IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISSOURI DEPARTMENT OF SOCIAL SERVICES Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al. Defendants.	)	Civ. No. 1:15-cv-01329 (EGS)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Missouri Department of Social Services ("Plaintiff") moves for summary judgment. For the reasons set forth in the accompanying Memorandum in Support of Plaintiff's Motion for Summary Judgment, there is no genuine issue of material fact, and Plaintiff is entitled to judgment as a matter of law. Plaintiff therefore asks this Court to enter judgment in its favor.

A Memorandum of Points and Authorities, a Statement of Material Facts, the Declaration of Andrew Bond, Exhibits, and a Proposed Order, are attached to this motion.

Respectfully submitted,

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September 24, 2015

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h), Plaintiff Missouri Department of Social Services ("Missouri") submits the following statement of material facts as to which Missouri contends there is no genuine issue.

1. Missouri Department of Social Services is the "single State agency" responsible for administration of the State of Missouri's participation in the federal Medicaid program. *See* Social Security Act ("SSA") § 1902(a)(5), 42 U.S.C. § 1396a(a)(5).

2. The Medicaid statute requires States to annually audit their disproportionate share hospital ("DSH") payments to, among other things, confirm that hospitals did not receive payments in excess of the hospital-specific payment cap established by Section 1923(g)(1)(A). SSA § 1923(j), § 1396r-4(j).

3. If an audit reveals a payment to a hospital in excess of its hospital-specific DSH payment cap, the federal share of that overpayment must be returned to the federal government. *See* 42 C.F.R. § 455.304(a)(2).

4. The State of Missouri's regulations specify that "overpayments that are recouped from hospitals as the result of the final DSH adjustment will be redistributed to hospitals that are

shown to have a total shortfall," based on the final audit. Mo. Code Regs. Ann. tit. 13, § 70-15.220(7)(B). A "shortfall" refers to the "hospital-specific DSH limit in excess of the total amount a hospital has been paid (including all DSH payments)." *Id.* § 70-15.220(10)(S).

5. The Centers for Medicaid and Medicare Services ("CMS") issued a response to a "Frequently Asked Question" ("FAQ") regarding auditing hospital-specific DSH limits on January 20, 2010. *See* CMS, Additional Information on the DSH Reporting and Auditing Requirement, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and reimbursement/downloads/additionalinformationonthedshreporting.pdf (last visited Aug. 13, 2015). CMS's response to FAQ number 33 ("FAQ No. 33") stated "[d]ays, cost[s], and revenues associated with patients that are dually eligible for Medicaid and private insurance should be included in the calculation of the Medicaid inpatient utilization rate for the purposes of determining a hospital eligible to receive DSH payments." *Id.*

6. On April 1, 2015, Dr. Joseph Parks, Director of MO HealthNet, wrote to Victoria Wachino, Director of CMS's Center for Medicaid and CHIP Services, about Missouri's DSH audit. (*See* Exhibit 1 to Declaration of Andrew Bond ("Bond Decl.") ¶ 9.) Dr. Parks stated that in light of the injunction in *Texas Children's Hospital v. Burwell*, No. 14-cv-02060 (Dec. 29, 2014), "Missouri plans to instruct its independent auditor, Myers and Stauffer LC, to redo the SFY 2011 DSH audit to exclude all payments/revenues from private insurers in recalculating the hospital-specific DSH limits." (Bond Decl., Ex. 1.) Dr. Parks also stated that "this second independent audit will not be completed within the timeframe specified in CMS regulations." (Bond Decl., Ex. 1.)

