

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN HOSPITAL ASS'N,)
et al.)

Plaintiffs,)

v.)

Case No. CIV-14-607-RBW

SYLVIA MATHEWS)
BURWELL,¹)

Defendant.)

_____)

ANSWER

The first, unnumbered paragraph of the Complaint contains Plaintiffs' characterizations of this lawsuit, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies that this action challenges an unlawful Medicare policy that has harmed Plaintiffs.

INTRODUCTION

1. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 1.

2. The Secretary denies the allegations in the first sentence of Paragraph 2 except to admit that whether a Medicare patient is treated on an "inpatient" or an "outpatient" basis affects the reimbursement a hospital can receive under the Medicare Act. The Secretary admits the allegations in the second, third, and fourth sentences of Paragraph 2.

¹ Pursuant to Fed. R. Civ. P. 25(d), Sylvia Mathews Burwell has been substituted as Defendant for Kathleen Sebelius.

3. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of Paragraph 3. The Secretary denies the allegations in the second sentence of Paragraph 3.

4. The Secretary denies the allegations in Paragraph 4.

5. The Secretary denies the allegations in Paragraph 5 except to admit that she reduced the standardized amount, the hospital-specific rates, and the Puerto Rico-specific standardized amount by .2 percent to offset the expected \$220 million in additional expenditures under Medicare Part A associated with her two-midnight policy.

6. The Secretary denies the allegations in Paragraph 6.

7. The Secretary denies the allegations in Paragraph 7.

8. The first two sentences of Paragraph 8 contain Plaintiffs' characterizations of the relief sought in this lawsuit, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies that Plaintiffs are entitled to the requested relief. The third sentence of Paragraph 8 contains Plaintiffs' characterization of the .2 percent reduction the Secretary applied to the standardized amount, the hospital-specific rates, and the Puerto Rico-specific standardized amount, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies that characterization and avers that the .2 percent reduction does not violate the law or rest on faulty assumptions.

PARTIES

9. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9.

10. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 10.

11. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 11.

12. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12.

13. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 13.

14. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 14.

15. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15.

16. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16.

17. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 17.

18. The Secretary denies the allegations in the first sentence of Paragraph 18 and avers that Sylvia Mathews Burwell, who was confirmed June 5, 2014, is the Secretary of the Department of Health and Human Services. The Secretary admits the allegations in the second sentence of Paragraph 18.

JURISDICTION AND VENUE

19. Paragraph 19 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the statutory provisions cited in Paragraph 19 for a full and complete statement of their contents.

20. Paragraph 20 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the statutory provision cited in Paragraph 20 for a full and complete statement of its contents.

21. Paragraph 21 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the statutory provisions cited in Paragraph 21 for a full and complete statement of their contents.

22. Paragraph 22 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the statutory provision cited in Paragraph 22 for a full and complete statement of its contents.

STATUTORY AND REGULATORY BACKGROUND

A. Medicare Act

23. The Secretary admits the allegations in the first sentence of Paragraph 23. The second sentence of Paragraph 23 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the statutory provision cited in Paragraph 23 for a full and complete statement of its contents.

24. The Secretary admits the allegations in the first and second sentences of Paragraph 24. The Secretary denies the allegations in the third and fourth sentences of Paragraph 24 except to admit that Medicare Part A and Medicare Part B, respectively, provide reimbursement for certain inpatient and outpatient services. The Secretary denies the allegations in the last sentence of Paragraph 24.

25. The first sentence of Paragraph 25 contains a conclusion of law, not allegations of fact, and thus no response is required. The second sentence of Paragraph 25 purports to quote the statutory language codified at 42 U.S.C. § 1395hh(a)(1), which speaks for itself. The Secretary respectfully refers the Court to the cited statutory provision for a full and complete statement of its contents.

26. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of Paragraph 26 except to admit that hospitals that are reimbursed under Medicare Part A are reimbursed on a prospective basis for eligible inpatient services according to the formula set forth in Section 1395ww(d)(5) of the Medicare Act. The Secretary admits the allegations in the second sentence of Paragraph 26. The third sentence of Paragraph 26 contains Plaintiffs' characterizations of 42 U.S.C. § 1395ww(d)(5)(I)(i), not allegations of fact, and thus no response is required. The Secretary denies those characterizations and respectfully refers the Court to the cited statutory provision for a full and complete statement of its contents.

B. Administrative Procedure Act

27. Paragraph 27 contains a conclusion of law, not allegations of fact, and thus no response is required.

28. Paragraph 28 purports to quote 5 U.S.C § 706(2)(A) and (C), which speaks for itself. The Secretary respectfully refers the Court to the cited statutory provision for a full and complete statement of its contents.

29. Paragraph 29 purports to quote 5 U.S.C § 706(2)(D), which speaks for itself. The Secretary respectfully refers the Court to the cited statutory provision for a full and complete statement of its contents.

