

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

NEW LIFECARE HOSPITALS OF CHESTER COUNTY
LLC D/B/A LIFECARE HOSPITALS OF CHESTER
COUNTY
400 East Marshall Street
West Chester, PA 19380,

NEW LIFECARE HOSPITALS OF DAYTON LLC D/B/A
LIFECARE HOSPITALS OF DAYTON
4000 Miamisburg-Centerville Road
Miamisburg, OH 45342,

NEW NEXTCARE SPECIALTY HOSPITAL OF DENVER
LLC D/B/A COLORADO ACUTE LONG TERM
HOSPITAL
1690 North Meade Street
Denver, CO 80204,

NEW LIFECARE HOSPITALS OF MILWAUKEE LLC
D/B/A LIFECARE HOSPITALS OF WISCONSIN
2400 Golf Road
Pewaukee, WI 53702,

NEW LIFECARE HOSPITALS OF NORTH CAROLINA
LLC D/B/A LIFECARE HOSPITALS OF NORTH
CAROLINA
1051 Noell Lane
Rocky Mount, NC 27804,

NEW LIFECARE HOSPITALS OF NORTH TEXAS LLC
D/B/A LIFECARE HOSPITALS OF DALLAS
1950 Record Crossing Road
Dallas, TX 75235,

NEW LIFECARE HOSPITALS OF PITTSBURGH LLC
D/B/A LIFECARE HOSPITALS OF PITTSBURGH
225 Penn Avenue
Pittsburgh, PA 15221,

NEW LIFECARE HOSPITALS OF SARASOTA LLC
D/B/A COMPLEX CARE HOSPITAL AT RIDGELAKE
6150 Edgelake Drive
Sarasota, FL 34240,

Civil Action No. 19-705

**COMPLAINT FOR REVIEW
OF AGENCY ACTION**

NEW SAN ANTONIO SPECIALTY HOSPITAL LLC
D/B/A LIFECARE HOSPITALS OF SAN ANTONIO
8902 Floyd Curl Drive
San Antonio, TX 78240,

NEW LIFECARE HOSPITALS LLC D/B/A LIFECARE
HOSPITALS OF SHREVEPORT
8001 Youree Drive
Shreveport, LA 71105,

NEW LIFECARE HOSPITALS OF NORTHERN NEVADA
LLC D/B/A TAHOE PACIFIC HOSPITALS – MEADOWS
10101 Double R Boulevard
Reno, NV 89521,

NEW LIFECARE HOSPITAL AT TENAYA LLC D/B/A
COMPLEX CARE HOSPITAL AT TENAYA
2500 North Tenaya Way
Las Vegas, NV 89128,

PAM SQUARED AT CORPUS CHRISTI, LLC D/B/A PAM
SPECIALTY HOSPITAL OF CORPUS CHRISTI
BAYFRONT
345 South Water Street, 3rd Floor
Corpus Christi, TX 78401,

POST ACUTE SPECIALTY HOSPITAL OF CORPUS
CHRISTI, LLC D/B/A PAM SPECIALTY HOSPITAL OF
CORPUS CHRISTI SOUTH
6226 Saratoga Boulevard
Corpus Christi, TX 78414,

PAM II OF COVINGTON, LLC D/B/A PAM SPECIALTY
HOSPITAL OF COVINGTON
20050 Crestwood Boulevard
Covington, LA 70433,

POST ACUTE MEDICAL AT HAMMOND, LLC D/B/A
PAM SPECIALTY HOSPITAL OF HAMMOND
42074 Veterans Avenue
Hammond, LA 70403,

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Lufkin, TX 75904,

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SPECIALTY HOSPITAL OF LULING

200 Memorial Drive
Luling, TX 78648,

POST ACUTE SPECIALTY HOSPITAL OF MILWAUKEE,
LLC D/B/A PAM SPECIALTY HOSPITAL OF
MILWAUKEE

5017 South 110th Street
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POST ACUTE MEDICAL OF NEW BRAUNFELS, LLC
D/B/A PAM SPECIALTY HOSPITAL OF NEW
BRAUNFELS

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New Braunfels, TX 78130,

WARM SPRINGS SPECIALTY HOSPITAL OF SAN
ANTONIO, LLC D/B/A PAM SPECIALTY HOSPITAL OF
SAN ANTONIO

5418 North Loop 1604 W
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SPECIALTY HOSPITAL OF TEXARKANA NORTH

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D/B/A PAM SPECIALTY HOSPITAL OF TULSA

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POST ACUTE MEDICAL AT VICTORIA, LLC D/B/A
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Victoria, TX 77904,

POST ACUTE SPECIALTY HOSPITAL OF VICTORIA,
LLC D/B/A PAM SPECIALTY HOSPITAL OF VICTORIA
SOUTH

506 East San Antonio Street, 3rd Floor
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THC - ORANGE COUNTY, LLC D/B/A KINDRED
HOSPITAL WESTMINSTER
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Westminster, CA 92683,

THC - ORANGE COUNTY, LLC D/B/A KINDRED
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HOSPITAL ONTARIO
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14148 E. Francisquito Avenue
Baldwin Park, CA 91706,

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HOSPITAL RANCHO
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Rancho Cucamonga, CA 91730,

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HOSPITAL SOUTH BAY
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KND DEVELOPMENT 54, LLC D/B/A KINDRED
HOSPITAL RIVERSIDE
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D/B/A VIBRA SPECIALTY HOSPITAL OF PORTLAND
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HOSPITAL OF SAN DIEGO
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VIBRA HOSPITAL OF CENTRAL DAKOTAS
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HOSPITAL OF FARGO
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VIBRA HOSPITAL OF SACRAMENTO, LLC D/B/A
VIBRA HOSPITAL OF SACRAMENTO
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Folsom, CA 95630,

VIBRA HOSPITAL OF RICHMOND, LLC D/B/A VIBRA
HOSPITAL OF RICHMOND
2220 Edward Holland Drive
Richmond, VA 23230,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary
United States Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201,

Defendant.

INTRODUCTION

1. This case is about an agency's unwillingness to correct a clear error in one of the factors used to determine Medicare payments to long-term care hospitals ("LTCHs"). Specifically, the Centers for Medicare & Medicaid Services ("CMS") at the Department of Health and Human Services ("HHS") is applying a negative 5.1 percent budget neutrality adjustment, not once, but *twice*, to the default "site neutral" payment rate for Medicare patients who receive inpatient care at LTCHs. The agency includes a 5.1 percent budget neutrality factor (adjustment) in the amounts used to calculate site neutral payments under the Long-Term Care

Hospital Prospective Payment System (“LTCH PPS”), and then applies a *second* 5.1 percent budget neutrality adjustment to the total site neutral payment amount that is duplicative.

2. A budget neutrality adjustment is sometimes used in the calculation of Medicare payment rates so that a change in payment policy does not increase or decrease total Medicare payments to health care providers. After the adjustment is applied, total payments are expected to be budget neutral. The 5.1 percent budget neutrality adjustment here relates to the 5.1 percent of additional estimated site neutral payments for patient cases that qualify for high-cost outlier (“HCO”) payments. The Plaintiffs, other hospitals, hospital trade associations, and the Medicare Payment Advisory Commission (“MedPAC”) all told CMS in written comments during rulemaking that CMS is applying *duplicative* budget neutrality adjustments to LTCH site neutral payments, and they explained CMS’ error in detail. Despite the overwhelming agreement of these commenters, CMS finalized the duplicative budget neutrality adjustment so that all site neutral payments to LTCH are reduced by 5.1 percent *twice*, for a total reduction of 10.2 percent. The extra 5.1 percent budget neutrality adjustment is very clearly *not* budget neutral, and it acts as an unwarranted payment cut that has and continues to cause significant financial injury to the Plaintiffs. As a result of the duplicative budget neutrality adjustment, the Plaintiffs’ Medicare reimbursement will be reduced by approximately \$9,388,544 in federal fiscal year (“FFY”) 2019 alone.

3. CMS has attempted to re-characterize the nature of these budget neutrality adjustments, but the math does not lie. It is clear that the agency has not taken a “hard look” at this issue and has failed to meaningfully consider this problem. This is a textbook violation of the arbitrary and capricious standard under the Administrative Procedure Act. 5 U.S.C. §

706(2)(A). Moreover, the duplicative budget neutrality adjustment violates the Social Security Act (“SSA”) and other federal laws.

4. For these reasons, and the other reasons discussed herein, CMS’s duplicative budget neutrality adjustment is legally invalid and should be set aside so that the agency is ordered to remove the duplicative budget neutrality adjustment from site neutral payments to LTCHs in the current payment year (FFY 2019), as well as past and future payment years. This relief is particularly needed now because the four-year transition period for site neutral payments ends on October 1, 2019. At that time, the site neutral payment rate will apply to the full default Medicare payment to LTCHs, instead of half of the Medicare payment, and the impact of this arbitrary payment cut will double.

5. Before filing this Complaint, the Plaintiffs received a final agency determination from the Provider Reimbursement Review Board (“PRRB”) granting the Plaintiffs’ request for expedited judicial review (“EJR”), pursuant to which the Plaintiffs now file this Complaint under 42 U.S.C. § 1395oo(f)(1). The PRRB decided that it did not have authority to decide the legal question at issue. The PRRB’s decision is attached hereto as **Exhibit A**.

JURISDICTION AND VENUE

6. This action arises under Title XVIII of the Social Security Act, as amended, 42 U.S.C. §§ 1395 *et seq.* (the “Medicare Act”) and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*

7. This Court may exercise subject matter jurisdiction over this action pursuant to 42 U.S.C. § 1395oo(f)(1).

8. Venue is proper in this judicial district under 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. § 405.1877(e)(2).

9. This Court has authority to grant the relief requested under 42 U.S.C. § 1395oo(f).

PARTIES

10. Plaintiffs are qualified as providers of hospital services under the federal Medicare program pursuant to Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq.* A list of the Plaintiff-hospitals with their Medicare provider numbers is included as **Exhibit B** and incorporated herein by reference.

11. Defendant Alex M. Azar II (“Secretary”) is the Secretary of the United States Department of Health and Human Services (“HHS”) and is sued in his official capacity. The Secretary is responsible for the administration of the Medicare program. The Secretary exercises the administrative responsibility of the Medicare program primarily through CMS, an agency of HHS.

MEDICARE PAYMENT FOR LONG-TERM CARE HOSPITAL SERVICES

12. The Medicare Act established a system of health insurance for the aged and disabled. *See* 42 U.S.C. §§ 1395 *et seq.* The Medicare program is federally funded and is administered by the Secretary through CMS. *See* 42 U.S.C. § 1395kk.

13. Plaintiffs entered into written agreements with the Secretary to provide hospital services to eligible individuals as a “provider of services” under the Medicare Act. *See* 42 § U.S.C. 1395cc.

14. Under the Medicare program, different payment methodologies are used to reimburse different types of providers. The Medicare reimbursement system for long-term care hospitals, the LTCH PPS, is based on different levels of cost than the system applicable to general acute care hospitals. For general acute care hospitals, Medicare inpatient costs are reimbursed under the inpatient hospital prospective payment system (“IPPS”) in which a hospital

receives a fixed payment amount per discharge (adjusted for area wage differences) using Medicare severity diagnosis related groups (“MS-DRGs”). The general acute care hospital MS-DRG payment rate is based on the national average cost of treating a Medicare patient’s condition in that type of facility. Although the average length of stay varies for each MS-DRG, the average stay of all Medicare patients in a general acute care hospital is approximately six days. Thus, the prospective payment system for general acute care hospitals is not designed to reimburse hospitals on a regular basis for long-stay hospital care.

15. For a hospital to be reimbursed under the LTCH PPS, by contrast, it must have an average Medicare inpatient length of stay that is greater than twenty-five days, which reflects the medically complex cases treated in LTCHs. Each patient discharged from a LTCH is assigned to a distinct Medicare severity long-term care diagnosis related group (“MS-LTC-DRG”), and the LTCH is generally paid a predetermined fixed amount applicable to the assigned MS-LTC-DRG (adjusted for area wage differences). The payment amount for each MS-LTC-DRG is intended to reflect the average cost of treating a Medicare patient assigned to that MS-LTC-DRG in a LTCH.

16. Weights are assigned to MS-DRGs and MS-LTC-DRGs on an annual basis that are multiplied against a Federal standard rate to arrive at the payment for the discharged patient, after taking other adjustments into consideration. *See* 42 C.F.R. §§ 412.515, 412.521. Most of the MS-LTC-DRGs for LTCHs are the same as the MS-DRGs for general acute care hospitals, but the weights are generally higher. Likewise, the standard Federal payment rate has been much greater for LTCHs than for general acute care hospitals: \$41,558.68 under the LTCH PPS for FY 2019, *see* 83 Fed. Reg. 49836, 49847 (Oct. 3, 2018) (correction notice), compared to approximately \$6,000 under the IPPS for FY 2019, *see id.* at 49844-45 (operating and capital rates combined).

