

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLINA HEALTH SERVICES, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 10-01463 (RMC)
)	
SYLVIA M. BURWELL, Secretary,)	CONSOLIDATED WITH
United States Department of)	10-01462 (RMC)
Health and Human Services,)	
)	
Defendant.)	
_____)	

PLAINTIFFS’ MOTION FOR FURTHER RELIEF

Plaintiffs in these consolidated cases—30 not-for-profit hospitals (the “Hospitals”)—successfully challenged the Secretary’s changed interpretation of the disproportionate share hospital (“DSH”) adjustment. Specifically, this Court held, *inter alia*, that the agency failed to meet notice and comment requirements in the 2004 rulemaking in which the agency attempted to change its interpretation of the DSH calculation to include part C days in one component of the DSH payment calculation, the part A/SSI fraction, rather than in the other component, the Medicaid fraction. Accordingly, this Court vacated that 2004 attempted rule change, and the D.C. Circuit affirmed the vacatur. But even after the issuance of that court’s mandate, the agency published part A/SSI fractions for fiscal year 2012 that applied the vacated rule for all hospitals nationwide, including the prevailing Hospitals. Despite repeated requests, the agency maintains that those 2012 SSI fractions will stand for the Hospitals. Accordingly, the Hospitals request that this Court enjoin the Secretary from applying the vacated rule when calculating any final, tentative, or interim DSH payments for plaintiff Hospitals or when calculating any component of the DSH payment calculation for any hospital cost year for plaintiff Hospitals

beginning before October 1, 2013, the effective date of the agency's new rulemaking on the issue.

BACKGROUND

As this Court is aware, the underlying interpretive issue in this case is whether "enrollees in Part C are 'entitled to benefits' under Part A, such that they should be counted in the Medicare [part A/SSI] fraction, or whether, if not regarded as 'entitled to benefits under Part A,' they should instead be included in the Medicaid fraction" of the DSH adjustment to the extent Medicaid eligible. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014). Under the regulation in effect prior to the 2004 rulemaking at issue, "the Secretary treated Part C patients as *not* entitled to benefits under Part A." *Id.* at 1106. In the 2004 rulemaking, the Secretary "abruptly announced a change in policy." *Allina Health Servs. v. Sebelius*, 904 F. Supp. 2d 75, 78 (D.D.C. 2012). The Hospitals challenged the new rule, contending, *inter alia*, that this abrupt reversal did not meet notice and comment requirements and was not the product of reasoned decision making because the Secretary failed to acknowledge or explain the agency's departure from past policy.

This Court agreed and held that the policy announced in the 2004 rulemaking regarding part C days was not the logical outgrowth of a proposed rule. 904 F. Supp. 2d at 89-92. This Court also held that the " cursory explanation in the 2004 Final Rule failed to meet the requirements of the APA" because "the Secretary[] fail[ed] to acknowledge her 'about-face,'" and "her reasoning for the change was brief and unconvincing." *Id.* at 93 (quoting *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 15 (D.C. Cir. 2011)). Accordingly, this Court concluded that "[t]he portion of the 2004 Final Rule ... that announced the Secretary's interpretation of the Medicare Disproportionate Share Hospital Fraction, as codified in 2007 at 42 C.F.R. § 412.106(b)(2) and as further modified in 2010, will be vacated, and the case will be remanded

to the Secretary for further action consistent with this Opinion.” *Id.* at 95. This Court held, moreover, that the Secretary “cannot impose her new interpretation [from the 2004 rule] on the FY 2007 calculations challenged in this case.” *Id.*

Approximately one month later, this Court issued an order responding to the government’s request for clarification regarding the scope of its judgment, noting that its ruling “necessarily included a finding that the 2004 Final Rule—on which the Secretary relied in defending the FY 2007 calculations ... —was procedurally defective and, therefore, infirm *ab initio*.” Post-Judgment Order, ECF No. 47, at 2 (Dec. 18, 2012). In the Post-Judgment Order, this Court also stated that its prior judgment “remanded the case to the Secretary to recalculate [the] reimbursements [at issue] without using the interpretation set forth in the 2004 Final Rule.” *Id.* The government appealed on January 11, 2013.