30. The Secretary denies the allegations in the first sentence of Paragraph 30 except to admit that the Administrative Procedure Act prescribes the procedures for notice-and-comment rulemaking. The second sentence of Paragraph 30 contains a conclusion of law, not allegations of fact, and thus no response is required. The Secretary respectfully refers the Court to the cited statutory provision for a full and complete statement of its contents.

C. Payment Rates

31. The Secretary denies the allegations in Paragraph 31 except to admit that reimbursements under the Medicare Part A Inpatient Prospective Payment System (“IPPS”) are based in part on the Medicare Severity Diagnosis-Related Group that corresponds to the treatment provided.

32. The Secretary denies the allegations in Paragraph 32 except to admit that the IPPS standardized amounts for operating expenses and for capital expenses are subject to adjustments, including to account for the beneficiary’s clinical condition and the market conditions in the hospital’s location.

33. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 33 specific to Plaintiffs but otherwise admits the allegations in Paragraph 33.

34. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 34 specific to Plaintiff Einstein Medical Center Montgomery but otherwise admits the allegations in Paragraph 34.

35. The Secretary admits the allegations in Paragraph 35.

36. The Secretary denies the allegations in the first sentence of Paragraph 36 and avers that the .2 percent reduction applies to the Medicare Part A standardized amount, the hospital

specific rates, and the Puerto Rico-specific standardized amount. The Secretary denies the allegations in the second sentence of Paragraph 36.

D. The 0.2 Percent Payment Cut

37. The Secretary admits the allegations in Paragraph 37.

38. The Secretary denies the allegations in the first sentence of Paragraph 38. As to the allegations in the second sentence of Paragraph 38, the Secretary admits that the decision to admit a patient is a complex medical judgment on which many factors bear. The third and fourth sentences of Paragraph 38 contain Plaintiffs' characterizations of Chapter 1, Section 10 of the *Medicare Benefit Policy Manual*, not allegations of fact, and thus no response is required. The Secretary denies Plaintiffs' characterizations and respectfully refers the Court to the cited section of that manual for a full and complete statement of its contents. The Secretary denies the allegations in the last two sentences of Paragraph 38.

39. The Secretary denies the allegations in Paragraph 39 and avers that her longstanding policy has been that a physician's order is required for all inpatient hospital admissions reimbursed under Medicare Part A.

40. The Secretary denies the allegations in the first sentence of Paragraph 40. The Secretary denies the allegations in the second sentence of Paragraph 40 except to admit that her .2 percent reduction was intended to offset an expected \$220 million dollars in additional expenditure under Medicare Part A.

41. The Secretary denies the allegations in Paragraph 41 except to admit that, in the Final Rules for the Inpatient Prospective Payment System published in the *Federal Register* on August 19, 2013, she finalized a .2 percent reduction to the standardized amount, the hospital-specific rates, and the Puerto Rico-specific standardized amount.

42. The Secretary denies the allegations in Paragraph 42 except to admit that the .2 percent reduction is not codified in the *Code of Federal Regulations*.

43. The Secretary denies the allegations in Paragraph 43.

44. The Secretary denies the allegations in Paragraph 44 except to admit that commenters on the proposed .2 percent reduction were critical of the adjustment and questioned how the .2 percent figure was calculated.

45. The Secretary denies the allegations in Paragraph 45.

46. The Secretary denies the allegations in Paragraph 46.

47. The Secretary denies the allegations in Paragraph 47 except to admit that, in estimating the number of encounters that would shift from outpatient to inpatient, her actuaries examined outpatient claims for observation or a major procedure.

48. The Secretary denies the allegations in Paragraph 48 except to admit that, in estimating the number of encounters that would shift from inpatient to outpatient, her actuaries examined inpatient claims containing a surgical MS-DRG.

E. Substantive Flaws in the 0.2 Percent Payment Cut

49. Paragraph 49 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies the allegations in Paragraph 49.

50. The first two sentences of Paragraph 50 contain Plaintiffs' characterization of an analysis described in the *Federal Register*, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies that characterization and respectfully refers the Court to the cited *Federal Register* discussion for a full and complete statement of its contents. The Secretary denies the allegations in the last sentence of Paragraph 50.

51. Paragraph 51 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

52. Paragraph 52 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

53. Paragraph 53 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies the allegations in Paragraph 53.

54. Paragraph 54 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies the allegations in Paragraph 54.

55. The Secretary denies the allegations in the first sentence of Paragraph 55. The second sentence of Paragraph 55 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

56. The Secretary denies the allegations in Paragraph 56 except to admit that in calendar year 2011, there were 1,569,693 reported inpatients stays of one day or less.