SITE NEUTRAL PAYMENT

17. For LTCH Part A discharges in cost reporting periods beginning on or after October 1, 2015, Congress established a new dual-rate payment structure under the LTCH PPS, with two distinct payment rates. 42 U.S.C. § 1395ww(m)(6) (SSA § 1886(m)(6)). The first payment rate is the LTCH PPS standard Federal payment rate, discussed above. *Id.* at § 1395ww(m)(6)(A)(ii) (SSA § 1886(m)(6)(A)(ii)). This first payment rate only applies to discharges that meet one of the two patient criteria established by section 1206 of the Pathway for SGR Reform Act of 2013 (“PSRA”), Pub. L. No. 113-67, Div. B, 127 Stat. 1165 (2013)—3 or more days in a “subsection (d) hospital”¹ intensive care unit (“ICU”) or LTCH ventilator services of at least 96 hours—and a principal diagnosis that is not psychiatric or rehabilitation. *Id.* at §§ 1395ww(m)(6)(A)(ii),(iii),(iv) (SSA § 1886(m)(6)(A)(ii),(iii),(iv)). All other LTCH Part A discharges are reimbursed at the site neutral payment rate, which is the lesser of the IPPS comparable per diem amount (including any applicable outlier payments) or 100 percent of the estimated cost of the services involved. *Id.* at § 1395ww(m)(6)(B)(ii) (SSA § 1886(m)(6)(B)(ii)).

18. CMS implemented the site neutral payment rate through the regulation at 42 C.F.R. § 412.522. The IPPS comparable per diem amount used for determining LTCH site neutral payments is calculated by adding the adjusted standardized IPPS operating amount to the adjusted capital IPPS Federal rate, divided by the geometric average length of stay of the specific MS-DRG under the IPPS, and multiplying that amount by the covered days of the LTCH stay, but no higher than the full IPPS payment amount. FY 2016 IPPS/LTCH PPS Final Rule, 80 Fed. Reg. 49326, 49608-09 (Aug. 17, 2015).

¹ A reference to section 1861(d)(1)(B) of the SSA (42 U.S.C. § 1395x(d)(1)(B)). These are primarily general short-term acute care hospitals paid by Medicare under the IPPS.

19. LTCHs are transitioning to the new LTCH PPS dual-rate structure with a blended payment rate that applies to site neutral case discharges in cost reporting periods beginning on or after October 1, 2015 and on or before September 30, 2019. 42 U.S.C. § 1395ww(m)(6)(B)(i)(I) (SSA § 1886(m)(6)(B)(i)(I)). During this transition period, the blended payment rate for site neutral cases is equal to one-half the site neutral payment rate and one-half of the LTCH PPS standard Federal payment rate. *Id.* at § 1395ww(m)(6)(B)(ii) (SSA § 1886(m)(6)(B)(ii)). FY 2019 is the last year of the transition period. LTCH site neutral case discharges on or after October 1, 2019 will be paid at 100 percent of the site neutral payment rate.

HIGH COST OUTLIER PAYMENTS

20. In addition to the standard Federal payment rate for a Medicare discharge, Medicare makes additional payments for high cost outlier (HCO) cases that have extraordinarily high costs relative to the costs of most discharges. These high cost outlier payments are a feature of both the IPPS and the LTCH PPS. 42 U.S.C. § 1395ww(d)(5)(A)(ii) (SSA § 1886(d)(5)(A)(ii)); 42 C.F.R. § 412.525(a)(1). CMS sets a threshold each year at the maximum loss that a provider can incur for a case with unusually high costs before the provider will receive an additional high cost outlier payment.

21. Like LTCH cases that are paid the standard Federal payment rate, site neutral cases paid at the IPPS comparable per diem amount may include a LTCH outlier payment. 42 U.S.C. § 1395ww(m)(6)(B)(ii)(I) (SSA § 1886(m)(6)(B)(ii)(I)). The HCO payment for site neutral cases is equal to 80% of the estimated cost of the case above the HCO threshold. 42 C.F.R. § 412.525(a)(3); FY 2019 IPPS/LTCH PPS Final Rule. 83 Fed. Reg. 41144, 41734 (Aug. 17, 2018) (“[A]n LTCH receives 80 percent of the difference between the estimated cost of the case and the applicable HCO threshold, which is the sum of the LTCH PPS payment for the case

and the applicable fixed-loss amount for such case.”). Each fiscal year, CMS establishes a HCO threshold for site neutral payment rate cases that is separate from the HCO threshold used for standard LTCH Federal payment rate cases. *See e.g.*, 80 Fed. Reg. at 49804 (establishing a \$22,544 site neutral HCO threshold for FY 2016). For LTCH site neutral cases, the HCO threshold is the site neutral payment rate for the case plus the IPPS fixed-loss amount. 83 Fed. Reg. at 41734 (“For site neutral payment rate cases, we adopted the operating IPPS HCO target (currently 5.1 percent) and set the fixed-loss amount for site neutral payment rate cases at the value of the IPPS fixed-loss amount.”). There is no additional HCO payment for site neutral payment rate cases that are paid at 100 percent of the estimated cost of the case. 80 Fed. Reg. at 49804 (“[A]ny site neutral payment rate case that is paid 100 percent of the estimated cost of the case (because that amount is lower than the IPPS comparable per diem amount) will not be eligible to receive a HCO payment because, by definition, the estimated costs of such cases would never exceed the IPPS comparable per diem amount by any threshold.”).

FACTS SPECIFIC TO THIS CASE

22. CMS first implemented the site neutral payment rate for LTCHs during the FY 2016 IPPS/LTCH PPS rulemaking. In the FY 2016 IPPS/LTCH PPS Final Rule, CMS adopted a budget neutrality factor (adjustment) (the “BNA”) for the site neutral portion of the LTCH site neutral blended payment rate. FY 2016 IPPS/LTCH PPS Final Rule, 80 Fed. Reg. 49326, 49805 (Aug. 17, 2015). CMS claimed that this BNA was necessary “to ensure that estimated HCO payments payable to site neutral payment rate cases in FY 2016 do not result [in] any increase in estimated aggregate FY 2016 LTCH PPS payments” *Id.* CMS finalized this BNA to reduce the LTCH site neutral payment rate amount by 5.1%. *Id.* In the same FY 2016 Final Rule, CMS also finalized high cost outlier budget neutrality adjustments of negative 5.1% to the IPPS

operating standardized amount and approximately the same amount to the IPPS capital Federal rate.² *Id.* at 49785, 49794-95. The IPPS payment rate, as reduced by these IPPS outlier budget neutrality adjustments, is used to determine the IPPS comparable per diem amount under the LTCH PPS site neutral payment rate discussed above.

23. During the comment period for the FY 2016 LTCH PPS rulemaking, the Plaintiffs and other stakeholders submitted comments to CMS objecting to the BNA. The Plaintiffs explained to CMS that the proposed BNA was duplicative of the outlier budget neutrality adjustments already applied to the IPPS payment rate. For example, Kindred Healthcare, Inc. (“Kindred Healthcare”), the parent company of many of the Plaintiffs, and another LTCH company submitted a comment letter to CMS that stated:

Specifically, CMS already reduced the operating standardized payment amount under the IPPS and the capital federal rate under the capital PPS for outliers. In determining these payment rates for FY 2016, CMS reduced the IPPS payment rate by a factor of 0.948999 and CMS reduced the capital PPS payment rate by a factor of 0.935731. **It would be duplicative (*i.e.*, CMS would be removing outlier payments twice) if CMS also applies the proposed site neutral HCO BNA. This would be the case because the IPPS comparable per diem amount will be based on the FY 2016 IPPS payment rate, which has already been adjusted by the 5.1 percent outlier target. Since CMS has already reduced the FY 2016 IPPS payment rate by the 5.1 percent of estimated outlier payments in FY 2016, it would be inappropriate for CMS to reduce LTCH payments that are based on the IPPS rate again for site neutral cases that qualify as HCOs. Therefore, we object to CMS’ proposal to apply a separate HCO BNA to LTCH site neutral payments.**³

² Payment rates for operating and capital costs are handled separately under the IPPS, but combined under the LTCH PPS. Each year, the IPPS operating standardized amount budget neutrality adjustment is 5.1% and the IPPS capital outlier budget neutrality adjustment is approximately 5.1%. Accordingly, for the sake of clarity, this Complaint generally refers to both IPPS adjustments as a budget neutrality adjustment of 5.1%.

³ Kindred Healthcare, Inc. & Select Medical Holdings Corp., Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 39 (June 16, 2015), <https://www.regulations.gov/contentStreamer?documentId=CMS-2015-0049-0222&attachmentNumber=1&contentType=pdf> (footnote omitted) (emphasis in original).

24. Post Acute Medical, LLC (“Post Acute Medical”) and Vibra Healthcare, LLC (“Vibra Healthcare”), the parent companies of other Plaintiffs, also submitted comments to CMS objecting to the duplicative budget neutrality adjustment.⁴ Vibra Healthcare’s FY 2016 comment letter explained that Vibra objected to the BNA because the IPPS comparable per diem amount was already reduced by the same 5.1 percent.⁵

25. Leading hospital trade associations also submitted comments to CMS during the FY 2016 rulemaking opposing the erroneous BNA. The American Hospital Association (“AHA”) submitted a comment letter to CMS objecting to the “two outlier-related BNAs for site-neutral rates.”⁶ The AHA explained:

Specifically, the inpatient PPS rates used as the basis for site-neutral payment rates are already subject to a BNA for the inpatient PPS’s 5.1 percent outlier pool. However, within the LTCH payment framework, CMS proposes a second BNA of 2.3 percent for the site-neutral outlier pool. CMS’s rationale for this second BNA is to ensure that site-neutral HCO payments do not increase aggregate LTCH PPS payments. **However, we strongly disagree that the additional 2.3 percent BNA is necessary to achieve this goal; rather, it was already achieved when the 5.1 percent BNA was applied to the inpatient PPS rates used as the basis for the site-neutral rates. We recommend that CMS calculate standard LTCH PPS and site-neutral rates separately, without any co-mingling of these payments, as mentioned previously.** Furthermore, the second BNA prevents LTCH site-neutral payments from aligning with inpatient PPS payments for associated MS-DRG and MS-LTC-DRGs, which would counter the goals of BiBA.⁷

⁴ See Post Acute Medical, Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 23-25 (June 16, 2015), <https://www.regulations.gov/contentStreamer?documentId=CMS-2015-0049-0199&attachmentNumber=1&contentType=pdf>; Vibra Healthcare, Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 19-21 (June 15, 2015).

⁵ See Vibra Healthcare, Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 21.

⁶ American Hospital Association, Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 7 (June 15, 2015), <https://www.regulations.gov/contentStreamer?documentId=CMS-2015-0049-0121&attachmentNumber=1&contentType=pdf>.

⁷ The AHA’s FY 2016 comment letter references a 2.3% budget neutrality adjustment. CMS initially proposed a 2.3% adjustment in the FY 2016 Proposed Rule because CMS planned to apply a budget neutrality adjustment to all LTCH PPS payments. FY 2016 IPPS/LTCH PPS Proposed Rule, 80 Fed. Reg. 24324, 24649 (Apr. 30, 2015). However, in the FY 2016 Final

Id. (emphasis in original).

26. The Federation of American Hospitals (“FAH”) submitted similar comments in response to the FY 2016 Proposed Rule. The FAH opposed the outlier budget neutrality adjustment for LTCH site neutral cases because “CMS has already accounted for estimated outlier payments for site neutral cases when it adjusted the IPPS payment rate for FY 2016.”⁸ The FAH explained that because LTCH site neutral cases are already paid at the IPPS comparable rate, the additional budget neutrality adjustment is “an additional unwarranted reduction in payment.” *Id.*

27. In the FY 2016 Final Rule, CMS acknowledged that it received comments objecting to the site neutral outlier budget neutrality adjustment. 80 Fed. Reg. at 49622. In response to these objections, CMS stated:

We disagree with the commenters that a budget neutrality adjustment for site neutral payment rate HCO payments is unnecessary or duplicative. While the commenters are correct that the IPPS base rates that are used in site neutral payment rate calculation include a budget neutrality adjustment for IPPS HCO payments, that adjustment is merely a part of the calculation of one of the inputs (that is, the IPPS base rates) that are used in the LTCH PPS computation of site neutral payment rate. The HCO budget neutrality factor that is applied in determining the IPPS base rates is intended to fund estimated HCO payment made under the IPPS, and is therefore determined based on estimated payments made under the IPPS. As such, the HCO budget neutrality factor that is applied to the IPPS base rates does not account for the additional HCO payments that would be made to site neutral payment rate cases under the LTCH PPS. Without a budget neutrality adjustment when determining payment for a case under the LTCH PPS, any HCO payment payable to site neutral payment rate cases would increase aggregate LTCH PPS payments above the level of expenditure if there were no HCO payments for site neutral payment rate cases. Therefore, our proposed approach appropriately results in LTCH PPS payments to site neutral payment

Rule, CMS decided that it would instead apply a 5.1% adjustment only to the site neutral portion of the blended payment rate. *See* FY 2016 IPPS/LTCH PPS Final Rule, 80 Fed. Reg. at 49805.

⁸ Federation of American Hospitals, Comment Letter on FY 2016 IPPS/LTCH PPS Proposed Rule at 67 (June 16, 2015), <https://www.regulations.gov/contentStreamer?documentId=CMS-2015-0049-0188&attachmentNumber=1&contentType=pdf>.

rate cases that are budget neutral relative to a policy with no HCO payments to site neutral payment rate cases. For these reasons, we are not adopting the commenters' recommendation to change the calculation of the IPPS comparable per diem amount to adjust the IPPS operating standardized amount used in that calculation to account for the application of the IPPS HCO budget neutrality adjustment.

Id.

