

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

SOUTH BROWARD HOSPITAL DISTRICT)
d/b/a MEMORIAL HOSPITAL MIRAMAR)
3501 Johnston Street)
Hollywood, FL 33021)

SOUTH BROWARD HOSPITAL DISTRICT)
d/b/a MEMORIAL REGIONAL PEMBROKE)
3501 Johnston Street)
Hollywood, FL 33021)

SOUTH BROWARD HOSPITAL DISTRICT)
d/b/a MEMORIAL HOSPITAL WEST)
3501 Johnston Street)
Hollywood, FL 33021)

SOUTH BROWARD HOSPITAL DISTRICT)
d/b/a MEMORIAL REGIONAL HOSPITAL)
3501 Johnston Street)
Hollywood, FL 33021)

Plaintiffs,

Case No. 1:21-cv-3372

v.

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

Defendant.

COMPLAINT

INTRODUCTION

1. Plaintiffs, South Broward Hospital District (d/b/a Memorial Hospital Miramar), South Broward Hospital District (d/b/a Memorial Regional Pembroke), South Broward Hospital District (d/b/a Memorial Hospital West), and South Broward Hospital District (d/b/a Memorial

Regional Hospital) (the “Hospitals”) by and through their counsel, challenge the Secretary of the United States Department of Health and Human Services’ (the “Secretary”) calculation of the disproportionate share hospital “DSH” adjustment relating to inpatients enrolled in a Medicare Advantage plan under Part C of the Medicare Act (“Part C”).

2. The Hospitals filed jurisdictionally proper appeals challenging the DSH Part C policy with the Provider Reimbursement Review Board (“PRRB”) in accordance with 42 U.S.C. § 1395oo(a). The Secretary, however, seeks to prevent the Hospitals’ appeals of the Medicare Part C issue. First, although the Court of Appeals and the Supreme Court have invalidated the DSH Part C Policy, the Secretary persists in applying it. *See Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16-17 (D.C. Cir. 2011); *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) (“*Allina I*”); *Allina Health Servs. v. Price*, 863 F.3d 937, 943-44 (D.C. Cir. 2017) (“*Allina II*”); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (affirming *Allina II*).

3. On August 6, 2020, the Secretary published a notice of proposed rulemaking in which he proposed to retroactively adopt the same policy that was vacated in the *Allina* litigation. 85 Fed. Reg. 47723 (Aug. 6, 2020) (the “Proposed Rule”). The Proposed Rule suggests that, due to the vacatur of the 2004 rule, the Secretary has no rule governing the treatment of Part C days and must therefore engage in retroactive rulemaking. *Id.* at 47724.

4. On August 17, 2020, the Secretary issued CMS Ruling 1739-R (“The Ruling”). Exhibit 1. The Ruling deprives the PRRB of jurisdiction over any pending jurisdictionally proper administrative appeals “regarding the treatment of patient days associated with patients enrolled in Medicare Advantage plans in the Medicare and Medicaid fractions of the disproportionate patient percentage” so that Medicare Administrative Contractors (“MACs”) can apply the result of the retroactive rulemaking to those pending appeals once the new rule is in place.

5. The Ruling requires the PRRB to determine whether the appeal “satisfies the applicable jurisdictional and procedural requirements of section 1878 of the [Medicare] Act, the Medicare regulations, and other agency rules and guidelines.” *See* Exhibit 1 at 7. The Ruling instructs the PRRB to remand jurisdictionally proper appeals of the “Part C day DSH issue” back to the MACs that issued the payment determinations under appeal. *Id.* at 2, 7-8. The Ruling was not adopted through notice-and-comment rulemaking.

6. Although the Ruling deprives the Hospitals of relief to which they are entitled, the Proposed Rule has not been finalized, and the Secretary concedes that the Proposed Rule has no payment effect. The Ruling claims that 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. Here, the Hospitals filed jurisdictionally proper appeals with the PRRB, which include a challenge to the DSH determination based on the DSH Part C policy. The PRRB remanded the Hospitals’ appeals of this issue, justifying the remand solely on the Proposed Rule and the Ruling. Exhibits 2-5.