57. The Secretary admits the allegations in the first sentence of Paragraph 57. The second sentence of Paragraph 57 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required. The Secretary denies the allegations in the third sentence of Paragraph 57 except to admit that her actuaries predicted that the number of encounters that would shift from inpatient to outpatient as a result of the 2-midnight rule was 360,000.

58. The Secretary denies the allegations in the first sentence of Paragraph 58 except to admit that subtracting 90,173, 87,572, 39,931, and 50,448 from 1.5 million yields more than 1.2

million. The second sentence of Paragraph 58 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

59. The Secretary denies the allegations in Paragraph 59.

60. The Secretary denies the allegations in Paragraph 60 except to admit that her actuaries did not impose a surgical-cases-only limitation on their estimation of the number of encounters that would shift from outpatient to inpatient and that her actuaries examined outpatient claims for observation or a major procedure.

61. The Secretary denies the allegations in Paragraph 61.

F. Procedural Flaws in the 0.2 Percent Payment Cut

62. The Secretary denies the allegations in Paragraph 62.

63. The Secretary denies the allegations in the first sentence of Paragraph 63. The second and third sentences of Paragraph 63 contain Plaintiffs' characterization of a discussion in the Preamble to the Final Rule, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary denies that characterization and respectfully refers the Court to the *Federal Register* page cited in Paragraph 63 for a full and complete statement of its contents.

64. The Secretary denies the allegations in Paragraph 64 except to admit that she disagreed with commenters who thought her actuaries' estimates were unsupported and insufficiently explained.

65. The first sentence of Paragraph 65 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required. The Secretary denies the allegations in the second sentence of Paragraph 65.

66. The Secretary denies the allegations in the first and third sentences of Paragraph 66. The second sentence of Paragraph 66 contains a conclusion of law, not allegations of fact, and

thus no response is required. The Secretary respectfully refers the Court to the cited statutory provisions for a true and complete statement of their contents.

THE PLAINTIFFS HAVE SUFFERED HARM

67. The Secretary denies the allegations in Paragraph 67.

68. The Secretary denies the allegations in Paragraph 68.

Banner Health

69. The Secretary denies the allegations in the first sentence of Paragraph 69. The second sentence of Paragraph 69 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

70. Paragraph 70 contains a conclusion of law, not allegations of fact, and thus no response is required.

71. The Secretary admits the first sentence of Paragraph 71. The second sentence of Paragraph 71 contains a conclusion of law, not allegations of fact, and thus no response is required.

72. The first sentence of Paragraph 72 contains Plaintiffs' characterization of Banner Health's challenge before the Provider Reimbursement Review Board ("PRRB"), not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary admits that Banner Health challenged her .2 percent reduction on substantive and procedural grounds before the PRRB. The second and third sentences of Paragraph 72 contain conclusions of law, not allegations of fact, and thus no response is required.

73. The Secretary admits the allegations in Paragraph 73.

Mount Sinai Hospital

74. The Secretary denies the allegations in the first sentence of Paragraph 74. The second sentence of Paragraph 74 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

75. Paragraph 75 contains a conclusion of law, not allegations of fact, and thus no response is required.

76. The Secretary admits the first sentence of Paragraph 76. The second sentence of Paragraph 76 contains a conclusion of law, not allegations of fact, and thus no response is required.

77. The first sentence of Paragraph 77 contains Plaintiffs' characterization of Mount Sinai Hospital's challenge before the PRRB, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary admits that Mount Sinai Hospital challenged her .2 percent reduction on substantive and procedural grounds before the PRRB. The second sentence of Paragraph 77 contains conclusions of law, not allegations of fact, and thus no response is required.

78. The Secretary admits the allegations in Paragraph 78.

Einstein

79. The Secretary denies the allegations in the first sentence of Paragraph 79. The second sentence of Paragraph 79 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

80. Paragraph 80 contains a conclusion of law, not allegations of fact, and thus no response is required.

81. The Secretary admits the first sentence of Paragraph 81. The second sentence of Paragraph 81 contains a conclusion of law, not allegations of fact, and thus no response is required.

82. The first sentence of Paragraph 82 contains Plaintiffs' characterization of Einstein's challenge before the PRRB, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary admits that Einstein challenged her .2 percent reduction on substantive and procedural grounds before the PRRB. The second and third sentences of Paragraph 82 contain conclusions of law, not allegations of fact, and thus no response is required.

83. The Secretary admits the allegations in Paragraph 83.

Wake Forest

84. The Secretary denies the allegations in the first sentence of Paragraph 84. The second sentence of Paragraph 84 contains Plaintiffs' speculation, not allegations of fact, and thus no response is required.

85. Paragraph 85 contains a conclusion of law, not allegations of fact, and thus no response is required.

86. The Secretary admits the first sentence of Paragraph 86. The second sentence of Paragraph 86 contains a conclusion of law, not allegations of fact, and thus no response is required.