28. Despite admitting that the “HCO budget neutrality factor that is applied in determining the IPPS base rates is intended to fund estimated HCO payment made under the IPPS,” CMS finalized the separate 5.1 percent reduction to the LTCH site neutral payment rate for the LTCH site neutral outlier BNA. *Id.*

29. A similar process played out during the FY 2017 LTCH PPS rulemaking. CMS proposed a 5.1 percent budget neutrality adjustment to the LTCH site neutral payment rate portion of the blended payment rate. FY 2017 IPPS/LTCH PPS Proposed Rule, 81 Fed. Reg. 24946, 25288-89 (Apr. 27, 2016). Commenters again responded that the proposed adjustment was flawed because CMS already reduced the IPPS comparable per diem amount to account for outlier payments. Kindred Healthcare,⁹ LifeCare Health Partners (“LifeCare Hospitals”),¹⁰ Post Acute Medical,¹¹ and Vibra Healthcare¹² each submitted comments objecting to the proposed

⁹ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 18-25 (June 17, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-0521&attachmentNumber=1&contentType=pdf>.

¹⁰ LifeCare Hospitals, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 7-11 (June 15, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-0315&attachmentNumber=1&contentType=pdf>.

¹¹ Post Acute Medical, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 14-21 (June 17, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-1262&attachmentNumber=1&contentType=pdf>.

¹² Vibra Healthcare, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 14-21 (June 17, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-0483&attachmentNumber=1&contentType=pdf>.

budget neutrality adjustment in the FY 2017 Proposed Rule. Kindred Healthcare included a table that clearly shows the duplication using the components of the site neutral payment rate.¹³

Without making this change, the duplicative BNA not only “exaggerates the disparity in payment rates across provider settings,” as the Medicare Payment Advisory Commission (“MedPAC”) states, but it is also purely punitive. *Id.* at 22. The AHA¹⁴ and FAH¹⁵ also opposed the proposed site neutral budget neutrality adjustment in the FY 2017 Proposed Rule. Many of these comments requested that CMS not only fix the erroneous calculation of the budget neutrality adjustment for FY 2017, but also correct the adjustment CMS applied in FY 2016 because the hospitals were systematically underpaid.¹⁶

30. Importantly, MedPAC also criticized the BNA. MedPAC’s FY 2017 comment letter objected to the separate budget neutrality adjustment for LTCH site neutral high-cost outliers because, as the Plaintiffs and hospital trade associations were telling CMS, “the IPPS standard payment amount is already adjusted to account for HCO payments.”¹⁷ MedPAC

¹³ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 20-22, Table 1.

¹⁴ American Hospital Association, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 5-8 (June 17, 2016), <https://www.aha.org/system/files/advocacy-issues/letter/2016/160617-let-nickels-slavitt-ltch.pdf>.

¹⁵ Federation of American Hospitals, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 48-49 (June 17, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-0575&attachmentNumber=1&contentType=pdf>.

¹⁶ *See e.g.*, Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 23 (“CMS must reverse this adjustment to all FY 2016 payments, or make an equivalent prospective increase in payments to FY 2017 site neutral rate cases to account for this underpayment.”).

¹⁷ MedPAC, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 16 (May 31, 2016), <https://www.regulations.gov/contentStreamer?documentId=CMS-2016-0053-0123&attachmentNumber=1&contentType=pdf>.

explained why it was incorrect for CMS to apply another budget neutrality adjustment to the LTCH site neutral payment rate:

CMS proposes to use the IPPS fixed-loss amount to determine if a discharge paid under the site-neutral rate qualifies to receive an HCO payment again for FY 2017. CMS sets the IPPS fixed-loss amount each year at a level that it estimates will result in aggregate HCO payments equal 5.1 percent of total IPPS payment. **To account for the spending attributed to these outlier payments, CMS reduces the IPPS base payment rates to maintain budget neutrality in the IPPS. The IPPS-comparable rate used to pay for site-neutral cases in LTCHs includes an adjustment for budget neutrality to account for spending associated with HCOs.**

With the Commission's payment principles in mind, **MedPAC urges CMS to eliminate the proposed payment adjustment for discharges paid the site-neutral rate to account for outlier payments under this payment methodology.** Given that the IPPS standard payment amount is already adjusted to account for HCO payments, CMS' proposal to reduce the site-neutral portion of the LTCH payment by a budget neutrality adjustment of 0.949 is duplicative and exaggerates the disparity in payment rates across provider settings. **Given this duplication, CMS should not adjust the site-neutral rate further.**

Id. at 16-17 (emphasis added).

31. Despite these strong objections from MedPAC, the Plaintiffs, other hospitals and hospital trade associations in written comments to the agency, CMS again dismissed these concerns and finalized the BNA for FY 2017. *See* FY 2017 IPPS/LTCH PPS Final Rule, 81 Fed. Reg. 56762, 57308-09 (Aug. 22, 2016).¹⁸ CMS said in the FY 2017 Final Rule that it continued to disagree with commenters “who assert that a HCO budget neutrality adjustment for site neutral payment rate cases is inappropriate, unnecessary, or duplicative.” *Id.* CMS also added that it has “broad authority” to establish adjustments to the LTCH PPS standard Federal payment rate. *Id.* Additionally, CMS attempted to make the argument that Congress approved of CMS’

¹⁸ In the FY 2017 IPPS/LTCH PPS Final Rule, CMS did make one change to the application of the BNA. CMS decided that the budget neutrality adjustment would not be applied to the HCO payment for site neutral payment rate cases. 81 Fed. Reg. at 57309.

implementation of the duplicative BNA because “Congress was well aware of how we had implemented our HCO policy under the LTCH PPS under § 412.525 at the time of the enactment of section 1206 of Public Law 113-67” and “Congress was also well aware of how we had implemented our ‘IPPS comparable per diem amount’ concept in the [short-stay outlier] context at the time of the enactment of section 1206 of Public Law 113-67.” 81 Fed. Reg. at 57308.

32. In FY 2018, CMS continued applying the BNA over the objections of the Plaintiffs and others. The FY 2018 IPPS/LTCH PPS Final Rule contained an identical budget neutrality adjustment. FY 2018 IPPS/LTCH PPS Final Rule, 82 Fed. Reg. 37990, 38544-46 (Aug. 14, 2017). During the FY 2018 comment period, Kindred Healthcare,¹⁹ LifeCare Hospitals,²⁰ Post Acute Medical,²¹ and Vibra Healthcare²² each submitted comments opposing the proposed adjustment for FY 2018. The Plaintiffs also continued to request that CMS correct the duplicative adjustment that CMS already applied to FY 2016 and FY 2017 LTCH site neutral payments.²³ In addition to the Plaintiffs, the AHA and FAH again objected to the FY 2018

¹⁹ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 5-12 (June 13, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-4033&attachmentNumber=1&contentType=pdf>.

²⁰ LifeCare Hospitals, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 14-18 (June 13, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-3745&attachmentNumber=1&contentType=pdf>.

²¹ Post Acute Medical, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 4 (June 12, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-3620&attachmentNumber=1&contentType=pdf>.

²² Vibra Healthcare, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 20-23 (June 13, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-3729&attachmentNumber=1&contentType=pdf>.

²³ *See e.g.*, Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 12 (“CMS should reverse this adjustment to all FY 2016 and FY 2017 payments, or make an equivalent prospective increase in payments to FY 2018 site neutral rate cases to account for this underpayment.”).

budget neutrality adjustment.²⁴ Despite these objections for a third year, CMS again finalized the BNA without any change. *See* FY 2018 IPPS/LTCH PPS Final Rule, 82 Fed. Reg. 37990, 38544-46 (Aug. 14, 2017). CMS reiterated its belief that it has “the authority to adopt the site neutral payment rate HCO policy in a budget neutral manner” and referred readers to its responses to comments in the two previous years. *Id.* at 38546.

33. In the FY 2019 IPPS/LTCH PPS Proposed Rule, CMS again proposed the BNA for all LTCH site neutral payment rate cases. CMS claimed that this adjustment is necessary so that HCO payments for such cases do not result in any change to estimated aggregate LTCH payments. FY 2019 IPPS/LTCH PPS Proposed Rule, 83 Fed. Reg. 20164, 20596 (May 7, 2018). The proposed budget neutrality adjustment would reduce the LTCH site neutral payment rate amount by 5.1 percent to offset the cost of LTCH site neutral HCO payments in FY 2019. *Id.* In addition to this budget neutrality adjustment for LTCH site neutral HCO cases, CMS again proposed adjusting the IPPS payment rate to account for projected IPPS outlier payments. 83 Fed. Reg. at 20583. Specifically, CMS proposed a budget neutrality adjustment to reduce the IPPS payment rate by 5.1%. *Id.* As in prior years, the IPPS rate is used to determine the IPPS comparable per diem amount for LTCH site neutral payment rate cases.

34. In response to the FY 2019 IPPS/LTCH PPS Proposed Rule, the Plaintiffs and other commenters again objected to the BNA on the grounds that the adjustment is duplicative of the budget neutrality adjustment CMS proposed to apply to the IPPS payment rate. Kindred Healthcare stated that CMS’ calculation of the 5.1 percent LTCH PPS site neutral budget

²⁴ American Hospital Association, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 4-7 (June 13, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-3995&attachmentNumber=1&contentType=pdf>; Federation of American Hospitals, Comment Letter on FY 2018 IPPS/LTCH PPS Proposed Rule at 62-63 (June 13, 2017), <https://www.regulations.gov/contentStreamer?documentId=CMS-2017-0055-4057&attachmentNumber=1&contentType=pdf>.

neutrality adjustment did not account for the budget neutrality adjustment CMS already proposed for the IPPS payment rate:

Consistent with MedPAC's and the AHA's comments, we strongly disagree with the proposed 0.949 budget neutrality adjustment for site neutral cases that qualify as high-cost outliers. CMS already reduced the FY 2019 site neutral payment amount for estimated outlier payments via the IPPS HCO outlier factor and the capital PPS outlier factor. CMS should not reduce LTCH site neutral payments by another 5.1%.²⁵

LifeCare Hospitals explained to CMS that the proposed LTCH site neutral adjustment was duplicative of the adjustments already included in the LTCH site neutral payment rate:

This BNA is duplicative and unwarranted because CMS has *already* applied budget neutrality adjustments to reduce the operating and capital portions of the IPPS standard Federal payment rate by the same 5.1%, before using that rate to determine the IPPS comparable per diem amount for site neutral payment cases.²⁶

Similarly, Vibra Healthcare submitted similar comments to CMS explaining CMS' error in calculating the budget neutrality adjustment.²⁷ As in prior years, the AHA and FAH also objected to the BNA.²⁸

²⁵ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 42 (June 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=CMS-2018-0046-1349&attachmentNumber=1&contentType=pdf>.

²⁶ LifeCare Hospitals, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 14 (June 21, 2018), <https://www.regulations.gov/contentStreamer?documentId=CMS-2018-0046-1055&attachmentNumber=1&contentType=pdf>.

²⁷ Vibra Healthcare, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 21-25 (June 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=CMS-2018-0046-1360&attachmentNumber=1&contentType=pdf>.

²⁸ See American Hospital Association, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 6-8 (June 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=CMS-2018-0046-1495&attachmentNumber=1&contentType=pdf>; Federation of American Hospitals, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 42-43 (June 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=CMS-2018-0046-1468&attachmentNumber=1&contentType=pdf>.

35. The comment letters to the proposed rule specifically asked CMS to take a fresh look at this issue and consider the detrimental effect the duplicative adjustment would have on LTCHs in FY 2019, as well as the harm that already occurred by applying the adjustment in FYs 2016 through 2018. LifeCare Hospitals said that “[b]ecause CMS has been unwilling to address these issues directly the past two years, we are forced to raise them again for consideration this year.”²⁹ Kindred Healthcare said “[w]e request that CMS take a fresh look at this issue to avoid a continuation of this erroneous policy”³⁰ and that “CMS’ unwillingness to address these issues directly the past two years requires that we raise them again for further consideration this year. We ask that CMS take our concerns more seriously, now that the agency has had additional time to consider the matter and the analysis and table we provided.” *Id.* at 42.

36. The Plaintiffs’ comment letters explained that after taking a fresh look at this issue and correcting the erroneous adjustment for FY 2019, CMS also needed to fix the duplicative adjustments already applied in FYs 2016 through 2018. For example, Kindred Healthcare said:

For the same reason, it was incorrect for CMS to apply the 5.1% site neutral HCO BNA to FY 2016, FY 2017 and FY 2018 payments for site neutral rate cases. CMS should reverse this adjustment to all FY 2016, FY 2017 and FY 2018 payments, or make an equivalent prospective increase in payments to FY 2019 site neutral rate cases to account for this underpayment.³¹

37. Despite these comments, CMS finalized the duplicative budget neutrality adjustment for all LTCH site neutral payment rate cases in the FY 2019 IPPS/LTCH PPS Final Rule. 83 Fed. Reg. 41144, 41737-38 (Aug. 17, 2018). At the same time, CMS finalized the 5.1

²⁹ LifeCare Hospitals, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 15.

³⁰ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 36.

³¹ Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 42.

percent budget neutrality adjustment to the IPPS payment rate. *Id.* at 41723, 41728. CMS offered only a brief response to the Plaintiffs' comments objecting to the duplicative budget neutrality adjustments, essentially repeating what it had said in the FY 2018 Final Rule:

We continue to disagree with the commenters that a budget neutrality adjustment for site neutral payment rate HCO payments is inappropriate, unnecessary, or duplicative. As we discussed in response to similar comments (82 FR 38545 through 38546, 81 FR 57308 through 57309, and 80 FR 49621 through 49622), we have the authority to adopt the site neutral payment rate HCO policy in a budget neutral manner. More importantly, we continue to believe this budget neutrality adjustment is appropriate for reasons outlined in our response to the nearly identical comments in the FY 2017 IPPS/LTCH PPS final rule (81 FR 57308 through 57309) and our response to similar comments in the FY 2016 IPPS/LTCH PPS final rule (80 FR 49621 through 49622).

