

CENTERS FOR MEDICARE & MEDICAID SERVICES

Order of the Administrator

In the case of:

ALLINA II-TYPE
DSH ADJUSTMENT CASES

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

Plaintiff

vs.

Xavier Becerra, SECRETARY
of Health and Human Services,
Defendant

PRRB Case Nos.: See Attachment
(List of remanded Civil Action Nos.)

Misc. Action No. 19-0190(ABJ)

The consolidated matter in *In Re: Allina II-Type DSH Adjustment Cases*, Misc. Action No. 19-0190 (ABJ), 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 I*”), and following the issuance of that ruling, the Secretary filed motions to consolidate them. 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.

The Secretary sought remand of the consolidated cases to re-examine the Part C patient days claims in light of *Allina II* and to take further action as necessary to comply with the applicable legal standards announced therein. The Secretary advised the Court that the agency was considering whether retroactive rulemaking was necessary to comply with the Supreme Court’s decision. On August 4, 2020, the Secretary issued a proposed rule to address the Part C days issue identified by the Supreme Court and raised by the plaintiff hospitals in the consolidated cases. *See* Medicare Program; Treatment of Medicare Part C Days in the Calculation of a Hosp.’s Medicare Disproportionate Patient Percentage, 85 Fed. Reg. 47,723 (proposed Aug. 6, 2020) (“2020 Proposed Rule” or “CMS 1739P”). The 2020 Proposed Rule proposed to count Part C days in the Medicare/SSI fraction of the disproportionate patient percentage (DPP) used to calculate the DSH payment adjustment, and for this methodology to apply to fiscal years prior to FY 2014. 85 Fed. Reg. at 47,725.

The United States District Court for the District of Columbia, by order dated January 19, 2021, granted the Secretary's motion and remanded the cases to the Secretary for further administrative action in light of the *Allina II* ruling. The court ordered that:

In sum, defendant's motion for voluntary remand . . . is GRANTED, plaintiffs' motion for deferral of the remand motion pending summary judgment briefing on an administrative record . . . is DENIED, and plaintiffs' motion for determination . . . is DENIED. It is ORDERED that the cases appearing in defendant's Exhibit A (attached hereto) are remanded in whole or in part as listed in the exhibit.

Because subsequent cases have been filed and consolidated into this matter since defendant filed his motion, it is FURTHER ORDERED that the parties shall meet and confer and file by February 16, 2021 a list identifying which additional cases, filed after the motion for remand was filed, should be remanded for further action by the Secretary.

Exhibit A to the court order listed 93 cases that were "Voluntar[il]y Remand[ed] In Full" or "Voluntar[il]y Remand[ed] In Part (Except as Specified)".

Subsequently, by order dated March 12, 2021, the court ordered that:

[U]pon consideration of the parties' responses to the Court's January 19, 2021 order and in light of their agreement that the following cases should be remanded in whole or in part, it is ORDERED that the following cases are consolidated into this miscellaneous matter and remanded in whole or in part as set forth below, for the reasons stated in the January 19, 2021 order.

The court listed 28 cases that were "Consolidated into this Miscellaneous Matter and Remand[ed] in Full," or "Remand[ed] in Part (Except as Specified)."¹

On June 9, 2023, the Secretary finalized the Proposed Rule to count Part C days in the Medicare/SSI fraction of the DPP used to calculate the DSH payment adjustment and to apply this methodology to fiscal years prior to FY 2014. 88 Fed. Reg. 37772 (June 9, 2023).

ACCORDINGLY, the Administrator ORDERS, for those cases included in the January 19, 2021 and March 12, 2021 court orders, AND herein listed in the incorporated Attachment:

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

¹ 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 additional cases to the Secretary. The Administrator intends to address such subsequently remanded cases in separate Administrator Remand Orders.

Medicare & Medicaid Services, with instructions to direct the relevant MACs to apply the final Part C days rule 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 those providers 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 (or in NPRs for those providers who never received an NPR for the cost year at issue), will be subject to appeal, pursuant to 42 C.F.R. § 405.1877(g)(2)(iii)(A).