7. On May 1, 2015, Timothy Hill, Deputy Director of CMS's Center for Medicaid and CHIP Services, responded to Dr. Parks April 1, 2015 letter. (Bond Decl., Ex. 2.) Mr. Hill stated

that, aside from Texas and Washington, "CMS may disallow federal financial participation if a state does not comply with the policy articulated in FAQ No. 33." (Bond Decl., Ex. 2.) Mr. Hill further stated that "[i]f the state does not submit an audit that meets federal requirements, CMS may defer or disallow state claims for DSH federal financial participation until such time as the state submits a compliant audit." (Bond Decl., Ex. 2.) Finally, Mr. Hill stated that "if the SPRY 2011 audit findings identify any DSH payments exceeded documented hospital-specific DSH limits, these payments will be treated as provider overpayments that, pursuant to 42 CFR Part 433, Subpart F, trigger the return of the federal share to the federal government." (Bond Decl., Ex. 2.)

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

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LIST OF ABBREVIATIONS

CMS	Centers for Medicare & Medicaid Services
DSH	Disproportionate Share Hospital
Missouri	Missouri Department of Social Services
SFY	State Fiscal Year
SMF	Plaintiff's Statement of Material Facts
SSA	Social Security Act

I. Introduction

This motion asks this Court to address the discrete legal issue of whether its preliminary injunction Order in *Texas Children's Hospital v. Burwell*, 76 F. Supp. 3d 224 (D.D.C. 2014), is limited only to hospitals located in the States of Texas and Washington. *Texas Children's* involved a challenge to a Centers for Medicare & Medicaid Services ("CMS") policy (referred to as FAQ No. 33) that requires certain payments from private insurers to be counted in calculating a hospital's "disproportionate share hospital" ("DSH") payment limit. In *Texas Children's*, this Court "ORDERED that Defendants are hereby enjoined from enforcing, applying, or implementing FAQ No. 33 pending further Order of this Court." Order, *Texas Children's*, No. 14-02060, ECF No. 19. Despite the language in the Order, CMS has informed the Missouri Department of Social Services, the plaintiff here, that it will continue to enforce, apply, and implement FAQ No. 33 in the State of Missouri.

The *Texas Children's* Order is not limited to Washington and Texas and plainly states that CMS is enjoined from "enforcing, applying, or implementing FAQ No. 33." Nothing in the Court's opinion indicates that there were particularities with respect to application of the policy in those States as opposed to other States such as Missouri. Missouri is being forced to apply a policy to its DSH-eligible hospitals that this Court enjoined. Therefore, Missouri requests that this Court issue a declaratory judgment that the *Texas Children's* Order applies to Missouri.

II. Background

A. Medicaid's Disproportionate Share Hospital Payments

Missouri is the "single State agency" responsible for the administration of the State of Missouri's participation in the federal Medicaid program. *See* Social Security Act ("SSA") § 1902(a)(5), 42 U.S.C. § 1396a(a)(5). The Medicaid statute requires States to make payments to hospitals that "take into account (in a manner consistent with section 1923) the situation of

hospitals which serve a disproportionate number of low-income patients with special needs." *See* SSA § 1902(a)(13)(A)(iv), § 1396a(a)(13)(A)(iv); *see also* SSA § 1923, 42 U.S.C. § 1396r-4. These DSH payments are available to hospitals that serve a disproportionate share of Medicaid patients. 42 U.S.C. § 1396r-4. The Medicaid statute includes a hospital-specific DSH payment cap. SSA § 1923(g)(1)(A), § 1396r-4(g)(1)(A).

In 2008, CMS finalized rules implementing the DSH audit and reporting requirements. 73 Fed. Reg. 77,904 (Dec. 19, 2008). Among other things, States must report each hospital's "total uncompensated care costs," which affect the hospital-specific DSH payment caps. *Id.* On January 20, 2010, CMS issued responses to frequently asked questions on its website. FAQ No. 33 addressed the meaning of uncompensated costs, and stated that for purposes of calculating the hospital-specific DSH payment limit, "revenues associated with patients that are eligible for Medicaid and also have private insurance should be included in the calculation of the hospital-specific DSH limit." *See* CMS, Additional Information on the DSH Reporting and Auditing Requirement, http://www.medicaid.gov/medicaid-chip-program-information/by-topics/financing-and-reimbursement/downloads/additionalinformationonthedshreporting.pdf (last visited September 23, 2015).