Id. at 41738.

38. Accordingly, CMS is applying a BNA factor of 0.949 (5.1 percent) to reduce the site neutral payment rate portion of the LTCH PPS blended payment rate for all site neutral cases, despite the fact that the IPPS comparable per diem amount has already been reduced by the same percentage by the IPPS outlier budget neutrality adjustments. This BNA reduces site neutral case payments by an *additional* 5.1 percent for all LTCHs, including the Plaintiffs' LTCHs. The Plaintiffs gave CMS ample opportunity to correct the flawed methodology for determining the BNA. The Plaintiffs clearly spelled out the duplication in their comments, and MedPAC agreed that a separate budget neutrality adjustment should not be applied for this reason. However, CMS has been dismissive of the Plaintiffs' concerns.

39. The Plaintiffs had hoped that CMS would correct the error before the end of the LTCH site neutral transition period because when the transition period ends on September 30, 2019, the monetary consequences of CMS' error will double. *See* 42 U.S.C.

§ 1395ww(m)(6)(B)(i)(I) (SSA § 1886(m)(6)(B)(i)(I)). Starting in FY 2020, the entire payment for site neutral cases will be the lesser of the IPPS comparable per diem amount or 100% of the

estimated costs of the case. *Id.* at §§ 1395ww(m)(6)(B)(i)-(ii). If CMS continues to insist on applying the duplicative outlier budget neutrality adjustment in FY 2020, the adjustment will apply to the entire payment for site neutral cases. The Plaintiffs are already experiencing significantly reduced Medicare payments under the site neutral payment policy for many of their patients. Applying a budget neutrality adjustment twice to site neutral payments only increases the financial pressure on these hospitals and unnecessarily deters care for Medicare patients in LTCHs. The Plaintiffs have no choice but to seek relief from the courts.

MEDICARE APPEALS PROCESS

40. The PRRB is a five member administrative tribunal that sits in Baltimore, Maryland and decides disputes between Medicare providers and CMS over the amount of reimbursement owed by the Medicare program for services rendered to Medicare patients. *See generally* 42 U.S.C. § 1395oo.

41. The PRRB must grant a provider's request for EJR if the PRRB determines that it does not have authority to decide the legal question at issue. *See* 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. § 405.1842(a)(1). If the PRRB grants a provider's request for EJR, the provider may obtain judicial review of the legal question at issue by filing a lawsuit in the United State District Court within 60 days of receipt of the PRRB decision. *See* 42 U.S.C. § 1395oo(f)(1); 42 C.F.R. § 405.1842(g)(2). This action can be brought in the United States District Court for the judicial district in which the provider is located, or alternatively in the United States District Court for the District of Columbia.

PROCEDURAL HISTORY

42. On November 20, 2018, the Plaintiffs submitted an Initial Group Appeal Request and a Request for Expedited Judicial Review to the PRRB. On December 12, 2018, the PRRB

sent a letter to the Plaintiffs' counsel indicating that the PRRB was establishing four separate group appeals, one for each of the Plaintiffs' parent companies. The PRRB's letter also requested additional information from the Plaintiffs before the PRRB could decide the Plaintiff's request for EJR. On January 2, 2019, the Plaintiffs sent the PRRB the requested information and a revised Request for Expedited Judicial Review.

43. The issue in Plaintiffs' appeal request was whether CMS incorrectly applied the negative 5.1 percent outlier budget neutrality adjustment twice to LTCH PPS site neutral case payments in violation of the APA, the SSA, and other federal laws. Plaintiffs requested that the duplicative BNA be set aside. Because this issue turns on the pure legal question of whether the duplicative BNA is lawful, which the PRRB lacks authority to decide, Plaintiffs requested EJR in order to bring the issue before this Court.

44. The PRRB granted Plaintiffs' request for EJR on January 28, 2019. *See Exhibit A.*

45. The PRRB decided that it "is without the authority to decide the legal question of [whether] the Secretary incorrectly applied the outlier budget neutrality adjustment twice to the LTCH site neutral case payments for FFY 2019 as delineated in the August 17, 2018 Federal Register." **Exhibit A** at 7.

46. Pursuant to 42 U.S.C. § 1395oo(f)(1), this Complaint has been filed within 60 days of receipt by Plaintiffs of the PRRB's final decision in this case granting the Plaintiffs' request for EJR.

**THE LTCH PPS SITE NEUTRAL BUDGET NEUTRALITY ADJUSTMENT
MUST BE SET ASIDE**

47. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 47 above as if fully stated herein.

48. CMS' decision in the FY 2019 IPPS/LTCH PPS Final Rule (83 Fed. Reg. at 41737-38) to apply a negative 5.1 percent outlier budget neutrality adjustment twice to LTCH PPS site neutral case payments is reviewable by this Court pursuant to the provisions of the Medicare Act, 42 U.S.C. § 1395oo(f), and the APA, 5 U.S.C. § 706. CMS' decision to apply this duplicable budget neutrality adjustment is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, is unsupported by substantial evidence, and violates the APA's notice and comment rulemaking requirements, for the following reasons, among others:

(a) **The BNA Is Arbitrary and Capricious Because CMS Did Not Account For the Budget Neutrality Adjustments Already Included in the IPPS Comparable Amount**

CMS' promulgation of the duplicative BNA is a textbook violation of the Administrative Procedure Act's arbitrary and capricious standard. For several reasons, it is very clearly "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). First, the duplicative budget neutrality adjustment is arbitrary and capricious because it is unreasonable. It is not reasonable for CMS to apply a 5.1 percent budget neutrality adjustment to the LTCH site neutral payment rate to offset the cost of high cost outlier payments *after* CMS already applied the same 5.1 percent budget neutrality adjustment to the IPPS payment rate. CMS uses the IPPS payment rate, as reduced by the budget neutrality adjustments of 5.1 percent, to determine the LTCH site neutral payment rate. It was not reasonable for CMS to ignore the budget neutrality adjustments already included in the IPPS comparable per diem amount (which is the basis for the LTCH site neutral payment rate in most cases) when adopting the additional BNA. Under a reasonable approach, CMS would have *either* applied the negative 5.1 percent budget neutrality adjustments to the IPPS rate when calculating the LTCH site neutral payment rate, *or* applied the separate negative 5.1 percent BNA to that calculation, *but not both*. Instead of adopting either of these approaches, CMS used both,

resulting in a *negative 10.2 percent adjustment* to the LTCH site neutral payment rate—*double* the amount needed to maintain budget neutrality.

Second, the duplicative budget neutrality adjustment is arbitrary and capricious because “the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). CMS’ refusal to seriously consider whether the adjustment is duplicative shows that the agency has not taken a “hard look” to ensure that the math behind the calculation of the budget neutrality adjustment is valid. A serious examination of the way the IPPS comparable per diem amount is calculated for LTCH site neutral payments would reveal the fact that this extra LTCH budget neutrality adjustment results in underpayments to LTCHs and a savings for the Medicare program.

Third, the duplicative budget neutrality adjustment is arbitrary and capricious because CMS’ reasoning is “internally inconsistent.” CMS chose to make the LTCH site neutral outlier policy identical to the IPPS outlier policy, but CMS then decided to add an extra budget neutrality adjustment to LTCH site neutral payments. CMS’ LTCH PPS outlier policies are also “internally inconsistent” because LTCH PPS standard rate payments are subject to a single outlier budget neutrality adjustment, yet CMS applies two budget neutrality adjustments to the site neutral payment rate. Moreover, the BNA is “internally inconsistent” because it reduces aggregate payments to LTCHs and is therefore contrary to the intent of budget neutrality. Finally, the duplicative BNA is arbitrary and capricious because it reflects a clear error of judgment when CMS ignored evidence that the IPPS comparable per diem amount for LTCH site

neutral payment cases already includes a 5.1 percent budget neutrality adjustment to offset the cost of LTCH outlier cases. CMS continued setting the LTCH site neutral payment rate based upon an erroneous calculation that includes double the budget neutrality adjustment for HCO payments, even after MedPAC, the Plaintiffs, and others repeatedly brought the error to CMS' attention.

(b) **CMS' Decision to Apply a Second Outlier Budget Neutrality Adjustment to the LTCH Site Neutral Payment Rate is Not Supported by Substantial Evidence**

Pursuant to 5 U.S.C. § 706(2)(E) of the APA, a reviewing court is required to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute.” 5 U.S.C. § 706(2)(E). CMS claims that this second budget neutrality adjustment is necessary “to ensure estimated HCO payments payable for site neutral payment rate cases in FY 2019 would not result in any increase in estimated aggregate FY 2019 LTCH PPS payments” FY 2019 IPPS/LTCH PPS Final Rule, 83 Fed. Reg. at 41737. However, CMS offers no evidence in the rulemaking record in support of its claim that this second budget neutrality adjustment is *not* duplicative of the adjustment already applied to the IPPS payment rate used to determine the IPPS comparable per diem amount for LTCH site neutral cases. Instead, the evidence in the rulemaking record confirms that CMS is applying multiple outlier budget neutrality adjustments to the LTCH site neutral payment rate that serve the same purpose.

(c) **CMS Violated the APA's Notice and Comment Rulemaking Requirements When CMS Did Not Provide a Sufficient Response to Comments Raising Major Issues Regarding the Duplicative BNA in the FY 2019 IPPS/LTCH PPS Final Rule**

In addition to the substantive deficiencies with CMS' adoption of the site neutral budget neutrality adjustment, CMS' nominal response to comments in the FY 2019 IPPS/LTCH PPS Final Rule also violates the procedural requirements for notice and comment rulemaking at section 553(c) of the APA. The APA requires that the agency's response to comments, the basis and purpose statement, "must identify 'what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.'" *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985) (citing *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). Here, CMS' three sentence response to commenters in the FY 2019 IPPS/LTCH PPS Final Rule shows that the agency is disregarding major issues with the budget neutrality adjustment raised by commenters. CMS' response to comments did not attempt to explain why the BNA is not duplicative. CMS only responded that it "continue[s] to disagree with the commenters that a budget neutrality adjustment for site neutral payment rate HCO payments is inappropriate, unnecessary, or duplicative" and referred readers to CMS' responses in prior years. 83 Fed. Reg. at 41738. There was no effort by CMS to develop a substantive response to the commenters and explain why the BNA is not duplicative of the adjustment already applied to the IPPS payment rate used to determine the IPPS comparable per diem amount for LTCH site neutral cases. In sum, CMS did not even attempt to explain why commenters' criticisms of the budget neutrality adjustment were invalid. CMS' lack of a reasoned response to comments regarding the duplicative nature of the BNA therefore violates the procedural requirements for notice and comment rulemaking at section 553(c) of the APA.

(d) **There Was No Congressional Approval or Ratification of the Duplicative BNA**

Congress did not specifically require a budget neutrality adjustment in the PSRA. Congress did include a reference to the short stay outlier policy at 42 C.F.R. § 412.529(d)(4) for

calculating the IPPS comparable per diem amount. 42 U.S.C. § 1395ww(m)(6)(B)(ii)(I) (SSA § 1886(m)(6)(B)(ii)(I)). Congress also specified that the site neutral payment rate based on the IPPS comparable per diem amount must include high cost outlier payments under 42 C.F.R. § 412.525. *Id.* However, neither the statute itself, nor the referenced short stay outlier regulation (42 C.F.R. § 412.529(d)(4)), specifically requires a budget neutrality adjustment. Not only is there no Congressional authorization of the BNA in the statute, but there is no subsequent action from Congress ratifying the duplicative BNA. There have been some isolated amendments to the LTCH site neutral statutory provisions of the SSA, but there has been no re-enactment by Congress of the LTCH site neutral payment provisions to argue that Congress ratified CMS' duplicative BNA. Moreover, Congress has not implicitly ratified CMS' duplicative BNA because there is no evidence that Congress is familiar with CMS' duplicative BNA.

(e) **CMS' Duplicative BNA Violates the Social Security Act and Other Federal Laws**

CMS' decision to apply a second outlier budget neutrality adjustment to the LTCH site neutral payment rate violates several provisions of the SSA and other pieces of legislation. First, the adjustment violates section 307 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 ("BIPA"), Pub. L. No. 106-554, 114 Stat. 2763 (2000). This section states that the Secretary "may provide for appropriate adjustment to the long-term hospital payment system." BIPA § 307(b)(1). The duplicative budget neutrality adjustment that CMS applies to the LTCH site neutral payment rate is not an "appropriate adjustment" because budget neutrality was already accomplished by the 5.1% outlier budget neutrality adjustment from IPPS rate setting that CMS uses to calculate the IPPS comparable per diem amount for LTCH site neutral payments. Second, the adjustment is contrary to the SSA's authorization of only two payment rates for LTCH cases, the standard federal payment rate and the site neutral

payment rate. SSA § 1886(m)(6). CMS' implementation of the new dual-rate structure violates SSA section 1886(m)(6) because CMS has decided to pay LTCH site neutral cases a rate that is contrary to the statute. Finally, the unwarranted budget neutrality adjustment violates the SSA's prohibition on cost-shifting. The Social Security Act prohibits CMS from shifting Medicare costs to non-beneficiaries (*i.e.*, "cost-shifting"). 42 U.S.C. § 1395x(v)(1)(A) (SSA § 1861(v)(1)(A)). CMS' decision to apply a second outlier budget neutrality adjustment to the LTCH site neutral payment rate violates the statutory prohibition on cost-shifting under 42 U.S.C. § 1395x(v)(1)(A)(i) because it results in Medicare costs being shifted to non-Medicare beneficiaries. Applying this duplicative budget neutrality adjustment reduces aggregate LTCH payments by approximately \$28 million per year.³² This is a windfall for the Medicare program that violates the Social Security Act's cost-shifting prohibition.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

49. For an order setting aside the duplicative negative 5.1 percent outlier budget neutrality adjustment that CMS applies to LTCH PPS site neutral case payments pursuant to the FY 2019 IPPS/LTCH PPS Final Rule (83 Fed. Reg. at 41737-38);

50. For an order requiring the Secretary to reimburse Plaintiffs for the Medicare payments that CMS withheld from Plaintiffs during FFY 2019 as a result of the duplicative 5.1 percent outlier budget neutrality adjustment, which in the aggregate totals approximately \$9,388,544, before interest, fees and other costs;

51. For an order directing the Secretary to remove the duplicative BNA from all LTCH PPS site neutral payments made by CMS in FFYs 2016 through 2018;

³² American Hospital Association, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 6.

