

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: ALLINA II-TYPE)
DSH ADJUSTMENT CASES)
LEAD CASE: *Albert Einstein*)
Healthcare Network, et al. v. Azar,)
_____)

Misc. Action No.: 19-mc-190 (ABJ)

This Document Relates To:)
Albert Einstein Healthcare)
Network, et al. v. Azar, 17-cv-1134)
Florida Health Sciences)
Center, Inc. et al. v. Azar, 17-cv-1751)
Albany Medical Center Hospital)
et al v. Azar, 17-cv-2668)
Adventist Bolingbrook Hospital)
et al v. Azar, 17-cv-2683)
Alta Los Angeles v. Azar,)
18-cv-00934)
Alamance Regional Medical Center)
et al. v. Azar, 18-cv-936)
Yale-New Haven)
Hospital v. Azar, 18-cv-1718)
Aiken Regional Medical)
Centers v. Azar, 18-cv-02173)
Brooks Memorial Hospital)
et al. v. Azar, 18-cv-2705)
Methodist Healthcare Memphis Hospitals)
et al. v. Azar, 18-cv-2801)
Long Beach Memorial)
Medical Center v. Azar, 18-cv-03040)
Hackensack University)

Medical Center v. Azar, 19-cv-00670)
)
Fresno Community Hospital &
Medical Center v. Azar, 19-cv-01224)
)
University of North Carolina Hospitals
at Chapel Hill v. Azar, 19-cv-01356)
)
High Point Regional
Hospital v. Azar, 19-cv-01432)
)
Massachusetts General
Hospital v. Azar, 19-cv-2201)
)
St. Joseph Hospital of
Orange et al. v. Azar, 19-cv-2351)
)
St. Francis Hospital, Inc.,
et al. v. Azar, 19-cv-2411)
)
The Rochester General
Hospital v. Azar, 19-cv-2432)
)
Cookeville Regional Medical
Center v. Azar, 19-cv-02966)
)
Sharp Chula Vista Medical
Center v. Azar, 19-cv-03505)
)
Mount Sinai Hospital
et al. v. Azar, 20-cv-978)
)
Hospital Bella Vista v. Azar, 20-cv-00151)
)
Aiken Regional Medical
Centers v. Azar, 20-cv-01097)
)
Emanate Health v. Azar, 20-cv-01811)
)
_____)

RESPONSE TO DEFENDANT’S NOTICE OF PROPOSED RULE

Plaintiff Hospitals in these consolidated cases represented by Ropes & Gray; Akin Gump
Strauss Hauer & Feld LLP; Hall, Render, Killian, Heath & Lyman, P.C.; Hooper, Lundy &

Bookman, P.C.; Powers Pyles Sutter & Verville PC; and Verrill Dana LLP, hereby respond to Defendant's Notice of Proposed Rule (ECF No. 60).¹ Contrary to Defendant's assertion, Defendant's proposed rule would not, by any means, "*establish* a policy concerning the treatment of patient days associated with persons enrolled in a Medicare Part C plan for purposes of calculating a hospital's disproportionate share hospital (DSH) payment adjustments for reporting periods prior to fiscal year 2014." Def.'s Notice at 1 (emphasis added). Defendant's agency had a prior policy on this issue under the preexisting regulation that it applied for many years and attempted to change previously (and retroactively) without undertaking notice-and-comment rulemaking. *See Northeast Hosp. v. Sebelius*, 657 F.3d 1, 16-17 (D.C. Cir. 2011); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1106 (D.C. Cir. 2014) ("*Allina I*"). The D.C. Circuit held three times and the Supreme Court confirmed in June 2019 that Defendant's agency was required to undertake notice and comment *before* effectuating that policy change (which Defendant attempted first in 2004 through faulty rulemaking and then again in 2014 without any rulemaking at all). *See Northeast Hosp.*, 657 F.3d at 16-18; *Allina I*, 746 F.3d at 1111; *Allina Health Servs. v. Price*, 863 F.3d 937, 942-944 (D.C. Cir. 2017); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815-18 (2019) ("*Allina II*"). The vacatur of the 2004 rule in *Allina I*, 746 F.3d at 1110-11, restored the status quo ante and reinstated Defendant's prior policy. *See* Pls.' Mot. for J. on Count I at 5-6, *Florida Health Sciences v. Azar*, Case No. 17-cv-1751 (ECF No. 23); Pls.' Reply in Supp. of Mot. for J. on Count I at 3-5, *Florida Health Sciences v. Azar*, Case No. 17-cv-1751 (ECF No. 25); *see also Croplife Am. v. EPA*, 329 F.3d 876, 879 (D.C. Cir. 2003) (vacating

¹ The Ropes & Gray counsel conferred with all the Plaintiffs' counsel in the consolidated cases in an effort to achieve one filing.

rule and holding that “[a]s a consequence, the agency's previous practice ... is reinstated and remains in effect unless and until it is replaced by a lawfully promulgated regulation”).

