

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CATAWBA VALLEY MEDICAL CENTER)
810 Fairgrove Church Road S.E.)
Hickory, North Carolina 28602)

GRADY MEMORIAL HOSPITAL CORPORATION)
d/b/a GRADY MEMORIAL HOSPITAL)
80 Jesse Hill Jr. Drive)
Atlanta, Georgia 30303)

HOUSTON HOSPITALS, INC. d/b/a HOUSTON)
MEDICAL CENTER)
1601 Watson Boulevard)
Warner Robins, Georgia 31093)

JACKSON HOSPITAL & CLINIC, INC.)
1725 Pine Street)
Montgomery, Alabama 36106)

NORTH MEMORIAL HEALTH CARE d/b/a NORTH)
MEMORIAL MEDICAL CENTER)
3300 Oakdale Avenue North)
Robbinsdale, Minnesota 55422)

REGENTS OF THE UNIVERSITY OF MICHIGAN,)
ON BEHALF OF THE UNIVERSITY OF MICHIGAN)
HOSPITALS AND HEALTH CENTERS)
1500 East Medical Center Drive)
Ann Arbor, Michigan 48109)

SAMPSON REGIONAL MEDICAL CENTER, INC.)
607 Beaman Street)
Clinton, North Carolina 28328)

THE BROOKLYN HOSPITAL CENTER)
121 Dekalb Avenue)
Brooklyn, New York 11201)

Plaintiffs,)
v.)

XAVIER BECERRA, Secretary,)
United States Department of)
Health and Human Services,)
200 Independence Ave. S.W.)

Case No.

Washington, DC 20201,
 Defendant.

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

NATURE OF ACTION

1. This case concerns the proper treatment in the calculation of the Medicare Part A disproportionate share hospital (“DSH”) payment of inpatient hospital days for patients who were enrolled in Medicare Advantage plans under Part C of the Medicare Act. The Court of Appeals has now ruled against the agency in three actions challenging the agency’s repeated attempts to apply its Part C days policy change first adopted in 2004 to deny Medicare DSH payments to hospitals. *See Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16–17 (D.C. Cir. 2011) (finding application of the 2004 rule to prior periods impermissibly retroactive); *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) (“*Allina I*”) (vacating the 2004 rule because it was not a logical outgrowth of the proposed rule); *Allina Health Servs. v. Price*, 863 F.3d 937, 943–44 (D.C. Cir. 2017), *aff’d sub nom. Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (“*Allina II*”) (holding that the agency must undertake notice-and-comment rulemaking before the policy of the 2004 vacated rule can take effect). But the agency refuses to acquiesce in those decisions or in the Supreme Court’s recent decision in *Allina II* affirming the Court of Appeals’ decision. *Allina II*, 139 S. Ct. 1804. Instead, the agency has continued to apply the Part C days policy adopted in the now-vacated 2004 rule in violation of these decisions, including in the payment determinations at issue for the plaintiff hospitals in this case, in a recently issued proposed rule seeking to re-adopt the same 2004 policy retroactively, and in a ruling that would leave undisturbed the payment determinations from which hospitals have appealed and, as construed by the agency’s

administrative Board, not permit further administrative or judicial review of those determinations. The agency's continued attempts to apply the 2004 policy should be rejected because they are procedurally invalid, as the Court of Appeals has now twice ruled, fail any test of reasoned decision-making, and are inconsistent with congressional intent in adopting the Medicare DSH statute.

JURISDICTION AND VENUE

2. This action arises under the Medicare Act, Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq.

3. Jurisdiction is proper under 42 U.S.C. § 1395oo(f)(l).

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

PARTIES

5. The plaintiff hospitals in this action and hospital fiscal years (or portions thereof) at issue are as follows:

- (1) Catawba Valley Medical Center, Provider No. 34-0143, fiscal years ending June 30, 2013 and June 30, 2014;
- (2) Grady Memorial Hospital Corporation d/b/a Grady Memorial Hospital, Provider No. 11-0079, fiscal year ending December 31, 2012;
- (3) Houston Hospitals, Inc. d/b/a Houston Medical Center, Provider No. 11-0069, fiscal year ending December 31, 2013;
- (4) Jackson Hospital & Clinic, Inc., Provider No. 01-0024, fiscal year ending December 31, 2013;
- (5) North Memorial Health Care d/b/a North Memorial Medical Center, Provider No. 24-0001, fiscal year ending December 31, 2013;
- (6) Regents of the University of Michigan, on behalf of the University of Michigan Hospitals and Health Centers, Provider No. 23-0046, fiscal years ending June 30, 2013 and June 30, 2014;
- (7) Sampson Regional Medical Center, Inc., Provider No. 34-0024, fiscal year ending September 30, 2013; and

