

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRESENCE CHICAGO HOSPITALS)
NETWORK D/B/A PRESENCE SAINT)
JOSEPH HOSPITAL-CHICAGO)
2900 North Lake Shore Drive, Chicago, IL)
60657-5640)

PRESENCE CHICAGO HOSPITALS)
NETWORK D/B/A PRESENCE SAINT)
FRANCIS HOSPITAL)
355 Ridge Avenue, Evanston, IL 60693-)
3328)

OSF HEALTHCARE SYSTEM D/B/A)
OSF SACRED HEART MEDICAL)
CENTER)
812 North Logan Avenue, Danville, IL)
61832)

OSF HEALTHCARE SYSTEM D/B/A)
OSF HEART OF MARY MEDICAL)
CENTER)
1400 West Park Street, Urbana, IL 61801)

AURORA HEALTH CARE METRO,)
INC. D/B/A AURORA SINAI MEDICAL)
CENTER)
945 N. 12th St., Milwaukee, WI 53233)

WEST ALLIS MEMORIAL HOSPITAL,)
INC. D/B/A AURORA WEST ALLIS)
MEDICAL CENTER)
8901 W. Lincoln Ave., West Allis, WI)
53227)

AURORA MEDICAL CENTER OF)
OSHKOSH, INC. D/B/A AURORA)
MEDICAL CENTER OSHKOSH)
855 N. Westhaven Dr., Oshkosh, WI 54904)

NORTHWESTERN MEMORIAL)
HOSPITAL)
251 East Huron Street, Chicago, IL 60611)

Civil Action No. _____

Plaintiffs,)
)
v.)
)
XAVIER BECERRA, in his official)
capacity as Secretary, United States)
Department of Health and Human)
Services,)
200 Independence Ave. S.W.)
Washington, District of Columbia 20201,)
)
Defendant.)
)
)

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

Plaintiffs, Presence Chicago Hospitals Network d/b/a Presence Saint Joseph Hospital-Chicago; Presence Chicago Hospitals Network d/b/a Presence Saint Francis Hospital; OSF Healthcare System d/b/a OSF Sacred Heart Medical Center; OSF Healthcare System d/b/a OSF Heart of Mary Medical Center; Aurora Health Care Metro, Inc. d/b/a Aurora Sinai Medical Center; West Allis Memorial Hospital, Inc. d/b/a Aurora West Allis Medical Center; Aurora Medical Center Of Oshkosh, Inc. d/b/a Aurora Medical Center Oshkosh; and Northwestern Memorial Hospital (collectively “Plaintiffs”) bring this Complaint for Judicial Review and Declaratory and Injunctive Relief against Defendant Xavier Becerra, in his official capacity as Secretary of Health and Human Services (“HHS”) and allege as follows:

NATURE OF ACTION

1. This case concerns the proper treatment in the calculation of the Medicare disproportionate share hospital (“DSH”) payment of inpatient hospital days for patients who were enrolled in a Medicare Advantage plan under Part C of the Medicare Act. The ultimate issue is whether Medicare “enrollees in Part C are ‘entitled to benefits’ under Part A, such that they should



be counted in the Medicare [part A/SSI] fraction [one part of the DSH payment formula], or whether, if not regarded as ‘entitled to benefits under Part A,’ they should instead be included in the Medicaid fraction [the second part of the DSH payment calculus].” *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) (“*Allina I*”). In *Allina I*, the D.C. Circuit affirmed this Court’s decision declaring invalid and vacating a procedurally invalid rule, adopted in 2004, which changed the defendant Secretary’s policy on the treatment of Part C days to include them in the Medicare Part A/SSI fraction and exclude them from the numerator of the Medicaid fraction used to calculate the DSH payment. *Id.* at 1111.

2. On June 3, 2019, the Supreme Court issued another decision in the *Allina* litigation, upholding the Court of Appeals’ further ruling, in *Allina Health Servs. v. Price*, 863 F.3d 937, 944 (D.C. Cir. 2017) (“*Allina II*”), that the Secretary’s continued application after *Allina I* of the Part C days policy adopted in the 2004 rule is a procedurally invalid “change” from the rule in effect before the now-vacated 2004 rulemaking because the Secretary did not engage in the notice-and-comment rulemaking procedure required under the Medicare Act, 42 U.S.C. § 1395hh. *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019).

3. Although the D.C. Circuit has now twice ruled against the Secretary’s 2004 policy, the Secretary has not acquiesced in either of those decisions. Instead, the Secretary’s agency has continued to apply the Part C days policy adopted in the now-vacated 2004 rule, including in the payment determinations at issue for the Plaintiffs in this case. Most recently, the Secretary is seeking an end-run around the D.C. Circuit’s rulings through an improper attempt to resurrect the vacated 2004 rule via proposed retroactive rulemaking.

4. The continued application of the 2004 rule and the Part C policy adopted in that rule is both procedurally invalid, as the D.C. Circuit has now twice ruled, and is substantively

invalid as well. The Part C policy adopted in the 2004 rule and applied here fails any test of reasoned decision-making and is inconsistent with congressional intent. The Plaintiffs, therefore, seek an order setting aside the Secretary's DSH payment determinations and directing the Secretary to recalculate the Plaintiffs' DSH payments by excluding Part C days from the Medicare Part A/SSI fraction and including the Medicaid-eligible portion of those days in the numerator of the Medicaid fraction.

JURISDICTION AND VENUE

5. This action arises under the Medicare Act, Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq.

6. Jurisdiction is proper under 42 U.S.C. § 1395oo(f)(1).

7. Venue is proper in this judicial district under 42 U.S.C. § 1395oo(f)(1).

PARTIES

8. Plaintiff Presence Chicago Hospitals Network d/b/a Presence Saint Joseph Hospital-Chicago ("Saint Joseph") is a hospital located in Chicago, Illinois that participates in the Medicare program (provider number 14-0224). Saint Joseph has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2007 (Provider Reimbursement Review Board Case Number ("PRRB Case No.") 14-1397GC).

9. Plaintiff Presence Chicago Hospitals Network d/b/a Presence Saint Francis Hospital ("Saint Francis") is a hospital located in Evanston, Illinois that participates in the Medicare program (provider number 14-0080). Saint Francis has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2007 (PRRB Case No. 14-1397GC).

10. Plaintiff OSF Healthcare System d/b/a OSF Sacred Heart Medical Center ("OSF Sacred Heart"), is a hospital located in Danville, Illinois that participates in the Medicare program

(provider number 14-0093). OSF Sacred Heart has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2007 (PRRB Case No. 14-1397GC).

11. Plaintiff OSF Healthcare System d/b/a OSF Heart of Mary Medical Center (“OSF Heart of Mary”), is a hospital located in Urbana, Illinois that participates in the Medicare program (provider number 14-0113). OSF Heart of Mary has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2007 (PRRB Case No. 14-1397GC).

12. Plaintiff Aurora Health Care Metro, Inc. d/b/a Aurora Sinai Medical Center (“Aurora Sinai”) is a hospital located in Milwaukee, Wisconsin that participates in the Medicare program (provider number 52-0064). Aurora Sinai has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2006 (PRRB Case Nos. 14-1991GC and 14-1992GC).

13. Plaintiff West Allis Memorial Hospital, Inc. d/b/a Aurora West Allis Medical Center (“Aurora West Allis”) is a hospital located in West Allis, Wisconsin that participates in the Medicare program (provider number 52-0139). Aurora West Allis has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2006 (PRRB Case Nos. 14-1991GC and 14-1992GC).

14. Plaintiff Aurora Medical Center Of Oshkosh, Inc. d/b/a Aurora Medical Center Oshkosh (“Aurora Oshkosh”) is a hospital located in Oshkosh, Wisconsin that participates in the Medicare program (provider number 52-0198). Aurora Oshkosh has been underpaid for DSH payments in the manner described in this complaint for the fiscal year ending 2006 (PRRB Case Nos. 14-1991GC and 14-1992GC).¹

¹ Plaintiffs Aurora Sinai, Aurora West Allis, and Aurora Oshkosh previously sought expedited judicial review (“EJR”) before the Board for Medicare DSH underpayments as described in this complaint for fiscal year ending 2006. Those EJR requests were denied, and these Plaintiff appealed those EJR denials to this Court in *Thorek Memorial Hospital, et. al. v. Cochran*, 21-cv-0205. For the avoidance of doubt and to preserve all rights in case the Secretary elects at

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