Meanwhile, on or about June 27, 2013, the agency published 2011 part A/SSI fractions for all hospitals nationwide that included part C days. Consistent with this Court’s vacatur of the 2004 rule, however, the Secretary calculated revised fractions for 2011 for the plaintiff Hospitals that did not apply the vacated rule but instead excluded part C days as required by the restored, pre-2004 regulation. *See* Technical Direction Letter, TDL-130516, Sept. 3, 2013 (attached as Exhibit A). Earlier in 2013, the agency had also revised 2010 fractions initially published by the Secretary on or about October 17, 2012 to exclude part C days for the plaintiff Hospitals. Technical Direction Letter, TDL-13179, Jan. 30, 2013 (attached as Exhibit B).¹ While the government’s appeal was pending, the agency engaged in a new notice and comment rulemaking on the treatment of part C days. In that rulemaking, the agency “proposed to readopt the policy

¹ For hospitals not plaintiffs in the *Allina* litigation that received final payment determinations on their cost reports using part A/SSI fractions that included part C days, the Secretary had instructed the contractors as follows: “In the event of an unfavorable final nonappealable decision in *Allina Health Services v. Sebelius*, the cost report will be reopened to adjust the Disproportionate Share payment calculation.” *See id.*

of counting the days of patients enrolled in [part C] plans in the Medicare fraction” “in an abundance of caution.” 78 Fed. Reg. 50,496, 50,615 (Aug. 19, 2013). Accordingly, effective as of October 1, 2013 on a prospective basis only, the rule governing the DSH calculation is the same as the vacated rule had been. *See id.* at 50,619 (stating that rule “readopt[ion]” applies to “FY 2014 and subsequent years” only).

Following proceedings in this Court regarding the Secretary’s obligations pending appeal, this Court stayed its judgment “pending resolution of Defendant’s appeal of this case to the D.C. Circuit Court of Appeals.” Stay Order, ECF No. 59, at 4 (Aug. 27, 2013).

On April 1, 2014, the D.C. Circuit affirmed this Court’s *Allina* decision on the merits, “agree[ing] with the district court that the Secretary’s final rule was not a logical outgrowth of the proposed rule.” *Allina Health Servs.*, 746 F.3d at 1109. Because this procedural failure was a sufficient basis to vacate the rule, the D.C. Circuit did not reach the arbitrariness of the Secretary’s explanation. *Id.* at 1111. With respect to remedy, the D.C. Circuit held that this Court “correctly concluded that vacatur was warranted.” *Id.* The court reversed, however, that part of this Court’s remedy holding that the Secretary “cannot impose her new interpretation on the FY 2007 calculations challenged in this case,” 904 F. Supp. 2d at 95, and “order[ing] the Secretary to recalculate the hospitals’ reimbursements ‘without using the interpretation set forth in the 2004 Final Rule.’” 746 F.3d at 1111 (quoting the Post-Judgment Order). The court held that the “question whether the Secretary could reach the same result” on remand as would have applied under the vacated rule “was not before the district court” and therefore this Court should have simply “remand[ed] after identifying the error.” *Id.*

The D.C. Circuit’s mandate issued on May 28, 2014. On June 13, 2014, the agency once again published its calculations of the part A/SSI fractions for every hospital in the country, this

time for 2012. Those fractions included part C days for all hospitals, including the prevailing Hospitals. The agency provided no explanation of the Secretary's determination to include part C patient days in the part A/SSI fraction following the Court of Appeals decision affirming the vacatur of the rule change. The release simply stated that the fractions "include[ed] MA [*i.e.*, part C] claims submissions."²

The time for filing a petition for certiorari expired on June 30, 2014, and on June 24 the Secretary determined not to seek Supreme Court review. The Hospitals notified the Secretary of their view that the publication of these 2012 part/A SSI fractions applying the now-vacated 2004 rule violated the D.C. Circuit's decision and sought assurances from the Secretary that new 2012 fractions that did not apply the vacated rule would be calculated for the Hospitals. The Secretary did not agree to issue new fractions for the Hospitals.

ARGUMENT

The Court's vacatur of the 2004 rule change related to part C days has been affirmed on appeal, the Court of Appeals' mandate has issued, this Court's stay pending appeal has terminated, and the time for seeking further review has expired. But the Secretary has continued business as usual, as if the vacatur never occurred and the change she made to the DSH payment rule in 2004 was in effect. But it is not in effect. Rather, as this Court has stated, it is "infirm *ab initio*." Post-Judgment Order, ECF No. 47, at 2.