States are required to annually audit their DSH payments to confirm that hospitals did not receive payments in excess of the hospital-specific payment cap established by Section 1923(g)(1)(A). SSA § 1923(j), § 1396r-4(j). One of the specific requirements of the independent audit is a verification that "DSH payments made to each qualifying hospital comply with the hospital-specific DSH payment limit." 42 C.F.R. § 455.304. Missouri's state regulations specify that "overpayments that are recouped from hospitals as the result of the final DSH adjustment will be redistributed to hospitals that are shown to have a total shortfall," based

on the final audit. Mo. Code Regs. Ann. tit. 13, § 70-15.220(7)(B) (West 2015). A "shortfall" refers to the "hospital-specific DSH limit in excess of the total amount a hospital has been paid (including all DSH payments)." *Id.* § 70-15.220(10)(S).

State audits of DSH payments "must be completed by the last day of the Federal fiscal year ending three years from the end of the Medicaid State plan rate year under audit." 42 C.F.R. § 455.304(b). "Completed audit reports must be submitted to CMS no later than 90 days after completion. Post-audit adjustments based on claims for the Medicaid State plan rate year paid subsequent to the audit date, if any, must be submitted in the quarter the claim was paid." *Id.*

B. Missouri's Efforts To Comply With *Texas Children's Hospital v. Burwell*

Five days before the decision in *Texas Children's*, Myers and Stauffer LC, Missouri's outside auditor, completed the independent audit of Missouri's state fiscal year ("SFY") 2011 DSH payments. *See* Plaintiff's Statement of Material Facts ("SMF"), at ¶ 6; Exhibit 1 to Declaration of Andrew Bond ("Bond Decl."); 42 C.F.R. Part 455, Subpart D. In so doing, Myers and Stauffer followed CMS's regulations and guidance governing DSH independent audits and payments, including FAQ No. 33's instruction that "days, costs, and revenues associated with patients that are eligible for Medicaid and also have private insurance should be included in the calculation of the hospital-specific DSH limit." Bond Decl., Ex. 1. Based in part on the policy in FAQ No. 33, this audit report concluded that Missouri made payments to several hospitals in excess of those hospitals' DSH payment limits. Bond Decl. ¶ 4. This meant that Missouri would need to recoup those excess payments from those hospitals and, pursuant to Missouri state law, use those recouped funds to make DSH payments to hospitals that had not been paid up to their hospital-specific DSH limit. *See* Mo. Code Regs. Ann. tit. 13, § 70-15.220(7)(B).

However, the following week, this Court granted Texas Children's Hospital and Seattle Children's Hospital's motion for a preliminarily injunction in *Texas Children's*. *See Texas Children's*, 76 F. Supp. 3d at 247. In doing so, this Court enjoined CMS from enforcing its policy (FAQ No. 33) that payments from private insurers for services to individuals dually enrolled in Medicaid and private insurance should be counted in calculating Medicaid uncompensated care payments to hospitals. *Id.* at 246-47. This Court reasoned that because FAQ No. 33 constitutes a final agency action that "was not subject to notice-and-comment procedures," the hospitals would likely prove it is unlawful. *Id.* at 241.

The Order read as follows:

> For the reasons stated in the accompanying Memorandum Opinion, it is hereby
>
> ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED; and it is
>
> FURTHER ORDERED that Defendants are hereby ENJOINED from enforcing, applying, or implementing FAQ No. 33 pending further Order of this Court; and it is
>
> FURTHER ORDERED that Defendants shall immediately notify the Texas and Washington state Medicaid programs that, pending further order by the Court, the enforcement of FAQ No. 33 is enjoined and that Defendants will take no action to recoup any federal DSH funds provided to Texas and Washington based on a state's noncompliance with FAQ No. 33; and it is
>
> FURTHER ORDERED that any request to stay this Order pending appeal will be denied for the reasons stated in the accompanying Memorandum Opinion.
>
> SO ORDERED.