52. For an order directing the Secretary not to apply the duplicative BNA to LTCH PPS site neutral payments in FFY 2020 and later years;

53. That the Court award Plaintiffs prejudgment interest to which they are entitled to as a matter of right under 42 U.S.C. § 1395oo(f)(2);

54. That the court award Plaintiffs' costs and legal fees pursuant to 28 U.S.C. § 2412; and

55. That the Court grant to Plaintiffs such other and further relief that the Court deems proper.

Dated: March 13, 2019

Respectfully submitted,

/s/ Jason M. Healy

Jason M. Healy (D.C. Bar No. 468569)

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EXHIBIT A



DEPARTMENT OF HEALTH & HUMAN SERVICES

Provider Reimbursement Review Board
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Baltimore, MD 21207
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Electronic Mail

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RE: Expedited Judicial Review Determination

- 19-0407GC LifeCare Health Partners FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
- 19-0408GC Post Acute Medical FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
- 19-0409GC Kindred Healthcare FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
- 19-0410GC Vibra Healthcare FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group

Dear Mr. Healy:

The Provider Reimbursement Review Board (Board) has reviewed the Providers' hearing request and request for expedited judicial review (EJR) that was submitted on November 20, 2018 (received November 21, 2018). When the original hearing request was received, it was noted that it was submitted as one large group appeal containing the four healthcare corporations identified above. The Board sent you a development letter on December 12, 2018, and advised that the group appeal was filed as an invalid optional group appeal that violated 42 C.F.R. § 405.1837(b), and that the Board has established four common issue related party (CIRP) groups (identified above). You were instructed to submit a Schedule of Providers with the associated jurisdictional documentation for each group, along with a copy of the EJR request and exhibits for each group. This request for additional information affected the 30-day period to respond to the EJR.¹ The requested information was submitted on January 3, 2019. The Board has subsequently reviewed the request for EJR and the Schedules of Providers and associated jurisdictional documents. The determination regarding EJR is set forth below.

¹ See 42 C.F.R. § 405.1842(b)(2), (e)(2)(i) and (e)(3)(ii).

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Issue under Appeal

The issue under appeal in these cases is:

Whether the Centers for Medicare & Medicaid Services (“CMS”) incorrectly applied the negative 5.1 percent outlier budget neutrality adjustment twice to Long-Term Care Hospital Prospective Payment System (“LTCH PPS”) site neutral case payments in violation of the Administrative Procedure Act (“APA”), the Social Security Act (“SSA”), and other federal laws.²

Background

The LTCH PPS was established through Section 123 of the Medicare, Medicaid, and SCHIP (State Children’s Health Insurance Program) Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) as amended by section 307(b) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554). These statutes provided for payment for both the operating and capital-related costs of hospital inpatient stays in LTCHs under Medicare Part A based on prospectively set rates. The Medicare prospective payment system (PPS) for LTCHs applies to hospitals that are described in section 42 U.S.C. § 1395ww(d)(1)(B)(iv) and is effective for cost reporting periods beginning on or after October 1, 2002. The LTCH PPS replaced the reasonable cost-based payment system that had been established under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).³

To be classified as a LTCH, a hospital must have an average length of stay greater than 25 days.⁴ In the Federal Fiscal Year (FFY) 2008 final rule, the Secretary adopted the use of the Medicare severity long term care diagnosis related groups (MS-LTC-DRGs) which are assigned to each patient discharged from a LTCH as the basis for payment. The payment amount for each MS-LTC-DRG is intended to reflect the average cost of treating a Medicare patient assigned to an MS-LTC-DRG.⁵ Weights are assigned to MS-LTC-DRGs on an annual basis that are multiplied against a Federal standardized rate⁶ to arrive at a payment for the discharged patient after taking other adjustments into consideration.⁷

Site Neutral Payment

For LTCH Part A discharges for cost report periods beginning on or after October 1, 2015 (FFY 2016), Congress established a new dual-rate payment structure for LTCH PPS hospitals, with

² Providers’ EJRs requests at 1.

³ 80 Fed. Reg. 49,326, 49,599 (August 17, 2015).

⁴ 42 C.F.R. § 412.23(e)(2).

⁵ 72 Fed. Reg. 47,130, 47,278 (August 22, 2007).

⁶ The standardized rate is the average standardized charge for each DRG that is calculated by summing the charges for all cases in the DRG and dividing that amount by the number of cases classified in the DRG. *See* Medicare Hospital Prospective Payment System How DRG Rates Are Calculated and Updated (Office of the Inspector General, Report OEI-09-00-00200 (Aug. 2001)) on the internet at <https://oig.hhs.gov/oei/reports/oei-09-00-00200.pdf>.

⁷ *See* 42 C.F.R. §§ 412.515, 412.521.

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two distinct payment rates.⁸ The first payment rate is the LTCH PPS standard Federal payment rate.⁹ This rate only applies to discharges that meet one of two patient criteria: 3 or more days in a subsection(d) hospital¹⁰ intensive care unit or LTCH ventilator services of at least 96 hours and a principle diagnosis that is not psychiatric or rehabilitation.¹¹ All other LTCH discharges are reimbursed at the site neutral payment rate which is the lesser of the IPPS comparable per diem amount (including applicable outlier payments) or 100 percent of the estimated services involved.¹²

LTCH are transitioning to the new LTCH PPS dual rate with a blended payment rate that applies to site neutral case discharges in cost reporting periods beginning on or after October 1, 2015 (FFY 2016) and on or before September 30, 2019 (FFY 2019).¹³ During this transition period, the blended payment rate for site neutral cases is equal to one-half of the site neutral payment rate and one-half of the LTCH PPS standard Federal payment rate.¹⁴ Beginning on October 1, 2019 (FFY 2020), site neutral cases will be paid at 100 percent of the site neutral payment rate.

High Cost Outlier Payments

Both the standard Federal payment rate and the site neutral payment rates include additional payments for high cost outliers (HCO) that have extraordinarily high costs relative to most discharges. For cases paid under the Federal payment rate, the HCO outlier rate is set annually by the Secretary. LTCH cases that are paid under the site neutral basis receive outlier payments that equal 80% of the estimated cost of the case above the HCO threshold which is the sum of the LTCH PPS payment for the case and the applicable fixed-loss amount for such case.¹⁵ The calculation of the site neutral payment cases is separate from the standard LTCH Federal payment rate cases.¹⁶ For LTCH site neutral cases, the HCO threshold is the site neutral payment rate for the case plus the IPPS fixed loss amount.

Budget Neutrality Adjustment

The site neutral payment rate for LTCH was first implemented in FFY 2016 through the IPPS¹⁷/LTCH PPS rulemaking. In the 2016 IPPS/LTCH PPS Final Rule, the Secretary adopted a budget neutrality factor adjustment for the site neutral portion of the LTCH site neutral blended payment rate.¹⁸ The Secretary stated that this budget neutrality adjustment was necessary “to ensure that estimated HCO payments payable to site neutral payment rate cases in [FFY] 2016 do not result in any increase in estimated aggregate FY 2016 LTCH PPS payments.”¹⁹ The

⁸ See generally 80 Fed. Reg. 24,323, 24,525-24,553 (April 30, 2015) and 80 Fed. Reg. 49,436, 49,599-49,623 (Aug. 17, 2017).

⁹ 42 U.S.C. § 1395ww(m)(6)(A)(ii) and 42 C.F.R. § 412.522(b).

¹⁰ 42 U.S.C. § 1395ww(d).

¹¹ 42 U.S.C. § 1395ww(m)(6)(A)(ii), (iii), (iv).

¹² *Id.* at § 1395ww(m)(6)(B)(ii) and 42 C.F.R. § 412.522(a).

¹³ *Id.* at § 1395ww(m)(6)(B)(i)(I).

¹⁴ *Id.* at § 1395ww(m)(6)(B)(ii).

¹⁵ 42 C.F.R. § 412.525(a)(3). See also 83 Fed. Reg. 41,144, 41,734 (August 17, 2018).

¹⁶ See e.g. 80 Fed. Reg. at 49,804.

¹⁷ Inpatient Prospective Payment System.

¹⁸ 80 Fed. Reg. at 49,805.

¹⁹ *Id.*

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budget neutrality adjustment reduced the LTCH site neutral payment rate amount by 5.1 percent.²⁰ In the same final rule, the Secretary also finalized high cost outlier budget neutrality adjustment of 5.1 percent to the IPPS operating and capital standardized amounts.²¹ The IPPS payment rate, as reduced by the IPPS outlier budget neutrality adjustment, is used to determine the IPPS comparable per diem amount under the LTCH PPS site neutral payment rate discussed above.

Providers' Position

The Providers explain that during the comment period for the FFY 2016 LTCH PPS rulemaking, the Providers and other stakeholders submitted comments objecting to the budget neutrality adjustment to both the site neutral high cost outlier payments and the operating standardized amount. The Providers believe that proposed budget neutrality adjustment (BNA) was duplicative of the outlier budget neutrality adjustment already applied to the IPPS payment rate. The American Hospital Association (AHA) explained that they believed that:

[T]he inpatient PPS rates used as the basis for the site-neutral payment rates are already subject to a BNA for the inpatient PPS's 5.1 percent outlier pool. However, within the LTCH payment framework, CMS [the Centers for Medicare & Medicaid Services] proposes a second BNA of 2.3²² percent for the site neutral outlier pool. CMS's rationale for this second BNA is to ensure that the site-neutral HCO payments do not increase aggregate LTCH PPS payments. However, we strongly disagree that the additional 2.3 percent BNA is necessary to achieve this goal; rather, it was already achieved when the 5.1 percent BNA was applied to the inpatient PPS rates used as the basis for the site neutral rates. We recommend that CMS calculate standard LTCH PPS and site neutral rates separately, without any co-mingling of these payments, as mentioned previously. Furthermore, the second BNA prevents LTCH site-neutral payments from aligning with inpatient PPS payments for the associated MS-DRGs and MS-LTCH-DRGs, which would counter the goals of BiBA [Bipartisan Budget Act of 2015].²³

In response to this and other comments, in the FFY 2016 Final rule the Secretary stated that she disagreed with the commenters statements that a budget neutrality adjustment for the site neutral

²⁰ *Id.*

²¹ *Id.* at 49,785.49,794-95.

²² See Providers' EJR requests at 8, Fnt. 6. See also *Id.* at 49,785.49,794-95. (The AHA's 2016 comment letter references at 2.3 percent budget neutrality adjustment. CMS initially proposed a 2.3 percent adjustment in the FY 2016 Proposed Rule because CMS planned to apply a budget neutrality adjustment to all LTCH PPS payments. FY 2016 IPPS/LTCH PPS Proposed Rule, 80 Fed. Reg. 23,324, 24,649 (Apr. 30, 2015). However, in the FY 2016 Final Rule, CMS decided that it would instead apply a 5.1 percent adjustment only to the site neutral portion of the blended rate.)

²³ Providers' EJR Request at 8.

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payment rate HCO payments is unnecessarily duplicative and declined to adopt the commenters recommendations. The Secretary explained that:

While the commenters are correct that the IPPS base rates that are used in site neutral payment rate calculation include a budget neutrality adjustment for IPPS HCO payments, that adjustment is merely a part of the calculation of one of the inputs (that is, the IPPS base rates) that are used in the LTCH PPS computation of site neutral payment rate. The HCO budget neutrality factor that is applied in determining the IPPS base rates is intended to fund estimated HCO payment made under the IPPS, and is therefore determined based on estimated payments made under the IPPS. As such, the HCO budget neutrality factor that is applied to the IPPS base rates does not account for the additional HCO payments that would be made to site neutral payment rate cases under the LTCH PPS. Without a budget neutrality adjustment when determining payment for a case under the LTCH PPS, any HCO payment payable to site neutral payment rate cases would increase aggregate LTCH PPS payments above the level of expenditure if there were no HCO payments for site neutral payment rate cases. Therefore, our proposed approach appropriately results in LTCH PPS payments to site neutral payment rate cases that are budget neutral relative to a policy with no HCO payments to site neutral payment rate cases.²⁴

These types of comments continued in subsequent Federal Register notices through the current Federal fiscal year. The Providers had hoped that the Secretary would corrected the alleged error before the end of the LTCH site neutral transition period on September 30, 2019. In FFY 2020, the entire payment for site neutral cases will be lesser of the IPPS comparable per diem amount or 100 percent of the estimated cost of the case.²⁵ The Providers explain that if the Secretary continues to insist on applying the duplicative outlier budget neutrality adjustment in FFY 2020, the adjustment will apply to the entire site neutral payment. The Providers believe that LTCH's have already experienced a significant reduction in payments for site neutral cases and that applying a budget neutrality adjustment twice to site neutral payments only increases the financial pressure on these facilities.

