

CENTERS FOR MEDICARE & MEDICAID SERVICES

Order of the Administrator

In the case of:

ALLINA II-TYPE
DSH ADJUSTMENT CASES and
Others

LEAD CASE: *Albert Einstein
Healthcare Network, et al., v. Becerra,*

Plaintiff

vs.

Xavier Becerra, SECRETARY
of Health and Human Services,

Defendant

Misc. Action No. 19-0190(ABJ) (D.D.C.)
and 2:20-cv-04245 (PA) (C.D. Cal.).

The consolidated matter in *In Re: Allina II-Type DSH Adjustment Cases*, Misc. Action No. 19-0190 (ABJ) (D.D.C.), involves a large number of lawsuits challenging Medicare payments made to hospitals by the Secretary of Health and Human Services (“Secretary”) covering fiscal years (FYs) before 2014. The lawsuits were filed by hospitals across the country challenging how the Secretary treated patient days attributable to patients enrolled in Medicare Part C when calculating the Disproportionate Share Hospital (“DSH”) payment adjustment. The cases were stayed pending a ruling by the Supreme Court in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019) (“*Allina II*”), and following the issuance of that ruling, the Secretary filed motions to consolidate these cases. After most of the cases were consolidated, the Secretary filed a motion for voluntary remand of the consolidated cases, some in whole, others in part.

By orders dated January 19, 2021 and March 21, 2021, the United States District Court for the District of Columbia remanded many of these cases to the Secretary; the cases in these judicial orders were the subject of an order of the Administrator dated June 16, 2023.

The court has continued to consolidate other DSH Part C days lawsuits into *In Re: Allina II-Type DSH Adjustment Cases* and has since remanded other additional cases, in whole or in part, to the Secretary. Other courts have also remanded cases, in whole or part, to the Secretary.

Accordingly, the Administrator, in this Remand Order, addresses the following:

- **THE COURT ORDERED REMANDS IN *IN RE: ALLINA II-TYPE DSH ADJUSTMENT CASES*, MISC. ACTION NO. 19-0190 (ABJ) (D.D.C.), DATED AS FOLLOWS, AND THE RESPECTIVE CIVIL ACTION(S) FOR EACH ORDER:**

Order dated 8/4/21

1. *Aurora Health Care Central, Inc.*, 20-cv-3422: Compl. Count I
2. *Sanford Health Network*, 20-cv-3433: Compl. Count I
3. *Allina Health System*, 20-cv-3434: Fourth Amend. Compl. Count I
4. *Central California Found. for Health*, 20-cv-3485: Second Amend. Compl. Count I (except the pre-2004 cost years)
5. *Duke University Health System*, 20-cv-3765: Amend. Compl. Count I
6. *West Florida Regional Medical Ctr.*, 21-cv-0004: Second Amend. Compl. Count I
7. *St. Luke's Health Network*, 21-cv-0188: Amend. Compl. Count I
8. *Thorek Memorial Hospital*, 21-cv-0205: Compl. Count I
9. *Alta Bates Medical Center*, 21-cv-0297: Compl. Count I (except the pre-2004 cost years)
10. *Watauga Medical Center*, 21-cv-0327: Compl. Count I
11. *Presence Chicago Hospitals Network*, 21-cv-0904: Compl. Count I
12. *Summa Health System*, 21-cv-1266: Amend. Compl. Count I
13. *Bedford Memorial Hospital*, 21-cv-1458: Compl. Count I
14. *Saint Barnabas*, 21-cv-1885: Compl. Counts I-IV
15. *Catawba Valley Medical Center*, 21-cv-1998: Compl. Count I

Order dated 10/21/21

1. *Henry Mayo Newhall Memorial Hospital*, 21-cv-2230: Compl. Count I
2. *Shands Jacksonville Med. Ctr.*, 21-cv-2504: Compl. Count I
3. *Dignity Health*, 21-cv-2520: Compl. Count I
4. *Beavercreek Med. Ctr.*, 21-cv-2521: Compl. Count I
5. *Glen Cove Hosp.*, 21-cv-2537: Amended Compl. Count I

Minute Order dated 11/1/21

1. *Central California Foundation for Health*, 20-cv-3485: SecondAmend. Compl. Count I (remaining cost years not previously remanded in August 4 Order)
2. *Brooks-TLC Hospital System*, 20-cv-3760: Amend. Compl. Count I
3. *Alta Bates Medical Center*, 21-CV-0297: Compl. Count I (remaining cost years not previously remanded in August 4 Order)

Minute Order dated 11/2/21

Allegheny Gen. Hosp., 21-cv-2823: Compl. Count I

Order dated 01/21/22

1. *Sacred Heart Hosp. of the Hosp. Sisters of the Third Order of St. Francis*, 21-cv-3123: Compl. Count I
2. *Methodist Hosps. of Dallas*, 21-cv-3279: Compl. Count I

3. *Long Island Jewish Med. Ctr.*, 21-cv-3300: Compl. Count I, including pre-2004 claims

Order dated 04/28/22

1. *Sacred Heart Hospital of the Hospital Sisters*, 22-cv-0503: Count I
2. *Central California Foundation for Health*, 22-cv-0615: Count I
3. *Kootenai Hospital District*, 22-cv-0626: Count I

Minute Order dated 07/01/22

John Muir Health, 22-cv-01796: Count I

- **THE COURT ORDER REMAND IN *CEDAR-SINAI MEDICAL CENTER V. AZAR*, CASE NO. 2:20-cv-04245 (PA) (C.D. Cal.), (DATED JUNE 18, 2020).**

ACCORDINGLY, the Administrator **ORDERS**, for the cases and claims included in the above-referenced court orders:

THAT, pursuant to 42 C.F.R. § 405.1877(g)(2)(ii), these cases are remanded to the Office of Financial Management (OFM), Centers for Medicare & Medicaid Services, with instructions to direct the relevant MACs to apply the final Part C days rule, 88 Fed. Reg. 37772 (June 9, 2023), and issue revised Notices of Program Reimbursement (NPRs) (or NPRs for those providers who never received an NPR for the cost year at issue), each of which shall set forth a DSH payment adjustment that accounts for Part C patient days in the calculation of the DPP in the manner set forth in the final Part C days rule;

THAT, OFM will also direct each relevant MAC to use the most recent cost report for each remanded cost reporting year for each provider over which it is responsible as the basis to recalculate that year's DSH payment adjustment under the final Part C days rule;

THAT, to the extent any provider has had multiple appeals for a single cost reporting year remanded to recalculate the DSH payment adjustment to reflect the treatment of Part C days in the DPP adopted through notice-and-comment rulemaking, OFM will further direct the relevant MAC to issue to that provider one revised NPR that reflects that treatment as applied to the most recent cost report for that cost year;

THAT, OFM will also direct the MAC to issue a revised NPR (or an NPR for each provider who never received an NPR for the cost year at issue) that reflects the treatment of Part C days in the DPP adopted through notice-and-comment rulemaking in the new final rule. Thus, even if the DSH fractions are unchanged or calculating the DPP under the new rule has no impact on the DSH payment

adjustment, the fractions will be revised (to the extent there was a prior NPR issued for that cost year) within the meaning of 42 C.F.R. § 405.1877(g)(2)(iii)(A) because they will be issued pursuant to the new final rule; and

THAT, pursuant to this remand order, the revised DSH payment adjustments calculated pursuant to the final rule to account for Part C patient days in the calculation of the DPP issued in revised NPRs will be subject to appeal, pursuant to 42 C.F.R. § 405.1877(g)(2)(iii)(A).

Date: December 22, 2023

/s/
Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services