87. The first sentence of Paragraph 87 contains Plaintiffs' characterization of Wake Forest's challenge before the PRRB, not allegations of fact, and thus no response is required. To the extent a response is deemed necessary, the Secretary admits that Wake Forest challenged her .2 percent reduction on substantive and procedural grounds before the PRRB. The second and

third sentences of Paragraph 72 contain conclusions of law, not allegations of fact, and thus no response is required.

88. The Secretary admits the allegations in Paragraph 88.

89. The Secretary denies the allegations in the first sentence of Paragraph 89. The Secretary lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the second sentence of Paragraph 89.

90. The Secretary admits the allegations in the first sentence of Paragraph 90. The second and third sentences of Paragraph 90 contain Plaintiffs' characterizations of the Letter from Rick Pollack to Marilyn Tavenner dated June 19, 2013, which speaks for itself. The Secretary denies Plaintiffs' characterizations and respectfully refers the Court to the copy of that letter published at <http://www.noticeandcomment.com/CMS-2013-0084-0152-fcod-366412.aspx> for a full and complete statement of its contents.

91. The Secretary denies the allegations in Paragraph 91 except to admit that she finalized a .2 percent reduction to the standardized amount, the hospital-specific rates, and the Puerto Rico-specific standardized amount.

COUNT I
VIOLATION OF ADMINISTRATIVE PROCEDURE ACT
The CMS Policy Is Arbitrary and Capricious Because CMS Relied on Indefensible Assumptions

92. The Secretary repeats and realleges her responses to Paragraphs 1 through 91 inclusive.

93. Paragraph 93 contains a conclusion of law, not allegations of fact, and thus no response is required.

94. The Secretary denies the allegations in Paragraph 94.

95. The Secretary denies the allegations in Paragraph 95.

96. The Secretary denies the allegations in Paragraph 96.

97. The Secretary denies the allegations in Paragraph 97.

COUNT II
VIOLATION OF ADMINISTRATIVE PROCEDURE ACT
The CMS Failed Policy Is Arbitrary and Capricious Because CMS Failed to Explain Its Assumptions

98. The Secretary repeats and realleges her responses to Paragraphs 1 through 97 inclusive.

99. Paragraph 99 contains a conclusion of law, not allegations of fact, and thus no response is required.

100. The Secretary denies the allegations in Paragraph 100.

101. The Secretary denies the allegations in Paragraph 101.

102. The Secretary denies the allegations in Paragraph 102.

COUNT III
VIOLATION OF ADMINISTRATIVE PROCEDURE ACT
CMS Failed to Comply with the Notice and Comment Procedure

103. The Secretary repeats and realleges her responses to Paragraphs 1 through 102 inclusive.

104. Paragraph 104 contains a conclusion of law, not allegations of fact, and thus no response is required.

105. Paragraph 105 contains a conclusion of law, not allegations of fact, and thus no response is required.

106. The Secretary denies the allegations in Paragraph 106.

107. The Secretary denies the allegations in Paragraph 107.

108. The Secretary denies the allegations in Paragraph 108.

COUNT IV
VIOLATION OF ADMINISTRATIVE PROCEDURE ACT
The CMS Policy Is Not Codified in the Code of Federal Regulations

109. The Secretary repeats and realleges her responses to Paragraphs 1 through 108 inclusive.

110. Paragraph 110 contains a conclusion of law, not allegations of fact, and thus no response is required.

111. Paragraph 111 contains a conclusion of law, not allegations of fact, and thus no response is required.

112. Paragraph 112 contains a conclusion of law, not allegations of fact, and thus no response is required.

113. The Secretary denies the allegations in Paragraph 113.

114. The Secretary denies the allegations in Paragraph 114.

115. The Secretary denies the allegations in Paragraph 115.

COUNT V
VIOLATION OF THE MEDICARE ACT
The CMS Policy Is Not Codified in the Code of Federal Regulations

116. The Secretary repeats and realleges her responses to Paragraphs 1 through 115 inclusive.

117. The Secretary denies the allegations in Paragraph 117.

118. Paragraph 118 contains a conclusion of law, not allegations of fact, and thus no response is required.

119. Paragraph 119 contains a conclusion of law, not allegations of fact, and thus no response is required.

120. The Secretary denies the allegations in Paragraph 120.

121. The Secretary denies the allegations in Paragraph 121.

122. The Secretary denies the allegations in Paragraph 122.

PRAYER FOR RELIEF

The remaining paragraphs of the Complaint contain Plaintiffs' prayer for relief, to which no response is required. To the extent a response is deemed necessary, the Secretary denies that Plaintiffs are entitled to the relief requested.

The Secretary denies any and all allegations not expressly admitted herein to which a response is required.

Dated: June 16, 2014

Respectfully submitted,

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