The Providers are disputing the application of a budget neutrality adjustment to LTCH site neutral case payments that reduces the payments below what they would otherwise be in the absence of HCO payments for qualifying site neutral cases. They contend this is not budget neutrality, rather it is a payment cut that is arbitrary and unsupported. They argue that the Secretary set the target amount of the LTCH HCO payments at 5.1% of total site neutral payments, but the extra budget neutrality adjustment reduces the total LTCH site neutral payments by another 5.1%.²⁶ The Providers assert that this action is arbitrary and capricious, an

²⁴ 80 Fed. Reg. at 49,622.

²⁵ 42 U.S.C. § 1395ww(m)(6)(B)(i)-(ii).

²⁶ Providers' EJR requests at 19.

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abuse of discretion and not in accordance with the Administrative Procedure Act, the Social Security Act and the laws authorizing the LTCH PPS and not supported by substantial evidence.

The Providers believe EJR is appropriate because the Board has jurisdiction over the appeals and lacks the authority to decide the legal question in these cases. There are no material facts in dispute and the challenge here is whether the budget neutrality adjustment violates the dual-rate structure of the LTCH PPS in the SSA and exceeds the Secretary's authority under the authorizing legislation for LTCH PPS.²⁷ The Providers believe that the duplicative budget neutrality adjustment is arbitrary and capricious and violates the APA.

Decision of the Board

Under the Medicare statute codified at 42 U.S.C. § 1395oo(f)(1) and the regulations at 42 C.F.R. § 405.1842(f)(1) (2016), the Board is required to grant a provider's EJR request if it determines that: (i) the Board has jurisdiction to conduct a hearing on the specific matter at issue; and (ii) the Board lacks the authority to decide a specific legal question relevant to the specific matter at issue because the legal question is a challenge either to the constitutionality of a provision of a statute or to the substantive or procedural validity of a regulation or CMS Ruling.

The Board has determined that the participants involved with the instant EJR requests which appealed from the issuance of the August 17, 2018 Federal Register^{28, 29} are timely filed. In addition, the participants' documentation shows that the estimated amount in controversy exceeds \$50,000, as required for a group appeal.³⁰ The estimated amount in controversy is subject to recalculation by the Medicare contractor for the actual final amount in each case.

Board's Decision Regarding the EJR Request

The Board finds that:

- 1) It has jurisdiction over the matter for the subject year and the Providers in these appeals are entitled to a hearing before the Board;
- 2) Based upon the remaining Providers' assertions regarding whether the Secretary incorrectly applied the outlier budget neutrality adjustment

²⁷ *Id.* at 28.

²⁸ In accordance with the Administrator's decision in District of Columbia Hospital Association Wage Index Group Appeal, (HCFA Adm. Dec. January 15, 1993) Medicare & Medicaid Guide (CCH) ¶ 41, 025, the wage index notice published in the Federal Register is a final determination. Likewise, other rate notices published in the Federal Register can be considered final determinations.

²⁹ The Board notes that the participants in these group appeals have cost report periods beginning on or after January 1, 2016, which would subject their appeals to the newly-added 42 C.F.R. § 405.1873 and the related revisions to 42 C.F.R. § 413.24(j) regarding submission of cost reports. *See* 80 Fed. Reg. 70298, 70555-70604 (Nov. 13, 2015). However, the Board notes that § 405.1873(b) has not been triggered because neither party has questioned whether any Provider's cost report included an appropriate claim for the specific item under appeal. *See* 80 Fed. Reg. at 70,556.

³⁰ *See* 42 C.F.R. § 405.1837.

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twice to the LTCH site neutral case payments, there are no findings of fact for resolution by the Board;

- 3) It is bound by the applicable existing Medicare law and regulation (42 C.F.R. § 405.1867); and
- 4) It is without the authority to decide the legal question of the Secretary incorrectly applied the outlier budget neutrality adjustment twice to the LTCH site neutral case payments for FFY 2019 as delineated in the August 17, 2018 Federal Register.

Accordingly, the Board finds that the question of whether the Secretary incorrectly applied the outlier budget neutrality adjustment twice to the LTCH site neutral case payments properly falls within the provisions of 42 U.S.C. § 1395oo(f)(1) and hereby grants the Providers' requests for EJR for the issue and the subject year. The Providers have 60 days from the receipt of this decision to institute the appropriate action for judicial review. Since this is the only issue under appeal the Board hereby closes the cases.

Board Members Participating:

Clayton J. Nix, Esq.
Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A
Robert A. Evarts, Esq.
Susan A. Turner, Esq.

For the Board:

1/28/2019

 Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: Clayton J. Nix -A

Enclosures: Schedules of Providers

cc: Bill Tisdale, Novitas Solutions (Electronic Mail w/Schedules of Providers)
Bruce Synder, Novitas Solutions (Electronic Mail w/Schedules of Providers)
Byron Lamprecht, WPS (Electronic Mail w/Schedules of Providers)
Wilson Leong, FSS (Electronic Mail w/Schedules of Providers)

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Schedule of Providers

JAN 03 2019

Date Prepared: 12/13/2018

Case Number: 19-0407GC
 Group Case Name: LifeCare Health Partners FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
 Group Representative: Jason M. Healy
 Lead MAC Name/Code: Novitas Solutions (JH)
 Issue Title: Whether CMS incorrectly applied a -5.1% high-cost outlier: budget neutrality adjustment twice to LTCH site neutral case payments.

PROVIDER REIMBURSEMENT
 REVIEW BOARD

#	Provider Number	Provider Name / Provider Location (City, State)	Appealed Period (and impacted CRPs)	MAC Name / MAC Code	Date of Final Determination	Date of Appeal Request / Add Issue	Number of Days	Audit Adjustment Number	Amount in Controversy	Prior Case Number(s)	Date of Direct Add or Transfer
1	39-2048	LifeCare Hospitals of Chester County West Chester, PA	3/31/19 & 3/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$43,034		11/21/2018
2	36-2028	LifeCare Hospitals of Dayton Dayton, OH	3/31/19 & 3/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$27,187		11/21/2018
3	06-2012	Colorado Acute Long Term Hospital Denver, CO	8/31/19 & 8/31/20	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$97,207		11/21/2018
4	52-2007	LifeCare Hospitals of Wisconsin Pewaukee, WI	12/31/18 & 12/31/19	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$47,405		11/21/2018
5	34-2013	LifeCare Hospitals of North Carolina Rocky Mount, NC	2/28/19 & 2/28/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$84,337		11/21/2018
6	45-2044	LifeCare Hospitals of Dallas Dallas, TX	12/31/18 & 12/31/19	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$286,137		11/21/2018
7	39-2024	LifeCare Hospitals of Pittsburgh Pittsburgh, PA	12/31/18 & 12/31/19	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$90,077		11/21/2018
8	10-2018	Complex Care Hospital at Ridgeland Sarasota, FL	5/31/19 & 5/31/20	Palmetto (JJ)	8/17/2018	11/21/2018	96	n/a	\$37,062		11/21/2018
9	45-2059	LifeCare Hospitals of San Antonio San Antonio, TX	8/31/19 & 8/31/20	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$72,205		11/21/2018
10	19-2011	LifeCare Hospitals of Shreveport Shreveport, LA	8/31/19 & 8/31/20	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$263,455		11/21/2018
11	29-2004	Tahoe Pacific Hospitals - Meadows Reno, NV	8/31/19 & 8/31/20	Neridian (JB)	8/17/2018	11/21/2018	96	n/a	\$69,404		11/21/2018
12	25-2006	Complex Care Hospital at Tonaya Las Vegas, NV	8/31/19 & 8/31/20	Neridian (JB)	8/17/2018	11/21/2018	96	n/a	\$134,520		11/21/2018
									Total:		\$1,252,830

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RECEIVED JAN 03 2019 Date Prepared: 12/13/2018 PROVIDER REIMBURSEMENT REVIEW BOARD											
Case Number: 19-0407GC Group Case Name: Post Acute Medical FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group Group Representative: Jason M. Healy Lead MAC Name/Code: Novitas Solutions (JL) Issue Title: Whether CMS incorrectly applied a -5.1% high-cost outlier budget neutrality adjustment twice to LTCH site neutral case payments.											
#	Provider Number	Provider Name / Provider Location (City, State)	Appealed Period (and impacted CRPs)	MAC Name / MAC Code	Date of Final Determination	Date of Appeal Request / Add Issue	Number of Days	Audit Adjustment Number	Amount in Controversy	Prior Case Number(s)	Date of Direct Add or Transfer
1	45-2086	PAM Specialty Hospital of Corpus Christi North Corpus Christi, TX	8/31/19 & 8/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$35,306		11/21/2018
2	45-2092	PAM Specialty Hospital of Corpus Christi South Corpus Christi, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$166,617		11/21/2018
3	19-2048	PAM Specialty Hospital of Covington Covington, LA	12/31/18 & 12/31/19	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$160,179		11/21/2018
4	19-2036	PAM Specialty Hospital of Hammond Hammond, LA	12/31/18 & 12/31/19	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$105,703		11/21/2018
5	45-2031	PAM Specialty Hospital of Lufkin Lufkin, TX	6/30/19 & 6/30/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$12,685		11/21/2018
6	45-2062	PAM Specialty Hospital of Luling Luling, TX	12/31/18 & 12/31/19	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$135,266		11/21/2018
7	52-2004	PAM Specialty Hospital of Milwaukee Greenfield, WI	8/31/19 & 8/31/20	WPS (J8)	8/17/2018	11/21/2018	96	n/a	\$59,945		11/21/2018
8	45-2106	PAM Specialty Hospital of New Braunfels New Braunfels, TX	9/30/19	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$122,322		11/21/2018
9	45-2090	PAM Specialty Hospital of San Antonio San Antonio, TX	8/31/19 & 8/31/20	Nacidian (JF)	8/17/2018	11/21/2018	96	n/a	\$59,800		11/21/2018
10	45-2061	PAM Specialty Hospital of Texarkana North Texarkana, TX	8/31/19 & 8/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$107,886		11/21/2018
11	37-2018	PAM Specialty Hospital of Tulsa Tulsa, OK	8/31/19 & 8/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$141,433		11/21/2018
12	45-2094	PAM Specialty Hospital of Victoria North Victoria, TX	12/31/18 & 12/31/19	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$71,455		11/21/2018
13	45-2056	PAM Specialty Hospital of Victoria South Victoria, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$36,586		11/21/2018
14	39-2025	PAM Specialty Hospital of Wilkes-Barre Wilkes-Barre, PA	8/31/19 & 8/31/20	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$75,086		11/21/2018
Total:									\$1,291,270		

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Case Number: 19-0410GC
 Group Case Name: Vibra Healthcare FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
 Group Representative: Jason M. Healy
 Lead MAC Name/Code: Wisconsin Physicians Service (JS)
 Issue Title: Whether CMS incorrectly applied a -1.1% high-cost outlier budget neutrality adjustment twice to LTCH site neutral case payments.

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#	Provider Number	Provider Name / Provider Location (City, State)	Appealed Period (and impacted CRFs)	MAC Name / MAC Code	Date of Final Determination	Date of Appeal Request / Add Issue	Number of Days	Audit Adjustment Number	Amount in Controversy	Prior Case Number(s)	Date of Direct Add or Transfer
1	05-2043	Kentfield Hospital Kentfield, CA	5/30/19 & 6/30/20	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$37,821		11/21/2018
2	22-2043	Vibra Hospital of Southeastern Massachusetts New Bedford, MA	12/31/18 & 12/31/19	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$61,661		11/21/2018
3	06-2014	Vibra Hospital of Denver Thornton, CO	8/31/19 & 8/31/20	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$29,096		11/21/2018
4	05-2047	Vibra Hospital of Northern California Redding, CA	12/31/18 & 12/31/19	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$120,298		11/21/2018
5	45-2097	Vibra Hospital of DeSoto DeSoto, TX	7/31/19 & 7/31/20	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$172,024		11/21/2018
6	38-2004	Vibra Specialty Hospital of Portland Portland, OR	1/31/19 & 1/31/20	Noridian (JF)	8/17/2018	11/21/2018	96	n/a	\$32,305		11/21/2018
7	23-2019	Vibra Hospital of Southeastern Michigan Lincoln Park, MI	5/31/19 & 5/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$137,634		11/21/2018
8	05-2044	Vibra Hospital of San Diego San Diego, CA	3/31/19 & 3/31/20	Novitas (JL)	8/17/2018	11/21/2018	96	n/a	\$126,793		11/21/2018
9	15-2027	Vibra Hospital of Fort Wayne Fort Wayne, IN	10/31/18 & 10/31/19	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$26,509		11/21/2018
10	15-2028	Vibra Hospital of Northwestern Indiana Crown Point, IN	10/31/18 & 10/31/19	WPS (J6)	8/17/2018	11/21/2018	96	n/a	\$78,300		11/21/2018
11	26-2023	Vibra Hospital of Mahoning Valley Boardman, OH	10/31/18 & 10/31/19	WPS (J8)	8/17/2018	11/21/2018	96	n/a	\$32,105		11/21/2018
12	13-2002	Vibra Hospital of Boise Boise, ID	8/31/19 & 8/31/20	Noridian (JF)	8/17/2018	11/21/2018	96	n/a	\$93,058		11/21/2018
13	22-2046	Vibra Hospital of Western Massachusetts Springfield, MA	8/31/19 & 8/31/20	WPS (J8)	8/17/2018	11/21/2018	96	n/a	\$81,179		11/21/2018
14	42-2005	Vibra Hospital of Charleston Mt. Pleasant, SC	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$72,320		11/21/2018

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15	14-2014	Vibra Hospital of Springfield Springfield, IL	8/31/19 & 8/31/20	NGS (36)	8/17/2018	11/21/2018	96	n/a	\$37,574	CN 19-04106C 2018 11/21/2018
16	35-2305	Vibra Hospital of Central Dakotas Mandan, ND	7/31/19 & 7/31/20	WPS (15)	8/17/2018	11/21/2018	96	n/a	\$23,311	11/21/2018
17	35-2304	Vibra Hospital of Fargo Fargo, ND	7/31/19 & 7/31/20	WPS (15)	8/17/2018	11/21/2018	96	n/a	\$9,647	11/21/2018
18	45-2060	Vibra Hospital of Amarillo Amarillo, TX	7/31/19 & 7/31/20	WPS (15)	8/17/2018	11/21/2018	96	n/a	\$169,524	11/21/2018
19	05-2033	Vibra Hospital of Sacramento Folsom, CA	8/31/19 & 8/31/20	WPS (18)	8/17/2018	11/21/2018	96	n/a	\$10,650	11/21/2018
20	49-2009	Vibra Hospital of Richmond Richmond, VA	7/31/19 & 7/31/20	WPS (15)	8/17/2018	11/21/2018	96	n/a	\$31,855	11/21/2018
									Total:	\$1,374,064

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Case Number: 19-0409GC
 Group Case Name: Kindred Healthcare FY 2019 LTCH Site Neutral Outlier Budget Neutrality Adjustment Group
 Group Representative: Jason M. Healy
 Lead MAC Name/Code: Wisconsin Physicians Service (JS)
 Issue Title: Whether CMS incorrectly applied a -5.1% high-cost outlier budget neutrality adjustment twice to LTCH site neutral case payments.

