UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAMEDA COUNTY MEDICAL CENTER, et al. Plaintiffs, v. THE HONORABLE MICHAEL O. LEAVITT, in his official capacity as Secretary of Health and Human Services, et al. Defendants.	)	Civ. No. 1:08CV0422 (JR)

DEFENDANTS' RESPONSE TO PLAINTIFFS'
STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rules 7.1(h) and 56.1, Defendants, Michael O. Leavitt, in his official capacity as Secretary of Health and Human Services, the United States Department of Health and Human Services, Kerry Weems, in his official capacity as Acting Administrator of the Centers for Medicare & Medicaid Services, and the Centers for Medicare & Medicaid Services (collectively, "the Secretary" or "HHS"), by and through undersigned counsel, submit the following response to Plaintiffs' Statement of Undisputed Material Facts:

1. Plaintiff, Alameda County Hospital Authority, doing business as Alameda County Medical Center ("Alameda"), is a non-profit public hospital authority located in Alameda County, California, which was established as a government entity separate and apart from the County pursuant to State law and Alameda County ordinance. Ex. 2, Declaration of Wright Lassiter, ¶¶ 5, 15.

   Response: Undisputed.

2. Plaintiff, National Association of Public Hospitals and Health Systems ("NAPH"), is a non-profit corporation, organized and existing under the laws of

the District of Columbia. NAPH is a national association comprised of approximately 100 of the nation's largest urban and metropolitan area safety net hospitals and health systems, committed to providing health care services to all individuals without regard to ability to pay. NAPH members rely heavily on Medicaid revenues to support their operations and mission. Ex. 9, Declaration of Christine Capito Burch, ¶¶ 4, 6, 8.

Response: Undisputed.

3. Plaintiff, American Hospital Association ("AHA"), is a non-profit corporation organized and existing under the laws of the State of Illinois. Headquartered in Chicago, Illinois, AHA's members include approximately 5,000 hospitals, health systems, networks, and other providers of medical care. Ex. 10, Declaration of Melinda Reid Hatton, ¶¶ 4,5.

Response: Undisputed.

4. Plaintiff, the Association of American Medical Colleges ("AAMC"), is a non-profit corporation organized and existing under the laws of the State of Illinois and headquartered in Washington, D.C. AAMC represents approximately 400 major public and private teaching hospitals and health systems, all 129 accredited U.S. allopathic medical schools, approximately 94 professional and academic societies, and medical students and residents. Ex. 11, Declaration of Ivy Baer, ¶¶ 4, 5.

Response: Undisputed.

5. Defendant, the Honorable Michael O. Leavitt, is the Secretary of the United States Department of Health and Human Services ("HHS"). The Secretary is sued in his official capacity only.

Response: Undisputed.

6. HHS is responsible for implementing the provisions of the Medicaid Statute, 42 U.S.C. §§ 1396-1396v, through the Centers for Medicare & Medicaid Services ("CMS").

Response: Undisputed.

7. Defendant, the Honorable Kerry N. Weems, is the Acting Administrator of CMS. The Acting Administrator is sued in his official capacity only.
Response: Undisputed.

8. On January 18, 2007, HHS, through CMS, published a Proposed Rule at 72 Fed.

Reg. 2236 (the "Proposed Rule").

Response: Undisputed.

9. CMS received over 400 comment letters responding to the Proposed Rule. No commenter uniformly approved of the Proposed Rule. Ex. 9, Declaration of Christine Capito Burch, ¶ 14.

Response: The Secretary does not dispute that CMS received over 400 comment letters responding to the Proposed Rule. The Secretary does not dispute the second sentence in this statement, but states that many of the comments he received were identical form letters; some of the comments approved the proposed rule but with reservations; and, in any event, these statements are immaterial to the claims in this case.

10. On May 29, 2007, HHS published a Rule at 72 Fed. Reg. 29748 (the "Rule"). The Rule purportedly was published as a final rule with an effective date of July 30, 2007.

Response: The Secretary admits that on May 24, 2007, he submitted the Rule to the Office of the Federal Register which placed the rule on public display on May 25, 2007. The Secretary further admits that the Office of the Federal Register published the Rule on May 29, 2007 and admits that the Rule had an effective date of July 30, 2007.

11. In both its Fiscal Year 2005 and 2006 budget proposals CMS requested that Congress enact proposals that limited Medicaid payments for governmental providers to cost and restricting the use of intergovernmental transfers ("IGTs"). Budget of the United States Government, Fiscal Year 2005, at 149-50; Budget of the United States Government, Fiscal Year 2006, at 143.

Response: Undisputed but immaterial to the claims in this case.

12. In August 2005, CMS submitted to Congress detailed legislative language substantially similar to the provisions of the Rule and requesting that Congress give the language prompt and favorable consideration. Letter from Sec. Michael O. Leavitt, Secretary of CMS [*sic*], to the Honorable J. Dennis Hastert, Speaker of the House of Representatives (Aug. 5, 2005).

Response: Undisputed but immaterial to the claims in this case.

13. Congress declined to enact legislation effectuating CMS's request. *See* Letter

from Sens. John Rockefeller, Gordon Smith, et al., to Sec. Michael O. Leavitt (Mar. 16, 2007); Letter from Rep. Henry Waxman, *et al.*, to Sec. Michael O. Leavitt (Mar. 19, 2007).

Response: Undisputed but immaterial to the claims in this case.

14. In March of 2007, Congress approved a one-year moratorium to prevent HHS from taking any further action on the Proposed Rule. The moratorium was attached to an emergency supplemental appropriations bill that was vetoed. H.R. 1591, 110th Cong. (2007).