(8) The Brooklyn Hospital Center, Provider No. 33-0056, fiscal year ending December 31, 2013.

6. The defendant is Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services (“Secretary”), the federal agency that administers the Medicare program. References to the Secretary herein are meant to refer to him, to his subordinates, and to his official predecessors or successors as the context requires.

7. The Centers for Medicare & Medicaid Services (“CMS”) is the component of the Secretary’s agency with responsibility for day-to-day operation and administration of the Medicare program. CMS was formerly known as the Health Care Financing Administration. References to CMS herein are meant to refer to the agency and its predecessors.

LEGAL AND REGULATORY BACKGROUND

Medicare Payment Determinations and Appeals

8. Part A of the Medicare Act covers “inpatient hospital services.” 42 U.S.C. § 1395d(a)(1). Since 1983, the Medicare program has paid most hospitals for the operating costs of inpatient hospital services under the prospective payment system (“PPS”). 42 U.S.C. § 1395ww(d); 42 C.F.R. Part 412. Under PPS, Medicare pays predetermined, standardized amounts per discharge, subject to certain payment adjustments. *Id.* One of the PPS payment adjustments is the DSH payment. *See* 42 U.S.C. § 1395ww(d)(5)(F); 42 C.F.R. § 412.106.

9. After the close of each fiscal year, a hospital is required to file a “cost report” with a Medicare Administrative Contractor designated by the agency. 42 C.F.R. §§ 413.20, 413.24.

10. The Medicare Administrative Contractor analyzes a hospital’s cost report and issues a year-end determination, called a Notice of Program Reimbursement (“NPR”), as to the amount of Medicare program reimbursement due the hospital for services furnished to Medicare patients during the fiscal year covered by the cost report. *See* 42 C.F.R. § 405.1803; *see also In re*

Medicare Reimbursement Litig., 309 F. Supp. 2d 89, 92 (D.D.C. 2004), *aff'd*, 414 F.3d 7 (D.C. Cir. 2005).

11. A hospital may appeal a Medicare Administrative Contractor’s determination as to the total amount of Medicare program reimbursement due the hospital for the fiscal year covered by a cost report to the agency’s Provider Reimbursement Review Board (“Board”). *See* 42 U.S.C. § 1395oo(a)(1)(A); 42 C.F.R. §§ 405.1835–405.1877.

12. A hospital has the right to a hearing before the Board if it is dissatisfied with the contractor’s payment determination in an NPR as to the total amount of program reimbursement due to the hospital for its cost reporting period. 42 U.S.C. § 1395oo(a)(1); *see also* 42 C.F.R. §§ 405.1835; 405.1837. The statute further requires a minimum amount in controversy and that the appeal be filed timely. 42 U.S.C. § 1395oo(a).

13. The Board’s regulations at 42 C.F.R. § 405.1801(d)(2) provide that in computing deadlines for appeals, days where the Board is “unable to conduct business in the usual manner due to extraordinary circumstances beyond its control” are not included in the calculation of deadlines. The regulation instead provides that the clock on a deadline resumes when the Board is “able to conduct business in the usual manner.” *Id.*

14. In response to the COVID-19 public health emergency, the Board published “Alert 19.”¹ This Alert states that the Board is “maximizing telework” due to COVID-19, but further states that the Board is “continuing to operate in the most efficient manner possible.” Nonetheless, in this Alert, the Board states that it is temporarily suspending all appeal deadlines set by the Board, invoking 42 C.F.R. § 405.1801(d) for the authority to do so. Alert 19 ¶ 2. The Board also makes

¹ Available at <https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/PRRB-Alerts>.

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