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#	Provider Number	Provider Name / Provider Location (City, State)	Appealed Period (and impacted CRFs)	MAC Name / MAC Code	Date of Final Determination	Date of Appeal Request / Add Issue	Number of Days	Audit Adjustment Number	Amount in Controversy	Prior Case Number(s)	Date of Direct Add or Transfer
1	05-2032	Kindred Hospital Los Angeles Los Angeles, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$66,798		11/21/2018
2	05-2034	Kindred Hospital San Francisco Bay Area San Leandro, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$50,227		11/21/2018
3	05-2035	Kindred Hospital Westminster Westminster, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$110,670		11/21/2018
4	05-2036	Kindred Hospital San Diego San Diego, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$54,068		11/21/2018
5	05-2037	Kindred Hospital Ontario Ontario, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$26,237		11/21/2018
6	05-2038	Kindred Hospital La Mirada La Mirada, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$270,959		11/21/2018
7	05-2039	Kindred Hospital Brea Brea, CA	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$27,532		11/21/2018
8	05-2045	Kindred Hospital Baldwin Park Baldwin Park, CA	8/31/19 & 8/31/20	Noridian (JE)	8/17/2018	11/21/2018	96	n/a	\$130,674		11/21/2018
9	05-2049	Kindred Hospital Rancho Rancho Cucamonga, CA	8/31/19 & 8/31/20	Noridian (JE)	8/17/2018	11/21/2018	96	n/a	\$23,598		11/21/2018
10	05-2050	Kindred Hospital South Bay Gardena, CA	8/31/19 & 8/31/20	Noridian (JE)	8/17/2018	11/21/2018	96	n/a	\$99,647		11/21/2018
11	05-2052	Kindred Hospital Riverside Perris, CA	8/31/19 & 8/31/20	Noridian (JE)	8/17/2018	11/21/2018	96	n/a	\$28,298		11/21/2018
12	06-2009	Kindred Hospital Denver Denver, CO	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$22,119		11/21/2018
13	06-2013	Kindred Hospital Aurora Aurora, CO	8/31/19 & 8/31/20	WPS (JS)	8/17/2018	11/21/2018	96	n/a	\$8,407		11/21/2018
14	06-2015	Kindred Hospital Denver South Denver, CO	8/31/19 & 8/31/20	Novius Solutions (IL)	8/17/2018	11/21/2018	96	n/a	\$19,358		11/21/2018

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15	10-2009	Kindred Hospital Bay Area - Tampa Tampa, FL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$146,931	11/21/2018
16	10-2010	Kindred Hospital South Florida - Ft. Lauderdale Ft. Lauderdale, FL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$115,633	11/21/2018
17	10-2013	Kindred Hospital Central Tampa Tampa, FL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$162,562	11/21/2018
18	10-2015	Kindred Hospital North Florida Green Cove Springs, FL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$110,285	11/21/2018
19	10-2019	Kindred Hospital Ocala Ocala, FL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$45,135	11/21/2018
20	10-2025	Kindred Hospital The Palm Beaches Riviera Beach, FL	8/31/19 & 8/31/20	First Coast (FN)	8/17/2018	11/21/2018	96	n/a	\$35,884	11/21/2018
21	10-2027	Kindred Hospital Melbourne Melbourne, FL	8/31/19 & 8/31/20	CGS (J15)	8/17/2018	11/21/2018	96	n/a	\$21,173	11/21/2018
22	11-2010	Kindred Hospital Rome Rome, GA	8/31/19 & 8/31/20	Palmetto (J1)	8/17/2018	11/21/2018	96	n/a	\$77,070	11/21/2018
23	14-2006	Kindred Hospital Sycamore Sycamore, IL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$57,356	11/21/2018
24	14-2008	Kindred Hospital Chicago - Northlake Northlake, IL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$149,353	11/21/2018
25	14-2009	Kindred Hospital Chicago Central - Central Chicago, IL	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$115,859	11/21/2018
26	14-2013	Kindred Hospital Peoria Peoria, IL	8/31/19 & 8/31/20	NGS (J5)	8/17/2018	11/21/2018	96	n/a	\$26,180	11/21/2018
27	15-2007	Kindred Hospital Indianapolis Indianapolis, IN	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$44,402	11/21/2018
28	15-2012	Kindred Hospital Northwest Indiana Hammond, IN	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$73,630	11/21/2018
29	15-2013	Kindred Hospital Indianapolis North Indianapolis, IN	8/31/19 & 8/31/20	Novitas Solutions (IL)	8/17/2018	11/21/2018	96	n/a	\$40,350	11/21/2018
30	16-2001	Kindred Hospital Louisville Louisville, KY	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$58,737	11/21/2018
31	26-2016	Kindred Hospital St. Louis St. Louis, MO	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$69,026	11/21/2018
32	26-2018	Kindred Hospital Northland Kansas City, MO	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$43,082	11/21/2018
33	29-2002	Kindred Hospital Las Vegas - Sahara Las Vegas, NV	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$156,836	11/21/2018

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34	31-2020	Kindred Hospital New Jersey - Morris County Dover, NJ	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$112,972	11/21/2018
35	32-2002	Kindred Hospital Albuquerque Albuquerque, NM	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$7,373	11/21/2018
36	34-2012	Kindred Hospital Greensboro Greensboro, NC	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$104,373	11/21/2018
37	36-2020	Kindred Hospital Lima Lima, OH	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$47,632	11/21/2018
38	36-2033	Kindred Hospital Dayton Dayton, OH	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$36,983	11/21/2018
39	39-2027	Kindred Hospital Philadelphia Philadelphia, PA	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$75,000	11/21/2018
40	39-2046	Kindred Hospital South Philadelphia Philadelphia, PA	8/31/19 & 8/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$36,067	11/21/2018
41	44-2007	Kindred Hospital Chattanooga Chattanooga, TN	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$34,126	11/21/2018
42	45-2015	Kindred Hospital Dallas Dallas, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$138,511	11/21/2018
43	45-2016	Kindred Hospital San Antonio San Antonio, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$50,774	11/21/2018
44	45-2019	Kindred Hospital Mansfield Mansfield, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$113,059	11/21/2018
45	45-2023	Kindred Hospital Houston Medical Center Houston, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$128,792	11/21/2018
46	45-2028	Kindred Hospital Tarrant County - Arlington Arlington, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$462,791	11/21/2018
47	45-2039	Kindred Hospital Houston Northwest Houston, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$267,174	11/21/2018
48	45-2073	Kindred Hospital San Antonio Central San Antonio, TX	8/31/19 & 8/31/20	Novitas Solutions (JL)	8/17/2018	11/21/2018	96	n/a	\$47,991	11/21/2018
49	45-2074	Kindred Hospital Tomball Tomball, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$473,791	11/21/2018
50	45-2075	Kindred Hospital Clear Lake Webster, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$172,262	11/21/2018
51	45-2079	Kindred Hospital El Paso El Paso, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$81,572	11/21/2018
52	45-2080	Kindred Hospital Sugar Land Sugar Land, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$267,505	11/21/2018

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53	45-2088	Kindred Hospital Fort Worth Fort Worth, TX	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$102,745	11/21/2018	
54	45-2108	Kindred Hospital Dallas Central Dallas, TX	8/31/19 & 8/31/20	Novitas Solutions (JH)	8/17/2018	11/21/2018	96	n/a	\$129,013	11/21/2018	
55	50-2002	Kindred Hospital Seattle - Northgate Seattle, WA	8/31/19 & 8/31/20	WPS (J5)	8/17/2018	11/21/2018	96	n/a	\$82,598	11/21/2018	
									Total:	\$5,471,180	

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EXHIBIT B

Legal Name	Facility Name (d/b/a)	Address	Medicare Provider No.
New LifeCare Hospitals of Chester County LLC	LifeCare Hospitals of Chester County	400 East Marshall Street, West Chester, PA 19380	39-2048
New LifeCare Hospitals of Dayton LLC	LifeCare Hospitals of Dayton	4000 Miamisburg-Centerville Road, Miamisburg, OH 45342	36-2028
New NextCare Specialty Hospital of Denver LLC	Colorado Acute Long Term Hospital	1690 North Meade Street, Denver, CO 80204	06-2012
New LifeCare Hospitals of Milwaukee LLC	LifeCare Hospitals of Wisconsin	2400 Golf Road, Pewaukee, WI 53702	52-2007
New LifeCare Hospitals of North Carolina LLC	LifeCare Hospitals of North Carolina	1051 Noell Lane, Rocky Mount, NC 27804	34-2013
New LifeCare Hospitals of North Texas LLC	LifeCare Hospitals of Dallas	1950 Record Crossing Road, Dallas TX 75235	45-2044
New LifeCare Hospitals of Pittsburgh LLC	LifeCare Hospitals of Pittsburgh	225 Penn Avenue, Pittsburgh, PA 15221	39-2024
New LifeCare Hospitals of Sarasota LLC	Complex Care Hospital at Ridgelande	6150 Edgelake Drive, Sarasota, FL 34240	10-2018
New San Antonio Specialty Hospital LLC	LifeCare Hospitals of San Antonio	8902 Floyd Curl Drive, San Antonio, TX 78240	45-2059
New LifeCare Hospitals LLC	LifeCare Hospitals of Shreveport	8001 Youree Drive, Shreveport, LA 71105	19-2011
New LifeCare Hospitals of Northern Nevada LLC	Tahoe Pacific Hospitals - Meadows	10101 Double R Boulevard, Reno, NV 89521	29-2004
New LifeCare Hospital at Tenaya LLC	Complex Care Hospital at Tenaya	2500 North Tenaya Way, Las Vegas, NV 89128	29-2006
PAM Squared at Corpus Christi, LLC	PAM Specialty Hospital of Corpus Christi Bayfront	345 South Water Street, 3rd Floor, Corpus Christi, TX 78401	45-2086
Post Acute Specialty Hospital of Corpus Christi, LLC	PAM Specialty Hospital of Corpus Christi South	6226 Saratoga Boulevard, Corpus Christi, TX 78414	45-2092
PAM II of Covington, LLC	PAM Specialty Hospital of Covington	20050 Crestwood Boulevard, Covington, LA 70433	19-2048
Post Acute Specialty Hospital at Hammond, LLC	PAM Specialty Hospital of Hammond	42074 Veterans Avenue, Hammond, LA 70403	19-2036
PAM Specialty Hospital of Lufkin, LLC	PAM Specialty Hospital of Lufkin	1201 West Frank Avenue, 5th Floor, Lufkin, TX 75904	45-2031
Post Acute Medical at Luling, LLC	PAM Specialty Hospital of Luling	200 Memorial Drive, Luling, TX 78648	45-2062
Post Acute Specialty Hospital of Milwaukee, LLC	PAM Specialty Hospital of Milwaukee	5017 South 110th Street, Greenfield, WI 53228	52-2004
Post Acute Medical of New Braunfels, LLC	PAM Specialty Hospital of New Braunfels	1445 Hanz Drive, New Braunfels, TX 78130	45-2106
Warm Springs Specialty Hospital of San Antonio, LLC	PAM Specialty Hospital of San Antonio	5418 North Loop 1604 W, San Antonio, TX 78249	45-2090
PAM Squared at Texarkana, LLC	PAM Specialty Hospital of Texarkana North	2400 St. Michael Drive, 2nd Floor, Texarkana, TX 75503	45-2061
Post Acute Specialty Hospital of Tulsa	PAM Specialty Hospital of Tulsa	3219 South 79th East Avenue, Tulsa, OK 74145	37-2018
Post Acute Medical at Victoria, LLC	PAM Specialty Hospital of Victoria	102 Medical Drive, Victoria, TX 77904	45-2094
Post Acute Specialty Hospital of Victoria, LLC	PAM Specialty Hospital of Victoria North	506 East San Antonio Street, 3rd Floor, Victoria, TX 77901	45-2056
Post Acute Medical at Nanticoke, LLC	PAM Specialty Hospital of Wilkes-Barre	575 North River Street, 7th Floor, Wilkes-Barre, PA 18510	39-2025
THC - Orange County, LLC	Kindred Hospital Los Angeles	5525 West Slauson Avenue, Los Angeles, CA 90056	05-2032
THC - Orange County, LLC	Kindred Hospital San Francisco Bay Area	2800 Benedict Drive, San Leandro, CA 94577	05-2034
THC - Orange County, LLC	Kindred Hospital Westminster	200 Hospital Circle, Westminster, CA 92683	05-2035
THC - Orange County, LLC	Kindred Hospital San Diego	1940 El Cajon Boulevard, San Diego, CA 92104	05-2036
THC - Orange County, LLC	Kindred Hospital Ontario	550 North Monterey Avenue, Ontario, CA 91764	05-2037
Southern California Specialty Care, LLC	Kindred Hospital La Mirada	14900 E. Imperial Highway, La Mirada, CA 90638	05-2038
KND Development 52, LLC	Kindred Hospital Brea	875 North Brea Boulevard, Brea, CA 92821	05-2039
KND Development 55, LLC	Kindred Hospital Baldwin Park	14148 E. Francisquito Avenue, Baldwin Park, CA 91706	05-2045
KND Development 53, LLC	Kindred Hospital Rancho	10841 White Oak Avenue, Rancho Cucamonga, CA 91730	05-2049
KND Development 54, LLC	Kindred Hospital South Bay	1246 W. 155th Street, Gardena, CA 90247	05-2050
Kindred Hospitals West, LLC	Kindred Hospital Riverside	2224 Medical Center Drive, Perris, CA 92571	05-2052
SCCI Hospitals of America, LLC	Kindred Hospital Denver	1920 High Street, Denver, CO 80218	06-2009
KND Development 65, LLC	Kindred Hospital Aurora	700 Potomac St., 2nd Floor, Aurora, CA 80011	06-2013
Kindred Hospitals East, LLC	Kindred Hospital Denver South	2525 South Downing St., 3rd Floor, Denver, CO 80210	06-2015
Kindred Hospitals East, LLC	Kindred Hospital Bay Area - Tampa	4555 South Manhattan Avenue, Tampa, FL 33611	10-2009
Transitional Hospitals of Tampa, LLC	Kindred Hospital South Florida - Ft. Lauderdale	1516 East Las Olas Boulevard, Ft. Lauderdale, FL 33301	10-2010
Kindred Hospitals East, LLC	Kindred Hospital Central Tampa	4801 North Howard Avenue, Tampa, FL 33603	10-2013
Kindred Hospitals East, LLC	Kindred Hospital North Florida	801 Oak Street, Green Cove Springs, FL 32043	10-2015
Kindred Hospital Palm Beach, LLC	Kindred Hospital Ocala	1500 SW 1st Avenue, 5th Floor, Ocala, FL 34471	10-2019
Kindred Development 17, LLC	Kindred Hospital The Palm Beaches	5555 W. Blue Heron Boulevard, Riviera Beach, FL 33418	10-2025
The Specialty Hospital, LLC	Kindred Hospital Melbourne	765 West Nasa Boulevard, Melbourne, FL 32901	10-2027
	Kindred Hospital Rome	320 Turner McCall Blvd., Rome, GA 30165	11-2010