Compliance with this Court's vacatur of the 2004 rule and the D.C. Circuit's affirmance of the vacatur is required even in the absence of an injunction. *See Committee on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (because "we have long presumed that officials of the Executive Branch will adhere to the law as declared by the

²2012 Part A/SSI Fraction Data File. Available at <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Downloads/FY-2012-SSI-Ratios-for-web-posting.zip>.

court,” a “declaratory judgment is the functional equivalent of an injunction”). But pursuant to 28 U.S.C. § 2202, “further relief may be granted if defendant has failed to comply with the declaratory judgment issued by the Court.” *Public Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998); 28 U.S.C. § 2202 (“Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing”); *cf. Affinity Healthcare Servs. v. Sebelius*, 746 F. Supp. 2d 106, 120 (D.D.C. 2010) (“Having ... determin[ed] that the regulation is invalid and that the Administrator may not rely on it, ... the court enjoins HHS from continuing to use the regulation to calculate the plaintiffs’ hospice cap liability.”). In *Public Citizen*, this Court entered an injunction after the agency “continued ... to rely” on a rule that this Court had vacated and “declared ... ‘null and void.’” 2 F. Supp. at 19. So too, here. Therefore, the Hospitals request that the Court enjoin the Secretary from applying the vacated rule.

A. Vacatur Rendered The 2004 Rule Void And Precludes Its Continued Application

The D.C. Circuit affirmed this Court’s vacatur of the 2004 rule. *Allina Health Servs.*, 746 F.3d at 1111. The effect of that vacatur is “to suspend” the operation of that rule “pending further rulemaking by the agency.” *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994). “To ‘vacate’ ... means ‘to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.’” *Id.* (ellipsis in original) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citations omitted)). Moreover, the Medicare Act specifies that where, as here, the 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).

The agency issued the 2012 part A/SSI fractions including part C days as if the vacatur never happened and the 2004 rule still has effect, and thus contravened the Medicare Act, the Administrative Procedure Act (APA), and the D.C. Circuit's mandate. It is plain that the recent calculations are based on the 2004 rule because the Secretary calculated and published the fractions *en masse* for every hospital in the country, just as she did for many years before the vacatur—and gave no explanation whatsoever for her treatment of part C days or her shift in policy, as applied to all DSH hospitals.³

And even when an agency may proceed to adopt a policy in adjudication—which the Secretary may not do here—it is well-established that it may not rely upon the vacated rule. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 196 (D.C. Cir. 2009) (noting that if prior rule had been vacated, “the agency could not have applied HHS’s [post-vacatur] 1999 rule retroactively” in adjudication). Indeed, the government’s counsel acknowledged as much in its argument to the D.C. Circuit in this case. Tr. of Oral Arg. at 4, Feb. 7, 2014 (Government counsel: “[O]f course, the agency couldn’t then rely on the rule if the rule--if this Court affirms.” Judge Silberman: “Obviously.”) (attached as Exhibit C). In any event, the publication of part A/SSI fractions applying nationwide policy for future payment rates to every hospital entitled to the DSH adjustment is not an “adjudication.” It is either the global application of a legislative rule that has been vacated, or it is wholly arbitrary. Neither is permissible.

Accordingly, this Court should enter an order enjoining the Secretary from applying the vacated rule to the Hospitals’ DSH payments or components of their DSH payment calculations for any years between 2004 and 2013. Under the law of this Circuit, plenary relief is appropriate

³ Moreover, if the 2012 fractions did not rely upon the vacated rule, then they were wholly arbitrary. Given that this Court has already held that the Secretary’s “cursory explanation” in the 2004 rule for its reversal in policy regarding part C days was arbitrary, *Allina Health Servs.*, 904 F. Supp. 2d at 93, the Secretary’s total silence on the subject in issuing the part A/SSI fractions for 2012 necessarily fails the test of reasoned decision making.

when a party successfully challenges the facial validity of a rule. *National Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Indeed, nationwide applicability of the vacatur is the default remedy: When “a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Id.* (sustaining a “broad injunction” when “a facial challenge to the validity of a regulation” was upheld because it “obviates ... repetitious filings” when regulated parties may all seek review in the D.C. Circuit). The government has represented as much to this Court, stating that “if this Court’s decision were appealed and ultimately upheld, the Secretary would, of course, not apply the Rule to other hospitals.” Gov’t Mot. To Amend, ECF No. 45, at 11 (Dec. 13, 2012).

But at the very least, it is well within this Court’s power, and an appropriate exercise of its discretion, to grant an injunction reaching all years for the prevailing Hospitals. When “the Secretary is apparently unwilling to give any assurance that she will voluntarily refrain from enforcing the invalid regulation against [the Hospitals],” a district court has “both the authority and discretion to enjoin future application of the invalid regulation,” at the least against the Hospitals. *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 662 (9th Cir. 2011). This Court has twice recognized the propriety of enjoining the Secretary from applying a rule to plaintiff providers when the rule has, as here, been declared facially void. *Affinity Healthcare Servs.*, 746 F. Supp. 2d at 119 (“[N]umerous courts have, after holding the cap reimbursement regulation invalid, entered injunctions barring HHS from prospectively using the regulation against the hospice plaintiff.”); *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 60 (D.D.C. 2010) (“prospectively enjoin[ing] HHS from applying the challenged regulation to the plaintiff”). The Hospitals twice sought this assurance from the agency’s counsel, to no avail.