Now, despite the special provisions of the Medicare statute imposing more stringent notice-and-comment requirements than the Administrative Procedure Act, *see* 42 U.S.C. § 1395hh(a)(2), and flouting the Supreme Court’s interpretation of those very Medicare provisions, *see* 139 S. Ct. at 1811, Defendant’s agency has taken the indefensible position that it can accomplish the same change through retroactive rulemaking that it incredibly claims to be in the “public interest,” 85 Fed. Reg. 47,723, 47,725-26 (Aug. 6, 2020). Apparently, the government has changed its mind, having previously assured this Court that acquiescence in the Supreme Court’s decision would mean not only “a new rulemaking,” but also “a recalculation of DSH payments pursuant to that newly promulgated rule for hospitals that properly preserved their claims.” Def.’s Sur-reply to Pls.’ Mot. to Clarify or Amend, *Allina Health Sys. v. Azar*, Case No. 16-cv-150 (ECF No. 42). And, according to the government last year when it argued for remand, that course would be “the functional equivalent of a victory” for the hospitals. Def.’s Mot. for Voluntary Remand at 5 (ECF No. 4). The proposed rule is no such thing.

Respectfully, the proposed rule only exacerbates the filing-Plaintiffs’ grave concerns about Defendant’s motion for remand of these consolidated cases. *See* Pls.’ Consolidated Opp’n to Def.’s Mot. for Voluntary Remand (ECF No. 9); Pls.’ Mot. for J. on Count I, *Florida Health Sciences v. Azar*, Case No. 17-cv-1751 (ECF No. 23); Pls.’ Reply in Supp. of Mot. for J. on Count I, *Florida Health Sciences v. Azar*, Case No. 17-cv-1751 (ECF No. 25). In light of the proposed rule, these Plaintiffs therefore request that the Court entertain further briefing on Defendant’s pending remand motion, ECF No. 4, as well as the pending motion for judgment in *Florida Health Sciences v. Azar* (one of the cases now consolidated before the Court brought by

the *Allina* plaintiffs), Pls.' Mot. for J. on Count I, *Florida Health Sciences v. Azar*, Case No. 17-cv-1751 (ECF No. 23), and hold a hearing on those motions.

Respectfully submitted,

By: /s/ Stephanie Ann Webster

Stephanie A. Webster

D.C. Bar No. 479524

James H. Richards

D.C. Bar No. 469524

Alex J. Talley

D.C. Bar No. 1020488

ROPES & GRAY LLP

2099 Pennsylvania Avenue, N.W.

Washington, D.C. 20006-6807

Telephone: (202) 508-4859

Fax: (202) 383-9334

Email: Stephanie.Webster@ropesgray.com

Counsel for Plaintiffs in 17-1134, 17-1751,
17-2668, 17-2683, 18-936, 18-2705,
19-2351, 19-2411, and 19-2432

John R. Jacob

D.C. Bar No. 444412

Pratik A. Shah

D.C. Bar No. 497108

Caroline L. Wolverton

D.C. Bar No. 496433

AKIN GUMP STRAUSS HAUER &
FELD, LLP

2001 K Street, N.W.

Washington, D.C. 20006

Telephone: (202) 887-4582

Fax: (202) 887-4288

Email: jjacob@akingump.com

Counsel for Plaintiffs in 20-978

Ronald S. Connelly
D.C. Bar No. 488298
Barbara Straub Williams
D.C. Bar No. 396582
POWERS PYLES SUTTER & VERVILLE,
PC
1501 M Street, N.W., 7th Floor
Washington, DC 20005
Telephone: (202) 466-6550
Fax: (202) 785-1756
Email: Ron.Connelly@PowersLaw.com
Email: Barbara.Williams@PowersLaw.com

Counsel for the Plaintiffs in 18-2801

Rachel M. Wertheimer, pro hac vice
VERRILL DANA, LLP
One Portland Square
Portland, ME 04101-4054
Telephone: (207) 774-4000
Email: rwertheimer@verrill-law.com

Counsel for Plaintiffs in 19-2201
and 18-1718

Robert L. Roth
D.C. Bar No. 441803
Kelly A. Carroll
D.C. Bar No. 1018485
Hooper, Lundy & Bookman, P.C.
401 9th Street, NW, Suite 550
Washington, DC 20004
Telephone: (202) 580-7700
Fax: (202) 580-7719
Email: rroth@health-law.com
Email: kcarroll@health-law.com

Counsel for Plaintiffs in 18-934,
18-2173, 18-3040, 19-670, 19-1224,
19-1356, 19-1432, 19-2966, 19-3505,
20-151, 20-1097, and 20-1811

Dated: August 7, 2020