Date: June 16, 2023

/s/

Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services

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**Exhibit A to Motion for Voluntary Remand
Voluntary Remand In Full**

1. *Albert Einstein Medical Center v. Azar*, 17-cv-1134
2. *Aria Health v. Azar*, 17-cv-1402
3. *Bedford Memorial Hosp. v. Azar*, 17-cv-1471
4. *Baptist Mem'l Hosp. v. Azar*, 17-cv-1968
5. *Menifee Valley Med. Ctr. v. Azar*, 17-cv-2029
6. *Advocate Christ Hospital v. Azar*, 17-cv-2321
7. *Albany Medical Center Hospital v. Azar*, 17-cv-2668
8. *Adventist Bolingbrook Hospital v. Azar*, 17-cv-2683
9. *Anderson Hospital v. Azar*, 17-cv-2749
10. *Atrium Medical Center v. Azar*, 18-cv-266
11. *Banner Health v. Azar*, 18-cv-275
12. *Central Florida Regional Hospital v. Azar*, 18-cv-286
13. *Baptist Hospital v. Azar*, 18-cv-404
14. *Alhambra Hospital and Medical Center v. Azar*, 18-cv-590
15. *Legacy Emanuel Hosp. v. Azar*, 18-cv-695
16. *Doctors Hospital of Augusta v. Azar*, 18-cv-829
17. *Alta Los Angeles Hospitals, Inc. v. Azar*, 18-cv-934
18. *Alamance Regional Medical Center v. Azar*, 18-cv-936
19. *Alliance Community Hospital v. Azar*, 18-cv-972
20. *Fort Sanders Reg'l Med. Ctr. v. Azar*, 18-cv-1155
21. *Methodist Medical Center of Illinois v. Azar*, 18-cv-1248
22. *Covenant Medical Center v. Azar*, 18-cv-1330
23. *Advocate Christ Medical Center v. Azar*, 18-cv-1385
24. *AHS Cushing Hospital v. Azar*, 18-cv-1454
25. *Beebe Medical Center v. Azar*, 18-cv-1613
26. *Edward W. Sparrow Hospital v. Azar*, 18-cv-1689
27. *Yale-New Haven Hospital v. Azar*, 18-cv-1718
28. *Affinity Hospital v. Azar*, 18-cv-1956
29. *Atrium Medical Center v. Azar*, 18-cv-1993
30. *Jefferson Parish Hospital Service District No. 2 v. Azar*, 18-cv-2039
31. *Affinity Hospital v. Azar*, 18-cv-2110
32. *Allen Memorial Hospital v. Azar*, 18-cv-2171
33. *Aiken Regional Medical Centers v. Azar*, 18-cv-2173
34. *Bon Secours Depaul Medical Center v. Azar*, 18-cv-2285
35. *Berkshire Medical Center v. Azar*, 18-cv-2404
36. *Brooks Memorial Hospital v. Azar*, 18-cv-2705
37. *Palm Beach Gardens Community Hospital v. Azar*, 18-cv-2736
38. *Methodist Healthcare-Memphis Hospitals v. Azar*, 18-cv-2801
39. *Alameda County Medical Center v. Azar*, 18-cv-2967
40. *Long Beach Memorial Medical Center v. Azar*, 18-cv-3040
41. *Care New England Health System v. Azar*, 19-cv-63