B. An Injunction Precluding The Secretary From Relying On The Vacated Rule Is Consistent With The Judgments Of This Court And The D.C. Circuit

The requested injunction is entirely consistent with the D.C. Circuit's judgment. The mandate of the Court of Appeals is plain: the 2004 rule is void and may not be applied by the Secretary. *See Alabama Power Co.*, 40 F.3d at 456. The D.C. Circuit reversed that part of this Court's judgment that "required the Secretary to affirmatively count Part C days under the Medicaid fraction for 2007" because it precluded the agency from applying "the interpretation set forth in the 2004 Final Rule." *Allina Health Servs.*, 746 F.3d at 1111 (quoting the Post-Judgment Order). But the D.C. Circuit did not hold that it was permissible for the agency to adopt that same 2004 interpretation through some method other than notice-and-comment rulemaking. Instead, it simply ruled that the question of what procedures the agency could use on remand to decide how to treat part C days, consistent with the strictures of the Medicare Act and the APA, was not yet before this Court or the D.C. Circuit. *See Allina Health Servs.*, 746 F.3d at 1111 ("The question whether the Secretary could reach the same result through adjudication was not before the district court[.]"). The D.C. Circuit did not leave the agency the option to continue to apply the vacated rule.

The Hospitals recognize that at the time of the final judgment in this case, this Court stated that "other years" besides the cost years involved in this suit were not before the Court. Post-Judgment Order, ECF No. 47, at 2. Now, however, after the vacatur has been affirmed by the D.C. Circuit and thus there can be no question that it applies nationwide, *see National Mining Ass'n*, 145 F.3d at 1409, and after the Secretary has refused repeated requests to modify the 2012 part A/SSI fractions that applied the vacated rule, the question of enforcing this Court's vacatur for all of the years to which it applies is now presented. Accordingly, the Secretary should be enjoined from applying the vacated rule to the Hospitals.

CONCLUSION

For the foregoing reasons, the Hospitals respectfully request that the Court enjoin the Secretary from applying the vacated rule when calculating any final, tentative, or interim DSH payments for plaintiff Hospitals or when calculating any component of the DSH payment calculation for any hospital cost year for plaintiff Hospitals beginning before October 1, 2013.

Respectfully Submitted,

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Dated: July 17, 2014

Counsel for Plaintiffs

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Baltimore, Maryland 21244-1850



TDL-130516, 08/27/2013

MEMORANDUM

DATE: September 3, 2013

FROM : Director, Financial Services Group
Office of Financial Management

Director, Hospital Ambulatory Policy Group
Center for Medicare

Director, Medicare Contractor Management Group
Center for Medicare

SUBJECT: Instructions Pertaining to the Fiscal Year (FY) 2011 Supplemental Security Income (SSI) Ratios for the Specific Disproportionate Share Hospitals that are Plaintiffs in Two Recent Court Cases (Allina Health Services v. Sebelius and Florida Health Center v. Sebelius)

TO: See Addressees

Technical Direction Letter (TDL)-13179, issued on January 30, 2013, instructed contractors to resume the issuance of all Notices of Program Reimbursement (NPRs), with the exception of the 29 hospitals that are plaintiffs in two recent court cases, Allina Health Services v. Sebelius and Florida Health Science Center v. Sebelius.

TDL-13179 also instructed contractors to utilize the SSI ratios included in the attachment to the TDL to update the Provider Specific File in PRICER. In addition, TDL13179 provided instructions for completing tentative settlements and interim rate reviews, including Periodic Interim Payments (PIP) rate reviews for the 29 plaintiff hospitals.

The Centers for Medicare & Medicaid Services (CMS) recently published the FY 2011 SSI ratios on its Website and issued Change Request 8406 on August 2, 2013, instructing the Medicare Administrative Contractors (MACs) to update the Provider Specific file in PRICER with these ratios. CMS is issuing this TDL to instruct MACs to continue to hold the NPRs for the 29 plaintiff hospitals listed on Attachment A. In addition, the MACs shall:

- Update the Provider Specific File in PRICER with the SSI ratios included on Attachment A within 15 business days of the issuance date of this TDL.
- MACs shall use the SSI ratios on Attachment A when completing tentative settlements and interim rate reviews.
- For those plaintiff hospitals on PIP, the MACs shall use the SSI ratios on Attachment A when completing PIP rate reviews.

