regarding the treatment of patient days associated with patients enrolled

in [Part C] Medicare Advantage plans in the Medicare and Medicaid fractions of the disproportionate patient percentage" so that contractors can apply the result of the retroactive rulemaking to those pending appeals once the new rule is in place. Ruling at 1-2 The purported authority for the Ruling is merely the Proposed Rule. The Ruling addresses appeals of the "Part C day DSH issue" for periods prior to October 1, 2013, including for periods prior to the enactment of the 2004 rule. *id.* at 7–8. The Ruling, which is "binding" and affects hospitals' substantive Medicare payment and appeal rights, was not adopted through notice-and-comment rulemaking. *See id.* at 1; *see also* 42 C.F.R. § 405.1867 (requiring the Board to comply with CMS rulings); *id.* § 401.108 (defining CMS ruling and explaining they are binding on agency adjudicators).

6. Before taking any action on an appeal of the DSH Part C Policy, the Ruling requires the Board to determine whether an appeal "satisfies the applicable jurisdictional and procedural requirements of section 1878 of the [Medicare] Act, the Medicare regulations, and other agency rules and guidance." Ruling at 7. The Ruling generally provides for remand of jurisdictionally proper appeals of the "Part C day DSH issue" pending at the Board back to the contractors that issued the payment determinations under appeal. *Id.* at 2, 7-8. Despite depriving the Hospitals of the relief to which they are entitled, although the Proposed Rule has not been finalized, and while CMS concedes that the Proposed Rule has no payment effect, the Ruling claims the Proposed Rule "eliminates any actual case or controversy regarding the hospital's previously calculated SSI and Medicaid fractions and its DSH payment adjustment and thereby renders moot each properly pending claim in a DSH appeal involving the issue resolved by the Supreme Court in *Allina* . . . ." *Id.* at 8.

7. The Hospitals filed a jurisdictionally proper appeal with the Board in compliance with the Medicare Act, 42 U.S.C.§ 1395oo(a), challenging their DSH determinations based on the DSH Part C Policy.

8. The Board remanded the Hospitals' jurisdictionally proper appeal solely in reliance on the Proposed Rule and the Ruling. (Exhibit 1).

9. The Hospitals seek judicial review of the final remand order issued by the Board. The Board's remand order, which states the PRRB's finding that it possessed jurisdiction over each Hospital's appeal, are the final agency decisions of the Secretary for purposes of judicial review because no further payment determination will be made upon remand. As noted, CMS states in the preamble to the Proposed Rule "[w]e do not expect this proposal to have an effect on payments as payments previously made reflect the proposed policy." *Id*. at 47726. As the remand simply confirms the very payment determinations that the Hospitals challenge, it constitutes final payment determinations.

a. The Board's remand decision must be set aside because, *inter alia*, the Ruling unilaterally, arbitrarily, and otherwise unlawfully (a) declares the Hospitals' long-pending jurisdictionally-proper PRRB appeals moot, (b) remands them for recalculation of the DSH payments at issue using criteria that were set forth in a proposed notice-and-comment rule that purports to have retroactive effect but that has not yet been finalized while, at the same time, prohibits reopening, which is the action necessary to issue the recalculated payments, (c) declares that the PRRB lacks jurisdiction over the appeals while, at the same time, requiring the PRRB to find that it has jurisdiction before remanding the appeals and (d) is based solely on the purported authority of the Proposed Rule. Further, there are no provisions in the Ruling that provide for review of the final payment calculations, as required by Medicare's statutory appeal provisions. Nor does

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