8. The Ruling and subsequent remands of the Hospitals’ appeals of the Medicare Part C issue must be vacated because they were arbitrary, capricious, and contrary to the law. The Ruling and remands violated the Medicare Act and the Administrative Procedure Act (“APA”) by throwing out the Hospitals’ rightful appeals of a final Medicare payment determination and implementing substantive payment policy changes without notice-and-comment rulemaking. The Secretary’s ruling also violated the Constitution by ending the Hospitals’ properly-filed appeals of

the Medicare Part C issue and providing no means of review of the Secretary's ruling—or adjudication of that issue in the Hospitals' appeals.

9. For these reasons as set forth herein, the Hospitals respectfully request that this Court issue a ruling:

- a. Vacating CMS Ruling 1739-R;
- b. Vacating the PRRB's order remanding the Hospitals' appeals of the Medicare Part C issue to the MAC to comply with CMS Ruling 1739-R;
- c. Reinstating the Hospitals' appeals of the Medicare Part C issue before the PRRB;
- d. In the alternative, issuing a writ of mandamus ordering the Secretary to rescind CMS Ruling 1739-R and reinstate the Hospitals' appeals of the Medicare Part C issue before the PRRB;
- e. Ordering the Secretary to recalculate the Hospitals' DSH payments for the Fiscal Period at issue as directed by the *Allina* Court and to make prompt payment of any additional amounts due to the Hospitals, plus interest calculated in accordance with 42 U.S.C. § 1395oo(f)(2), 42 U.S.C. § 1395g(d), or both;
- f. Requiring the agency to pay legal fees and costs of suit incurred by the Hospitals; and
- g. Providing such other relief as the Court may consider appropriate.

JURISDICTION AND VENUE

10. This action arises under the Medicare Statute, title XVIII of the Social Security Act, 42 U.S.C § 1395 *et seq.*, and the APA, 5 U.S.C. § 551 *et seq.*

11. Jurisdiction is proper under 42 U.S.C. § 1395oo(a)(1)(A)(ii), 42 U.S.C. § 1395oo(f)(1), 28 U.S.C. § 1331, and 28 U.S.C. § 1361.

12. Venue is proper in this judicial district in accordance with 42 U.S.C. § 1395oo(f)(1) and 28 U.S.C. § 1391(e).

PARTIES

13. The Plaintiffs in this action are hospitals that participate in the Medicare program.

a. Plaintiff South Broward Hospital District's (d/b/a Memorial Hospital Miramar) provider number is 10-0285 and the cost reporting periods at issue in this action are hospital fiscal years 2006, 2007, 2009.

b. Plaintiff South Broward Hospital District's (d/b/a Memorial Regional Pembroke) provider number is 10-0230 and the cost reporting periods at issue in this action are hospital fiscal years 2005, 2007, 2008, 2009.

c. Plaintiff South Broward Hospital District's (d/b/a Memorial Hospital West) provider number is 10-0281 and the cost reporting periods at issue in this action are hospital fiscal years 2006, 2007, 2008, 2009.

d. Plaintiff South Broward Hospital District's (d/b/a Memorial Regional Hospital) provider number is 10-0038 and the cost reporting periods at issue in this action are hospital fiscal years 2005, 2008, 2009.

14. Defendant, Xavier Becerra, is the Secretary of the United States Department of Health and Human Services ("HHS") and is sued in his official capacity. HHS is the Federal agency that administers CMS. CMS is the Federal agency to which the Secretary has delegated administrative authority over the Medicare program, which is established under title XVIII of the Social Security Act. *See* 42 U.S.C. § 1395 *et seq.* References to the Secretary are meant to refer

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