

# CENTERS FOR MEDICARE & MEDICAID SERVICES

## *Order of the Administrator*

**In the case of:**

EMPIRE HEALTH FOUNDATION for  
VALLEY HOSPITAL MEDICAL CENTER.  
Medicare Cost Report 09/30/2008

Plaintiff

vs.

XAVIER BECERRA, SECRETARY  
of Health and Human Services,  
Defendant

Civil Action No. 2:16-cv-00209-MKD

PRRB Case No. 15-3126GC

This is one of several cases that has arisen from the issue decided in the ruling by the United States Supreme Court in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019) (“Allina II”). The United States District Court for the Eastern District of Washington, in *Empire Health Foundation v. Azar*, 2:16-CV-209-MKD, issued an amended order in this case on June 14, 2023 with respect to treatment of Part C days in the calculation of the Provider’s disproportionate share hospital (“DSH”) payment. On March 12, 2021, the District Court had ordered that:

The Court REMANDS to the Provider Reimbursement Review Board to decide whether, in light of *Allina*, 746 F.3d at 1102, Medicare Part C days should have been included in the Medicare fraction for the Empire’s 2008 DSH calculation. Furthermore, the Court directs the Secretary to **promptly** recalculate the Plaintiff Hospital’s DSH payment for the 2008 fiscal year consistent with the Ninth Circuit’s opinion and to make **prompt** payment of any additional amounts due to the Plaintiff Hospital plus interest calculated in accordance with 42 U.S.C. §1395oo(f)(2). If the Secretary has failed to recalculate the Hospital’s DSH payment for the 2008 fiscal year and issue payment to Empire within six months of this order, the Secretary is ordered to submit a status report to this Court explaining the reason for delay.

*See Empire Health Foundation v. Azar*, Civil Action No. 2:16-CV-209-RMP (E.D. WA) at 13-14, ECF No. 80.

Subsequently, on June 14, 2023, the District Court held a hearing on the Secretary’s motion for clarification or amendment of the March 12, 2021 order, insofar as it directed the Secretary to

recalculate the payment with consideration of the still pending Medicare Part C issue. The District Court, in response to the Secretary's motion, found that:

Significant time has passed since the pending motion was filed and a new rule has been implemented. Published at 88 Fed. Reg. 37772 (June 9, 2023), the rule finds that “the statute itself requires the Secretary to count Part C days in the Medicare fraction because Medicare beneficiaries remain ‘entitled to [Medicare Part A]’ regardless of whether they enroll in Part C . . . .” 88 Fed. Reg. 37774 (citing *Becerra v. Empire Health Foundation*, 142 S. Ct. 2354, 1368 (2022)). The Hospital concedes that “[d]espite the parties continued disagreement on this issue, the dispute of whether the Secretary can act ‘promptly’ in resolving the Part C issue without a final rule has largely been rendered moot by the passage of time.”  
[ ]

The Secretary shall recalculate the relevant payment in accordance with whatever procedure is necessitated by statute, regulation, and case law, without court-imposed time limits.[ ]

Accordingly, IT IS HEREBY ORDERED:

1. The Secretary's Status Report and Motion to Clarify or Amend, [ ], is GRANTED.
2. The March 12, 2021 Order, [ ], is AMENDED to remove any timeline for the Secretary's recalculation of the Hospital's DSH payment for the 2008 fiscal year as related to whether Medicare Part C participants should be included in “entitled to Medicare Part A” for the purposes of the Medicare fraction.
3. The March 12, 2021 Order, [ ] is AMENDED to remove any requirement that the Secretary's recalculation be made “notwithstanding CMS Ruling 1739-R” and the Secretary's recalculation shall be made in accordance with the June 9, 2023 Rule.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to the parties.

*See Empire Health Foundation v. Azar*, Civil Action No. 2:16-CV-209-MKD (E.D. WA) at 5-6. ECF No. 110. In a footnote the District Court stated that:

At the hearing, it was suggested that the recalculation may need to be returned to a Medicare Administrative Contractor before decision by the PRRB. Consistent with the ordered cited herein, the Court declines to restrict or direct the Secretary's administrative process on the issue.

*Id.* at 5 fn. 2. As the amended Court order recognizes, the Secretary has published a final rule addressing this matter. On August 4, 2020, the Secretary issued a proposed rule to address the treatment of Part C days in the calculation of a hospital's disproportionate patient percentage. *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.

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:

THAT, pursuant to 42 C.F.R. § 405.1877(g)(2)(ii), this case is remanded to the Office of Financial Management (OFM), Centers for Medicare & Medicaid Services, with instructions to direct the relevant MAC to apply the final Part C days rule and issue a revised Notice of Program Reimbursement (NPR) for this provider and cost year 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 the relevant MAC to use the most recent cost report for the remanded cost reporting year for the provider as the basis to recalculate that year’s DSH payment adjustment under the final Part C days rule;

THAT, to the extent the provider has had multiple appeals for this 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 the provider one revised NPR that reflects that treatment as applied to the most recent cost report for that cost year;

THAT, 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 within the meaning of 42 CFR § 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 adjustment calculated pursuant to the final rule to account for Part C patient days in the calculation of the DPP issued in the revised NPR, will be subject to appeal, pursuant to 42 CFR § 405.1877(g)(2)(iii)(A).

Date: February 9, 2024

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