42. *Antelope Valley Hospital v. Azar*, 19-cv-328
43. *Atrium Medical Center v. Azar*, 19-cv-410
44. *Hackensack University Medical Center v. Azar*, 19-cv-670
45. *Harrison Medical Center v. Azar*, 19-cv-964
46. *Fort Loudoun Medical Center v. Azar*, 19-cv-1361
47. *Homestead Hospital, Inc. v. Azar*, 19-cv-1362
48. *Lourdes Medical Center of Burlington County v. Azar*, 19-cv-1514
49. *Nyack Hospital v. Azar*, 19-cv-1008
50. *Flower Hospital v. Azar*, 19-cv-1046
51. *Maine Coast Memorial Hospital v. Azar*, 19-cv-1181
52. *Ascension Via Christi Hospital v. Azar*, 19-cv-1216
53. *Fresno Community Hospital and Medical Center v. Azar*, 19-cv-1224
54. *University of North Carolina Hospitals at Chapel Hill v. Azar*, 19-cv-1356
55. *Southern Maine Medical Center v. Azar*, 19-cv-1366
56. *Anderson Hospital v. Azar*, 19-cv-1386
57. *High Point Regional Health v. Azar*, 19-cv-1432
58. *MCG Medical Center v. Azar*, 19-cv-1855
59. *Advocate Christ Medical Center v. Azar*, 19-cv-2089
60. *Willis Knighton Bossier Health Center v. Azar*, 19-cv-2116
61. *Massachusetts General Hospital v. Azar*, 19-cv-2201
62. *The Bloomberg Hospital v. Azar*, 19-2422
63. *The Rochester General Hospital v. Azar*, 19-2432
64. *Berkeley Medical Center v. Azar*, 19-2622

Voluntary Remand In Part (Except as Specified)

65. *Florida Health Sciences Ctr. v. Azar*, 17-cv-1751 (except for claims dismissed by PRRB, see Fourth Am. Compl., ECF No. 19, Count III)
66. *Adcare Hospital v. Azar*, 17-cv-1896 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
67. *St. Mary's Health Care Sys. v. Azar*, 17-cv-2106 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
68. *Cartersville Medical Center v. Azar*, 17-cv-2696 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
69. *Shannon Med. Center v. Azar*, 18-cv-799 1751 (except for claims dismissed by PRRB, see First Am. Compl., ECF No. 11, Count IV)
70. *Coastal Carolina Med. Center v. Azar*, 18-cv-970 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
71. *Grady Mem'l Hosp. v. Azar*, 18-cv-1126 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
72. *Arizona Regional Medical Center v. Azar*, 18-cv-1367 (except for claims of "Dismissed Hospitals," see First Amend. Compl., ECF No. 10, ¶¶ 59 and Count One and Count Two)
73. *E.A. Conway Medical Center v. Azar*, 18-cv-1415 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count IV)
74. *East Carolina Health v. Azar*, 18-cv-1571 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)

75. *Coliseum Medical Center v. Azar*, 18-cv-1845 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
76. *Banner Health v. Azar*, 19-cv-896 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
77. *East Cooper Community Hospital, Inc. v. Azar*, 19-cv-1534 (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
78. *St. Agnes Medical Center v. Azar*, 18-cv-222 (except for claims of “Dismissed Hospitals,” see Amend. Compl., ECF No. 9, ¶¶ 5 & Count One and Count Two)
79. *University of Washington Medical Center v. Azar*, 19-cv-1104 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 41 & Count 2)
80. *Houston Methodist Hospital v. Azar*, 19-cv-1150 (except for claims of “Excluded Hospitals,” see Amend. Compl., ECF No. 5, ¶ 41 & Count 2)
81. *Providence Saint Peter Hospital v. Azar*, 19-cv-1363 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 40 & Count 2)
82. *Barnes-Jewish Hospital v. Azar*, 19-cv-1445 (except for claims of “Excluded Hospitals,” see Amend. Compl., ECF No. 4, ¶ 40 & Count 2)
83. *Ruby Memorial Hospital v. Azar*, 19-cv-1600 (except for claims of “Excluded Hospitals,” see First Amend. Compl., ECF No. 4, ¶ 40 & Count 2)
84. *Lehigh Regional Medical Center v. Azar*, 19-cv-1014 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 41 & Count 2)
85. *Hollywood Presbyterian Med. Center v. Azar*, 19-cv-1038 (except for claims of “Excluded Hospitals,” see Second Amend. Compl., ECF No. 8, ¶ 40 & Count 2)
86. *Shannon Med. Center v. Azar*, 19-cv-1051 (except for claims of “Excluded Hospitals,” see Errata Compl., ECF No. 4, ¶ 41 & Count 2)
87. *Alvarado Hospital Medical Center v. Azar*, 19-cv-1378 (except for claims of “Excluded Hospitals,” see Amend. Compl., ECF No. 5, ¶ 40 & Count 2)
88. *SSM Good Samaritan Regional Health Center v. Azar*, 19-cv-1829 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 40 & Count 2)
89. *Whittier Hospital Medical Center v. Azar*, 19-cv-1839 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 40 & Count 2)
90. *Medical Center of Mesquite v. Azar*, 19-cv-1968 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 40 & Count 2)
91. *Avoyelles Hospital v. Azar*, 19-cv-2177 (except for claims of “Excluded Hospitals,” see Compl., ECF No. 1, ¶ 40 & Count 2)
92. *St. Joseph Hospital of Orange v. Azar*, 19-2351(D.D.C.) (except for claims dismissed by PRRB, see Compl., ECF No. 1, Count II)
93. *St. Francis Hospital v. Azar*, 19-2411 (D.D.C.) (except for claims dismissed by PRRB, see Amend. Compl., ECF No. 12, Count II)

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Consolidate into this Miscellaneous Matter and Remand in Full

1. *Aiken Regional Medical Centers v. Azar*, 20-1097 (D.D.C.)

Remand in Full

2. *Christus Good Shepherd Medical Center Longview v. Azar*, 19-2897 (D.D.C.)

3. *Cookeville Regional Medical Center Authority v. Azar*, 19-2966 (D.D.C.)

4. *Capital Health System v. Azar*, 19-3229 (D.D.C.)

5. *Holy Name Medical Center v. Azar*, 19-3230 (D.D.C.)

6. *Saint Michael's Medical Center v. Azar*, 19-3280 (D.D.C.)

7. *Capital Health System, Inc. v. Azar*, 19-3504 (D.D.C.)

8. *Sharp Chula Vista Medical Center v. Azar*, 19-3505 (D.D.C.)

9. *Atrium Medical Center v. Azar*, 19-3617 (D.D.C.)

10. *UH Cleveland Medical Center v. Azar*, 19-3623 (D.D.C.)

11. *Appalachian Regional Healthcare v. Azar*, 19-3775 (D.D.C.)

12. *University Medical Center New Orleans v. Azar*, 20-14 (D.D.C.)

13. *Our Lady of Lourdes Regional Medical Center v. Azar*, 20-99 (D.D.C.)

14. *Hospital Bella Vista v. Azar*, 20-151 (D.D.C.)

15. *Lee Memorial Health System v. Azar*, 20-462 (D.D.C.)

16. *St. Dominic-Jackson Memorial Hospital v. Azar*, 20-620 (D.D.C.)

17. *Saint Luke's Hospital-Gnaden Huetten Campus v. Azar*, 20-771 (D.D.C.)

18. *Delta Regional Medical Center v. Azar*, 20-839 (D.D.C.)

19. *Anmed Health v. Azar*, 20-949 (D.D.C.)

20. *Moses H. Cone Memorial Hospital v. Azar*, 20-951 (D.D.C.)

21. *Prisma Health Upstate v. Azar*, 20-953 (D.D.C.)

22. *Mount Sinai Hospital v. Azar*, 20-978 (D.D.C.)

23. *South Central Regional Medical Center v. Azar*, 20-1140 (D.D.C.)

24. *Memorial Hospital at Gulfport v. Azar*, 20-1375 (D.D.C.)

25. *Emanate Health Medical Center v. Azar*, 20-1811 (D.D.C.)

26. *The Reading Hospital and Medical Center v. Azar*, 20-2038 (D.D.C.)

Remand in Part (Except as Specified)

27. *Texas Health Presbyterian Hospital Dallas v. Azar*, 19-2741(D.D.C.) (except for claims dismissed by PRRB, see Compl., ECF No. 1, ¶¶ 10(g), 47 & Count II)