Provider Education

- **No national message will be distributed from CMS.**
- **Local contractor messaging about this TDL is prohibited.**

A/B MAC Contract Numbers

Jurisdiction 6 ~ HHSM-500-2012-M0013Z
 Jurisdiction 8 ~ HHSM-500-2011-M0006Z
 Jurisdiction 9 ~ HHSM-500-2008-M0008Z
 Jurisdiction 11 ~ HHSM-500-2010-M0001Z
 Jurisdiction H ~ HHSM-500-2010-M0001Z
 Jurisdiction K ~ HHSM-500-2013-M0015Z

This Technical Direction Letter (TDL) is being issued to you as technical direction under your MAC contract and has been approved by your Contracting Officer's Representative (COR). This technical direction is not construed as a change or intent to change the scope of work under the contract and is to be acted upon only if sufficient funds are available. In this regard, your attention is directed to the clause of the General Provisions of your contract entitled Limitation of Funds, FAR 52.232-22 or Limitation of Cost, FAR 52.232-20 (as applicable). If the Contractor considers anything contained herein to be outside of the current scope of the contract, or contrary to any of its terms or conditions, the Contractor shall immediately notify the Contracting Officer in writing as to the specific discrepancies and any proposed corrective action.

Unless otherwise specified, contractors shall be in compliance with this TDL within 10 business days of its date of issuance.

Should you require further technical clarification, you may contact your COR. Contractual questions should be directed to your CMS Contracting Officer. Please copy the COR and Contracting Officer on all electronic and/or written correspondence in relation to this technical direction letter.

/s/
Charlotte Benson

/s/
Marc Hartstein

/s/
Karen Jackson

Attachment(s)

Addressees:

Todd Reiger, National Government Services, Inc.
Sandy Coston, Chief Executive Officer, Novitas Solutions, Inc.
Thomas Hinkson, Chief Financial Officer, Novitas Solutions, Inc.
Michael Kapp, President, National Government Services, Inc.
Jared Adair, Executive Vice President, Medicare Operations, Wisconsin Physicians Service Insurance Corporation
Janet Kyle, Wisconsin Physicians Service Insurance Corporation
Joe Johnson, President & Chief Operating Officer, Palmetto GBA, LLC
Sandy Coston, President & Chief Operating Officer, First Coast Service Options, Inc.

cc:

All RAs, CMS
Amanda Bolger, Wisconsin Physicians Service Insurance Corporation
Amy Drake, CM/MCMG
Brenda Clark, OAGM
Brian Johnson, CM/MCMG
Christina Honey, OAGM
Courtney Garnes, OAGM
Craig Dash, OAGM
David Banks, CM/MCMG
David Vaughn, Novitas Solutions, Inc.
Dorothy Braunsar, OFM/FSG/DPAO
Ed Sanchez, Palmetto GBA, LLC
Harvey Dikter, First Coast Service Options, Inc.
James Massa, CM/MCMG
Jim Elmore, National Government Services, Inc.
Jody Grier, Novitas Solutions, Inc.
Jody Kurtenbach, CM/MCMG
Kathy Markman, OAGM
Kristen Lawrence, OAGM
Lamar James, First Coast Service Options, Inc.
Larry Young, CM/MCMG
Linda Hook, OAGM
Marco Turner, First Coast Service Options, Inc.
Margot Warren, CM/MCMG
Marilyn Bryan, CM/MCMG
Mark Defoil, Wisconsin Physicians Service Insurance Corporation
Marybeth Jason, CM/MCMG
Nanette Foster Reilly, Consortium Administrator for Financial Management & Fee-for-Service Operations
Peter Haas, OAGM
Ron Paige, Palmetto GBA, LLC
Salem Fussell, OAGM

Scott Kimball, National Government Services, Inc.
Shelby Minchew, OAGM
Stacey Greber, OAGM
Stacie Amburn, National Government Services, Inc.
Steve Stoyer, OAGM
Susan Oken, CM/MCMG
Tasha Logan, OAGM

allina_ssi

Attachment A						
						FY 2011
Provider Name	CCN	Contractor	Cont #	SSI FFS Days	Total FFS Days	SSI ratio
SHANDS JACKSONVILLE MEDICAL CENTER	100001	FCSO - J9	9001	8967	41103	0.21816
MOUNT SINAI MEDICAL CENTER	100034	FCSO - J9	9001	12063	44399	0.27170
SHANDS HOSPITAL AT THE UNIVERSITY O	100113	FCSO - J9	9001	8439	73127	0.11540
TAMPA GENERAL HOSPITAL	100128	FCSO - J9	9001	8105	69732	0.11623
HENRY FORD HOSPITAL	230053	WPS - J8	8001	11014	70592	0.15602
CAMBRIDGE MEDICAL CENTER	240020	NGS - J6	6201	98	3339	0.02935
UNITED HOSPITAL	240038	NGS - J6	6201	2034	33044	0.06155
ABBOTT NORTHWESTERN HOSPITAL INC	240057	NGS - J6	6201	3253	62103	0.05238
OWATONNA HOSPITAL	240069	NGS - J6	6201	25	2336	0.01070
UNITY HOSPITAL	240132	NGS - J6	6201	435	14156	0.03073
KALEIDA HEALTH	330005	NGS - J13	13001	7866	74283	0.10589
SOUTHSIDE HOSPITAL	330043	NGS - J13	13001	2197	26377	0.08329
NEW YORK HOSPITAL MEDICAL CENTER OF	330055	NGS - J13	13001	16252	69674	0.23326
MONTEFIORE MEDICAL CENTER	330059	NGS - J13	13001	27125	120329	0.22542
NEW YORK-PRESBYTERIAN HOSPITAL	330101	NGS - J13	13001	30754	191430	0.16065
NORTH SHORE UNIVERSITY HOSPITAL	330106	NGS - J13	13001	8801	117729	0.07476
STATEN ISLAND UNIVERSITY HOSPITAL	330160	NGS - J13	13001	6885	51977	0.13246
HIGHLAND HOSPITAL	330164	NGS - J13	13001	2330	20204	0.11532
MAIMONIDES MEDICAL CENTER	330194	NGS - J13	13001	25018	78232	0.31979
LONG ISLAND JEWISH MEDICAL CENTER	330195	NGS - J13	13001	8128	58037	0.14005
KINGSBROOK JEWISH MEDICAL CENTER	330201	NGS - J13	13001	5994	22117	0.27101
NEW YORK METHODIST HOSPITAL	330236	NGS - J13	13001	16216	58932	0.27516
STRONG MEMORIAL HOSPITAL	330285	NGS - J13	13001	6921	53853	0.12852
LUTHERAN MEDICAL CENTER	330306	NGS - J13	13001	8351	38980	0.21424
FOREST HILLS HOSPITAL	330353	NGS - J13	13001	7613	31376	0.24264
FRANKLIN HOSPITAL	330372	NGS - J13	13001	2592	23880	0.10854
NORTH CAROLINA BAPTIST HOSPITAL	340047	Palmetto - J11	11501	8740	78695	0.11106
METHODIST DALLAS MEDICAL CENTER	450051	Novitas - JH	4011	5001	31396	0.15929
METHODIST CHARLTON MEDICAL CENTER	450723	Novitas - JH	4011	3652	27907	0.13086

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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v.)	Case No.: 10-01463 (RMC)
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SYLVIA M. BURWELL, Secretary,)	CONSOLIDATED WITH
United States Department of)	10-01462 (RMC)
Health and Human Services,)	
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Defendant.)	
_____)	

PLAINTIFFS' MOTION FOR FURTHER RELIEF

EXHIBIT B

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850



TDL-13179, 01-18-13

MEMORANDUM

DATE: January 30, 2013

FROM: Acting Director, Financial Services Group
Office of Financial Management

Director, Hospital and Ambulatory Payment Group
Center for Medicare

Director, Medicare Contractor Management Group
Center for Medicare

SUBJECT: Medicare Cost Report Final Settlements and Instructions Pertaining to
Specific Disproportionate Share Hospitals (DSH)

TO: All Fiscal Intermediaries (FIs), and Part A and Part B Medicare
Administrative Contractors (A/B MACs)

Technical Direction Letter (TDL)-13105, issued on December 17, 2012, instructed contractors to immediately stop the issuance of Notices of Program Reimbursement (NPRs) for any cost reports that utilize a Social Security Income (SSI) ratio for determining DSH hospital payments, until further notice.

Effective immediately, contractors shall resume the issuance of all NPRs, with the exception of the 29 hospitals that are plaintiffs in two recent court cases, *Allina Health Services v. Sebelius* and *Florida Health Science Center v. Sebelius* (plaintiff hospitals are listed on Attachment A). For the non-plaintiff hospitals (all hospitals except those noted on Attachment A), contractors shall issue a Notice of Intent to Reopen the cost report along with the NPR. The Notice of Intent to Reopen shall use the following reason for reopening:

“In the event of an unfavorable final nonappealable decision in *Allina Health Services v. Sebelius*, the cost report will be reopened to adjust the Disproportionate Share payment calculation.”

In addition to holding the NPRs for the 29 plaintiff hospitals on Attachment A, the contractors shall:

- Update the Provider Specific File in PRICER with the SSI ratios included on Attachment A within 15 business days of the issuance date of this TDL.
- Contractors shall use the SSI ratios on Attachment A when completing tentative settlements and interim rate reviews.
- For those plaintiff hospitals on Periodic Interim Payments (PIP), the contractors shall use the SSI ratios on Attachment A when completing PIP rate reviews.

The Centers for Medicare & Medicaid Services will work with the individual contractors to address any other applicable cost report holds related to DSH.

Change Request 7814 (Transmittal 1096) was issued on June 8, 2012 and included timeframes for contractors to issue NPRs based on recently released SSI ratios. Due to the delay in the issuance of NPRs due to the Allina court case, the NPR timeframes in CR 7814 will be extended by 60 days.

NOTE: MEDICARE ADMINISTRATIVE CONTRACTORS (MACs)

A/B MAC Contract Numbers

Jurisdiction F ~ HHSM-500-2011-M0004Z
Jurisdiction H ~HHSM-500-2010-M0001Z
Jurisdiction 1 ~ HHSM-500-2008-M0002Z
Jurisdiction 5 ~ HHSM-500-2007-M0002Z
Jurisdiction 8 ~ HHSM-500-2011-M0006Z
Jurisdiction 9 ~ HHSM-500-2008-M0008Z
Jurisdiction 10~HHSM-500-2009-M0004Z
Jurisdiction 11~HHSM-500-2010-M0001Z
Jurisdiction 12~HHSM-500-2008-M0001Z
Jurisdiction 13~HHSM-500-2008-M0004Z
Jurisdiction 14~HHSM-500-2009-M0002Z
Jurisdiction 15~HHSM-500-2010-M0002Z

This Technical Direction Letter (TDL) is being issued to you as technical direction under your MAC contract and has been approved by your Contracting Officer's Representative (COR). This technical direction is not construed as a change or intent to change the scope of work under the contract and is to be acted upon only if sufficient funds are available. In this regard, your attention is directed to the clause of the General Provisions of your contract entitled Limitation of Funds, FAR 52.232-22 or Limitation of Cost, FAR 52.232-20 (as applicable). If the Contractor considers anything contained herein to be outside of the current scope of the contract, or contrary to any of its terms or conditions, the Contractor shall immediately notify

the Contracting Officer in writing as to the specific discrepancies and any proposed corrective action.

Should you require further technical clarification, you may contact your COR. Contractual questions should be directed to your CMS Contracting Officer. Please copy the COR and Contracting Officer on all electronic and/or written correspondence in relation to this technical direction letter.

If you are an FI and have any questions, please contact Dorothy Braunsar at (410) 786-4037.

/s/
Charlotte Benson

/s/
Marc Hartstein

/s/
Karen Jackson

Attachment

cc:

Dorothy W. Pines, NHIC, Corp.
 Robert Madgett, CGS Administrators, LLC
 Paul O'Donnell, Noridian Administrative Services, LLC
 Karla Thormodson, Noridian Administrative Services, LLC
 Kris Martin, Wisconsin Physicians Service Insurance Corporation
 Frances Dye, Wisconsin Physicians Service Insurance Corporation
 Amanda Bolger, Wisconsin Physicians Service Insurance Corporation
 Mike Barlow, Palmetto GBA, LLC
 Larry Leslie, Palmetto GBA, LLC
 Ed Sanchez, Palmetto GBA, LLC
 Laura Minter, Novitas Solutions, Inc.
 Gayeta Porter, Novitas Solutions, Inc.
 David Vaughan, Novitas Solutions, Inc.
 Beth Dum, Novitas Solutions, Inc.
 Jim Elmore, National Government Services, Inc.
 Scott Kimbell, National Government Services, Inc.
 Stacie Amburn, National Government Services, Inc.
 Lamar James, First Coast Service Options, Inc.
 Marco Turner, First Coast Service Options, Inc.
 Harvey Dikter, First Coast Service Options, Inc.
 Robert Harrington, NHIC, Corp.
 Craig Hess, Cahaba Government Benefit Administrators, LLC
 Dana Pippins, Cahaba Government Benefit Administrators, LLC
 Jai Spivey, Cahaba Government Benefit Administrators, LLC
 Melissa Lamb, CGS Administrators, LLC
 Yolanda Rocha, Railroad Retirement Board
 All RAs
 Nanette Foster Reilly, Consortium Administrator for Financial Management and