Legal Name	Facility Name (d/b/a)	Address	Medicare Provider No.
Kindred THC Chicago, LLC	Kindred Hospital Sycamore	225 Edward Street, Sycamore, IL 60178	14-2006
Kindred THC Chicago, LLC	Kindred Hospital Chicago - Northlake	365 East North Avenue, Northlake, IL 60164	14-2008
Kindred THC Chicago, LLC	Kindred Chicago Central Hospital	4058 West Melrose Street, Chicago, IL 60641	14-2009
Greater Peoria Specialty Hospital, LLC	Kindred Hospital Peoria	500 West Romeo B. Garrett Avenue, Peoria, IL 61605	14-2013
Kindred Hospitals Limited Partnership	Kindred Hospital Indianapolis	1700 West 10th Street, Indianapolis, IN 46222	15-2007
Triumph Hospital NW Indiana, LLC	Kindred Hospital Northwest Indiana	5454 Hohman Avenue, 5th Fl., Hammond, IN 46320	15-2012
KND Development 67, LLC	Kindred Hospital Indianapolis North	8060 Knue Road, Indianapolis, IN 46250	15-2013
Kindred Hospitals Limited Partnership	Kindred Hospital Louisville	1313 St. Anthony Place, Louisville, KY 40204	18-2001
Kindred Hospitals East, LLC	Kindred Hospital St. Louis	4930 Lindell Boulevard, St. Louis, MO 63108	26-2010
Northland LTACH, LLC	Kindred Hospital Northland	500 NW 68th Street, Kansas City, MO 64118	26-2018
Transitional Hospitals Corporation of Nevada, LLC	Kindred Hospital Las Vegas - Sahara	5110 West Sahara Avenue, Las Vegas, NV 89146	29-2002
Kindred Hospitals East, LLC	Kindred Hospital New Jersey - Morris County	400 W. Blackwell Street, Dover, NJ 07801	31-2020
Transitional Hospitals Corporation of New Mexico, LLC	Kindred Hospital Albuquerque	700 High Street, N.E., Albuquerque, NM 87102	32-2002
Kindred Hospitals East, LLC	Kindred Hospital Greensboro	2401 Southside Boulevard, Greensboro, NC 27406	34-2012
SCCI Hospitals of America, LLC	Kindred Hospital Lima	730 West Market Street, Lima, OH 45801	36-2020
Kindred Hospitals East, LLC	Kindred Hospital Dayton	707 S. Edwin C. Moses Boulevard, Dayton, OH 45417	36-2033
Kindred Hospitals East, LLC	Kindred Hospital Philadelphia	6129 Palmetto Street, Philadelphia, PA 19111	39-2027
SCCI Hospitals of America, LLC	Kindred Hospital South Philadelphia	1930 South Broad Street, Unit #12, Philadelphia, PA 19145	39-2046
Kindred Hospitals Limited Partnership	Kindred Hospital Chattanooga	709 Walnut Street, Chattanooga, TN 37402	44-2007
Kindred Hospitals Limited Partnership	Kindred Hospital Dallas	9525 Greenville Avenue, Dallas, TX 75243	45-2015
Kindred Hospitals Limited Partnership	Kindred Hospital San Antonio	3636 Medical Drive, San Antonio, TX 78229	45-2016
Kindred Hospitals Limited Partnership	Kindred Hospital Mansfield	1802 Highway 157 North, Mansfield, TX 76063	45-2019
Kindred Hospitals Limited Partnership	Kindred Hospital Houston Medical Center	6441 Main Street, Houston, TX 77030	45-2023
Transitional Hospitals Corporation of Texas, LLC	Kindred Hospital Tarrant County - Arlington	1000 North Cooper Street, Arlington, TX 76011	45-2028
THC - Houston, LLC	Kindred Hospital Houston Northwest	11297 Fallbrook Drive, Houston, TX 77065	45-2039
KND Development 68, LLC	Kindred Hospital San Antonio Central	1111 Dallas Street, 4th Floor, San Antonio, TX 78205	45-2073
Triumph Hospital of North Houston, LP	Kindred Hospital Tomball	505 Graham Drive, Tomball, TX 77375	45-2074
Triumph Hospital of East Houston, LP	Kindred Hospital Clear Lake	350 Blossom Street, Webster, TX 77598	45-2075
SCCI Hospital - El Paso, LLC	Kindred Hospital El Paso	1740 Currie Drive, El Paso, TX 79902	45-2079
Triumph Southwest, LP	Kindred Hospital Sugar Land	1550 First Colony Blvd., Sugar Land, TX 77479	45-2080
Kindred Hospitals Limited Partnership	Kindred Hospital Fort Worth	815 Eighth Avenue, Fort Worth, TX 76104	45-2088
Dallas LTACH, LLC	Kindred Hospital Dallas Central	8050 Meadow Road, Dallas, TX 75231	45-2108
THC - Seattle, LLC	Kindred Hospital Seattle - Northgate	10631 8th Avenue NE, Seattle, WA 98125	50-2002
1125 Sir Francis Drake Boulevard Operating Company, LLC	Kentfield Hospital	1125 Sir Francis Drake Boulevard, Kentfield, CA 94904	05-2043
4499 Acushnet Avenue Operating Company, LLC	Vibra Hospital of Southeastern Massachusetts	4499 Acushnet Avenue, New Bedford, MA 02745	22-2043
Vibra Hospital of Denver, LLC	Vibra Hospital of Denver	8451 Pearl Street, Thornton, CO 80229	06-2014
Northern California Rehabilitation Hospital, LLC	Vibra Hospital of Northern California	2801 Eureka Way, Redding, CA 96001	05-2047
Vibra Specialty Hospital of Dallas, LLC	Vibra Hospital of DeSoto	2700 Walker Way, DeSoto, TX 75115	05-2097
Vibra Specialty Hospital of Portland, LLC	Vibra Specialty Hospital of Portland	10300 NE Hancock Street, Portland, OR 97220	38-2004
Vibra of Southeastern Michigan, LLC	Vibra Hospital of Southeastern Michigan	26400 West Outer Drive, Lincoln Park, MI 48146	23-2019
Vibra Hospital of San Diego, LLC	Vibra Hospital of San Diego	555 Washington Street, San Diego, CA 92103	05-2044
Vibra Hospital of Fort Wayne, LLC	Vibra Hospital of Fort Wayne	2200 Randallia Drive, Fort Wayne, IN 46805	15-2027
Vibra Hospital of Northwestern Indiana, LLC	Vibra Hospital of Northwestern Indiana	9506 Georgia Street, Crown Point, IN 46307	15-2028
Vibra Hospital of Mahoning Valley, LLC	Vibra Hospital of Mahoning Valley	8049 South Avenue, Boardman, OH 44512	36-2023
Vibra Hospital of Boise, LLC	Vibra Hospital of Boise	6651 West Franklin Road, Boise, ID 83709	13-2002
Vibra Hospital of Western Massachusetts, LLC	Vibra Hospital of Western Massachusetts	1400 State Street, Springfield, MA 01109	22-2046
Vibra Hospital of Charleston, LLC	Vibra Hospital of Charleston	1200 Hospital Drive, Mt. Pleasant, SC 29464	42-2005
Vibra Hospital of Springfield, LLC	Vibra Hospital of Springfield	701 North Walnut Street, Springfield, IL 62702	14-2014

Legal Name	Facility Name (d/b/a)	Address	Medicare Provider No.
Vibra Hospital of Central Dakotas, LLC	Vibra Hospital of Central Dakotas	1000 18th Street NW, Mandan, ND 58554	35-2005
Vibra Hospital of Fargo, LLC	Vibra Hospital of Fargo	1720 S University Drive, Fargo, ND 58103	35-2004
Vibra Hospital of Amarillo, LLC	Vibra Hospital of Amarillo	7501 Wallace Blvd, Amarillo, TX 79124	45-2060
Vibra Hospital of Sacramento, LLC	Vibra Hospital of Sacramento	330 Montrose Drive, Folsom, CA 95630	05-2033
Vibra Hospital of Richmond, LLC	Vibra Hospital of Richmond	2220 Edward Holland Drive Richmond, VA 23230	49-2009

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran’s Benefits <input type="checkbox"/> 160 Stockholder’s Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multi-district Litigation
 7 Appeal to District Judge from Mag. Judge
 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 42 U.S.C. § 1395 et seq. and 5 U.S.C. § 551 et seq. - judicial review of agency rulemaking action

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$ 9,388,544	Check YES only if demanded in complaint JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: <u>March 13, 2019</u>	SIGNATURE OF ATTORNEY OF RECORD <u>/s/ Jason M. Healy</u>
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NEW LIFECARE HOSPITALS OF CHESTER
COUNTY LLC D/B/A LIFECARE HOSPITALS OF
CHESTER COUNTY, et al.

Plaintiff(s)

v.

ALEX M. AZAR II, Secretary
US Department of Health and Human Services

Defendant(s)

Civil Action No. 19-705

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) ALEX M. AZAR II, in his official capacity as
Secretary of the U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Jason M. Healy
THE LAW OFFICES OF JASON M. HEALY PLLC
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20006
(202) 706-7926

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. 19-705

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NEW LIFECARE HOSPITALS OF CHESTER
COUNTY LLC D/B/A LIFECARE HOSPITALS OF
CHESTER COUNTY, et al.

Plaintiff(s)

v.

ALEX M. AZAR II, Secretary
US Department of Health and Human Services

Defendant(s)

Civil Action No. 19-705

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Jason M. Healy
THE LAW OFFICES OF JASON M. HEALY PLLC
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20006
(202) 706-7926

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. 19-705

PROOF OF SERVICE

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was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

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Additional information regarding attempted service, etc:

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UNITED STATES DISTRICT COURT

for the

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NEW LIFECARE HOSPITALS OF CHESTER
COUNTY LLC D/B/A LIFECARE HOSPITALS OF
CHESTER COUNTY, et al.

Plaintiff(s)

v.

ALEX M. AZAR II, Secretary
US Department of Health and Human Services

Defendant(s)

Civil Action No. 19-705

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) United States Attorney for the District of Columbia
555 4th Street, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Jason M. Healy
THE LAW OFFICES OF JASON M. HEALY PLLC
1701 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20006
(202) 706-7926

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 19-705

PROOF OF SERVICE

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was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

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designated by law to accept service of process on behalf of *(name of organization)* _____
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Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: