IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMORY UNIVERSITY,
dba Emory University Hospital Midtown
550 Peachtree Street, NE
Atlanta, GA 30308,

HOSPITAL GENERAL MENONITA (AIBONITO),
Calle José C. Vázquez
Aibonito, PR 00705,

HOSPITAL GENERAL MENONITA (CAYEY),
Bo. Rincón Sector Lomas Carr. #14
Cayey, PR 00737,

INTEGRIS BASS BAPTIST HEALTH CENTER,
600 S. Monroe
Enid, OK 73701,

Plaintiffs,

v.

XAVIER BECERRA, Secretary, United States Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201,

Defendant.

Case No.

COMPLAINT

The above-captioned Plaintiff-hospitals (collectively, "the Hospitals"), by and through their undersigned attorneys, bring this action against defendant Xavier Becerra, in his official capacity as the Secretary ("the Secretary") of the Department of Health and Human Services ("HHS"), and state as follows:

INTRODUCTION

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

seq. The Medicare payment issue in this action is how inpatient hospital days should be counted for Medicare disproportionate share hospital ("DSH") payment purposes when the Medicare beneficiary patient was eligible for Medicare, and enrolled in a Medicare Part C plan (as opposed to participating in fee-for-service Medicare), during the inpatient stay.

2. The Hospitals seek judicial review of the final orders issued by the Provider Reimbursement Review Board ("Board" or "PRRB") remanding the Hospitals' Medicare appeals at issue to the Secretary's contractors in accordance with an agency issuance known as Centers for Medicare & Medicaid Services ("CMS") Ruling 1739-R ("the Ruling") (Exhibit A) for recalculation of their DSH payments. The PRRB's remand orders, which followed the PRRB's finding that it had jurisdiction over the appeals at issue, are the final agency decisions of the Secretary for purposes of judicial review.

3. The PRRB's remand decisions 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, and (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. 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 the Ruling establish any definitive time period for the contractors to act. Simply put, the Ruling requires remands for recalculated

payments that apparently will never be made, thus effectively extinguishing the Hospitals' statutory appeal rights for the payments at issue.

4. The Ruling's stated purpose is "to resolve in an orderly manner pending administrative appeals of the Part C days SSI fraction issue" in light of the decision of the United States Supreme Court in *Allina Health Services v. Price ("Allina II")*, 863 F.3d 937 (D.C. Cir. 2017), *aff'd sub nom, Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019), by requiring the Secretary's contractors to "recalculate the provider's DSH payment adjustment in accordance with CMS's forthcoming rule." Exhibit A at 7-8. But the remands required under the Ruling are premature, in part because CMS has not yet issued the final rule setting forth the actual payment criteria to be used when making the recalculated payments.

5. Moreover, even if the Secretary issues the payment criteria to be used when making the recalculated payments in a final rule, the remands required under the Ruling unlawfully prejudice the Hospitals by limiting (if not depriving them entirely of) their statutory right under 42 U.S.C. §1395oo and other authorities to (a) challenge the effect of the finalized payment criteria on the DSH payments at issue in the remanded appeals by prohibiting the issuance of recalculated DSH payments that the Hospitals could appeal to the PRRB, and (b) seek interest for their incorrect DSH payments, some of which extend back more than 15 years (the fiscal periods at issue all predate October 1, 2013, but some go back much further in time). The Ruling is also unlawful procedurally because it was not adopted using notice-and-comment rulemaking, as required by statute, despite its substantive impact on the Hospitals' Medicare payment rights, and has an unlawful retroactive effect.

6. Because the Ruling is unlawful procedurally and substantively, the Hospitals seek an order (a) setting aside the provisions of the Ruling that declare the Hospitals' appeals to the

PRRB moot and require the PRRB to remand their *Allina II* claims to the Secretary's contractors for recalculation of the Hospitals' DSH payments, (b) reversing the PRRB's remand orders, and (c) instructing the PRRB to reinstate the Hospitals' appeals.

JURISDICTION AND VENUE

7. This Court has jurisdiction under 42 U.S.C. §1395oo(f) (appeal of final Medicare program agency decision) and 28 U.S.C. §§1331 (federal question) and 1361 (mandamus).

8. Venue lies in this judicial district under 42 U.S.C. §1395oo(f) and 28 U.S.C. §1391.

PARTIES

9. At all times relevant to this action, the Hospitals were qualified as Medicare-participating, general acute-care hospital-providers under the federal Medicare program pursuant to the Medicare Act. The Plaintiff-Hospitals in this action are listed below with their unique Medicare provider numbers and their cost reporting periods at issue in this action, as set forth in their administrative appeals:

a. Emory University, d/b/a Emory University Hospital Midtown, Medicare Provider Number 11-0078, FY 2013.
b. Hospital General Menonita (Aibonito), Medicare Provider Number 40-0018, FYs 2002, 2003 and 2004.
c. Hospital General Menonita (Cayey), Medicare Provider Number 40-0013, FYs 2003 and 2004.
d. Integris Bass Baptist Health Center, Medicare Provider Number 37-0016, FY 2011.

The PRRB appeals at issue are listed in Exhibit B hereto with the date of the final remand orders.

10. Defendant Xavier Becerra is the Secretary of HHS. The Secretary, the federal official responsible for administration of the Medicare program, has delegated that responsibility to CMS. Before June 14, 2001, CMS was known as the Health Care Financing Administration

("HCFA"). In this Complaint, the Hospitals refer to the agency as CMS, even for events arising before June 14, 2001.

GENERAL BACKGROUND OF THE MEDICARE PROGRAM

11. The Medicare Act establishes a system of health insurance for the aged, disabled, and individuals with end-stage renal disease. 42 U.S.C. §1395c. The Medicare program is federally funded and administered by the Secretary through CMS and its contractors. 42 U.S.C. §1395kk; 42 Fed. Reg. 13,282 (Mar. 9, 1977).

12. CMS implements the Medicare program, in part, through the issuance of official Rulings. *See* 42 C.F.R. §401.108. In addition to the substantive rules published by the Secretary in the Code of Federal Regulations and the Rulings, CMS publishes numerous other interpretative rules implementing the Medicare program, which are compiled in one or more CMS Manuals. The Secretary also issues other subregulatory documents to implement the Medicare program, which generally do not have the force and effect of law.

13. The Medicare Act, at 42 U.S.C. §1395hh(a), prohibits the application of any rule or policy that establishes or changes a substantive legal standard governing the payment for service unless it is promulgated by the Secretary by notice-and-comment rulemaking. In addition, the Medicare Act specifies that where a final rule "is not a logical outgrowth of a previously published notice of proposed rulemaking . . ., such provision shall be treated as a proposed regulation and shall not take effect." 42 U.S.C. §1395hh(a)(4). *Allina II*, 139 S. Ct. at 1816.

14. The Medicare program is divided into five parts: A, B, C, D, and E. Part A of the Medicare program provides for coverage and payment for, among others, inpatient hospital services on a fee-for-service basis. 42 U.S.C. §§1395c *et seq*. Part A services are furnished to Medicare beneficiaries by "providers" of services, including the Hospitals, that have entered into

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