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Larry Young, CM/MCMG
Carol Messick, CM/MCMG
Mark Korpela, OFM/FSG
Dorothy Braunsar, OFM/FSG

Attachment A				
				Revised
Provider Name	CCN	Contractor	Cont #	2010 SSI
Shands Jacksonville	100001	FCSO - J9	9001	0.21135
Mount Sinai Florida	100034	FCSO - J9	9001	0.24962
Shands UF	100113	FCSO - J9	9001	0.0969
Tampa General Hospital	100128	FCSO - J9	9001	0.12222
Henry Ford Hospital	230053	WPS - J8	8001	0.1576
Allina Cambridge	240020	Noridian - FI	320	0.02374
Allina United	240038	Noridian - FI	320	0.06178
Allina Abbott Northwestern	240057	Noridian - FI	320	0.05706
Allina Owatonna	240069	Noridian - FI	320	0.02053
Allina Unity	240132	Noridian - FI	320	0.03866
Kaleida	330005	NGS - J13	13001	0.1216
Southside Hosp.	330043	NGS - J13	13001	0.07811
NY Hosp. of Queens	330055	NGS - J13	13001	0.23337
Montefiore	330059	NGS - J13	13001	0.22562
NYPres	330101	NGS - J13	13001	0.17226
North Shore Univ.	330106	NGS - J13	13001	0.06469
Staten Island Univ.	330160	NGS - J13	13001	0.1326
Highland Hosp. of Rochester	330164	NGS - J13	13001	0.13322
Maimonides	330194	NGS - J13	13001	0.32221
Long Island Jewish	330195	NGS - J13	13001	0.13895
Kingsbrook Jewish	330201	NGS - J13	13001	0.2539
NY Methodist	330236	NGS - J13	13001	0.26723
Strong Memorial	330285	NGS - J13	13001	0.11535
Lutheran Med Ctr.	330306	NGS - J13	13001	0.24105
Forest Hills	330353	NGS - J13	13001	0.25192
Franklin Hosp.	330372	NGS - J13	13001	0.11092
North Carolina Baptist	340047	Palmetto - J11	11501	0.1138
Methodist Dallas	450051	Novitas - JH	4011	0.14836
Methodist Charlton	450723	Novitas - JH	4011	0.12596

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Alina Health Services, et al v. Kathleen Sebelius
Case No. 13-5011

1 benefits under Part A.

2 And an important backdrop to this case
3 is that considering this Court's decisions in
4 Northeast and Catholic Health together, this
5 Court has already determined that the secretary's
6 interpretation, the substantive interpretation of
7 entitled to benefits under Part A is consistent
8 with the Medicare statute.

9 But here the District Court invalidated
10 the secretary's 2004 rulemaking as it applied to
11 these Part C patient days on procedural APA
12 grounds.

13 JUDGE LAURENCE H. SILBERMAN: But the
14 remedy was broader, wasn't it? If you win on the
15 remedy of this case, that is to say leaving it
16 open for the department to deal with this as an
17 adjudication, isn't this then a tempest in a
18 teapot?

19 STEPHANIE R. MARCUS: Well, Your Honor,
20 I think, that is if we--we're hoping it won't
21 even get to remedy because we certainly think--

22 JUDGE LAURENCE H. SILBERMAN: No, but
23 I'm asking the question the reverse way.

24 STEPHANIE R. MARCUS: Yes, right. If you
25 do, we do think that under Catholic Health and

1 Chenery that the agency should be able to reach
2 the same result by adjudication. So, regardless
3 of whether--now, of course, the agency couldn't
4 then rely on the rule if the rule--if this Court
5 affirms.

6 JUDGE LAURENCE H. SILBERMAN: Obviously.

7 STEPHANIE R. MARCUS: Yes. But, there
8 would be nothing stopping the agency from having
9 an adjudication and even when you have an
10 adjudication, an agency has the power to, and
11 again, even if you are taking--here one of the
12 important things is there can't be a reliance
13 interest as this Court in Northeast found that it
14 was problematic--

15 JUDGE LAURENCE H. SILBERMAN: Well, now
16 you're getting the hypothetical question that
17 would come up only if you did do an adjudication,
18 right?

19 STEPHANIE R. MARCUS: Yes, the
20 adjudication can be retroactive and--

21 JUDGE LAURENCE H. SILBERMAN: In other
22 words, if that case should come about the other
23 side will argue reliance interest and you'll
24 argue against that, but the point is that's not
25 before us now.

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10 Attested to by:

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13 Sonya Ledanski Hyde
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