Response: Undisputed but immaterial to the claims in this case.

15. In May of 2007, Congress again included a one-year moratorium in the U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, which it passed on May 24, 2007 ("Moratorium"). Pub. L. No. 110-28, § 7002(a), 121 Stat. 112 (2007).

Response: Undisputed but immaterial to the claims in this case.

16. On May 25, 2007, the President signed the U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007 into law. The Moratorium will remain in place through May 24, 2008. 121 Stat. 112 (2007).

Response: Undisputed.

17. On May 25, 2007, HHS placed the Rule on display in the Office of Federal Register. 72 Fed. Reg. at 29836.

Response: The Secretary admits that on May 24, 2007, he sent a letter to the Office of the Federal Register requesting that the Office of the Federal Register display the Rule on May 25, 2007. The Office of the Federal Register displayed the rule on May 25, 2007.

18. On May 29, 2007, HHS published the Rule in the Federal Register. 72 Fed. Reg. 29748.

Response: The Secretary admits that on May 29, 2007, the Office of the Federal Register published the Rule.

19. The following are some examples of the financial harm that hospitals will suffer if the Rule goes into effect:

(a) Alameda will lose $85 million annually, which constitutes 19 percent of its $460 million operating budget. Ex. 2, Declaration of Wright Lassiter, ¶¶ 10, 28.

(b) University Health System would lose $31 million, which is 5.4 percent of the System's operating budget. Ex. 13, Declaration of George B. Hernandez, Jr., ¶ 17.

(c) Lee Memorial Health System would lose $23.2 million annually, which constitutes 52 percent of its $44 million budgeted margin from operations. Ex. 4, Declaration of James R. Nathan, ¶¶ 24, 25.

(d) University of Colorado Hospital would lose $30-35 million annually, which constitutes 6 percent of its operating revenues. Ex. 7, Declaration of Bruce Schroffel, §§ 21, 22.

(e) El Paso County Hospital District (R.E. Thomason General Hospital) would lose $22 million annually, which constitutes nearly 7 percent of its overall operating budget. Ex. 6, Declaration of James N. Valenti, ¶ 16.

(f) Hurley Medical Center would lose approximately to [*sic*] $12.8 million annually, which constitutes 4 percent of the Medical Center's operating budget. Ex. 3, Declaration of Patrick R. Wardell, ¶ 25.

(g) Oregon Health & Science University would lose $2.8 million annually, which constitutes 18 percent of its net income budget. Ex. 5, Declaration of Peter Rapp, ¶ 13.

(h) University of Utah Hospitals & Clinics would lose at least $25 million annually, which constitutes more than 3.5 percent of its operating budget. Ex. 8, Declaration of David Entwistle, ¶ 13.

Response: Disputed. The Secretary disputes that these figures represent "net" losses and further states that, even if states lower payment rates because they are unable to finance the state share with refunded money from the providers, these providers will be able to retain their Medicaid payments, rather than being required to return a portion of their payments to the states. The Secretary further states that the Rule requires that all providers receive and retain the entire payment owing under the approved State Medicaid plan, and that payments to government providers may not exceed the actual cost of furnishing services to Medicaid recipients. 72 Fed. Reg. at

29748. Government providers will only be affected by the Rule if they are "diverting funds for other purposes, since that is the only circumstance in which Medicaid payments would not align with Medicaid costs." Id. Furthermore, states may still utilize Medicaid disproportionate share hospital ("DSH") payments to compensate hospitals, such as Plaintiffs, that serve a disproportionate share of low income individuals. 72 Fed. Reg. at 29778, 29779, 29826. In the event that some Plaintiffs are deemed not to be "units of government," these providers would only be subject to the Rule's requirement that all providers receive and retain the entire payment owing under the approved state Medicaid plan, and such providers may continue to receive Medicaid payments "up to the applicable regulatory upper payment limit, to the extent States use permissible sources of non-federal funding to make such payments." 72 Fed. Reg. at 29754. Ultimately, states' "decisions will be the major factor in the actual financial impact this regulation will have in each state." 72 Fed. Reg. at 29805. The Secretary further notes that these statements are immaterial to the claims in this case.

20. Plaintiff Alameda and other hospitals submitting Declarations referenced above will be unable to recover the funding lost due to the Rule. Ex. 2, Declaration of Wright Lassiter, ¶¶ 29, 30; Ex. 4, Declaration of James R. Nathan, ¶ 26; Ex. 7, Declaration of Bruce Schroffel, ¶ 24; Ex. 6, Declaration of James N. Valenti, ¶ 18; Ex. 3, Declaration of Patrick R. Wardell, ¶ 23; Ex. 5, Declaration of Peter Rapp, ¶¶ 15, 16; Ex. 8, Declaration of David Entwistle, ¶ 15; Ex. 13, Declaration of George B. Hernandez, Jr., ¶ 19.

Response: See response to paragraph 19.

21. A survey of State Medicaid Directors undertaken by the Committee on Oversight and Government Reform of the U.S. House of Representative in February 2008 regarding the expected impact of the Rule on individual States found that the expected loss of federal funding across the 43 States and the District of Columbia that responded to the survey was $21 billion over five years. Committee on Oversight and Government Reform, *The Administration's Medicaid Regulations: State-by-State Impacts*, March 2008.

Response: See response to paragraph 19. The Secretary further states that any loss in federal funding will occur because the Rule would diminish the states' ability to claim federal financial participation for excess payments claimed as part of the Medicaid state share that were merely recycled back to the states.

Respectfully submitted,

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