Order, *Texas Children's*, ECF No. 19. After this Court granted the preliminary injunction, the parties cross moved for summary judgment; the case is pending. *Id.* ECF Nos. 25-30.

In light of *Texas Children's*, on April 1, 2015, Dr. Joseph Parks, Director of MO HealthNet, wrote to Victoria Wachino, Director of CMS's Center for Medicaid and CHIP Services, about the implications of this Court's injunction for the State of Missouri. SMF ¶ 6. Dr. Parks stated that, unless Missouri received guidance from CMS by May 1, 2015, Missouri planned, pursuant to *Texas Children's*, to instruct its independent auditor to redo the state fiscal year 2011 DSH audit to exclude all payments or revenues from private insurers in recalculating the hospital-specific DSH limits. SMF ¶ 6; Bond Decl., Ex. 1. Dr. Parks further explained that Myers and Stauffer LC would continue to include the costs of all services delivered to Medicaid enrollees, even for services subsequently paid by private insurers, in recalculating these hospital-specific DSH limits. SMF ¶ 6; Bond Decl., Ex. 1. Finally, Dr. Parks informed Ms. Wachino that due to the re-audit, the second independent audit would not be completed within the time frame specified in CMS regulations. SMF ¶ 6.

On May 1, 2015, Timothy Hill, Deputy Director of CMS's Center for Medicaid and CHIP Services, responded to Dr. Parks's letter. SMF ¶ 7; Bond Decl., Ex. 2. Mr. Hill stated that CMS was continuing to enforce its policy in FAQ No. 33, "except as to Washington and Texas. . . . For all other states, including Missouri, CMS may disallow federal financial participation if a state does not comply with the policy articulated in FAQ No. 33." SMF ¶ 7; Bond Decl., Ex. 2. Mr. Hill further stated that CMS may disallow federal financial participation unless Missouri complies "with the submission deadline for [State Plan Rate Year] 2011 DSH audit as described in 42 CFR 455.304(b)." SMF ¶ 7; Bond Decl., Ex. 2. Mr. Hill also stated that if the "2011 audit findings identify any DSH payments exceeded documented hospital-specific DSH limits, these payments will be treated as provider overpayments that, pursuant to 42 CFR Part 433, Subpart F, trigger the return of the federal share to the federal government." SMF ¶ 7;

Bond Decl., Ex. 2. Subpart F requires that States return the federal share of provider overpayments within one year of "discovery" of the overpayment. *See* 42 C.F.R. § 433.300 - 322. According to Mr. Hill, however, Missouri may avoid refunding its federal share to the federal government by redistributing the funds "to other qualifying hospitals as an integral part of the audit process." SMF ¶ 7; Bond Decl., Ex. 2.

To comply with CMS's instructions in this letter, *i.e.*, to return the federal share of payments in excess of the hospital-specific DSH limits that Myers and Stauffer calculated applying FAQ No. 33, Missouri will need to recoup those funds from Missouri hospitals with overpayments by October at the latest. Bond Decl. ¶ 7. In addition, Myers and Stauffer has already started its audit of Missouri's SFY 2012 DSH payments. Bond Decl. ¶ 8.

III. Standard of Review

Under Rule 56, a party may move for summary judgment "at any time." Fed. R. Civ. P. 56(b). Indeed, a district court does "not have to allow discovery before issuing its ruling" on summary judgment. *Richardson v. Loyola Coll. in Md., Inc.*, 167 F. App'x 223, 224 (D.C. Cir. 2005). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

IV. Argument

CMS continues to apply FAQ No. 33 despite this Court's injunction in *Texas Children's*. The D.C. Circuit, however, has "made clear that when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (internal quotation marks and alteration marks

omitted). There, the district court "ORDERED, that the so-called *Tulloch* rule is declared invalid and set aside, and henceforth is not to be applied or enforced by the Corps of Engineers or the Environmental Protection Agency." *Am. Min. Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267, 278 (D.D.C. 1997). On appeal, the D.C. Circuit affirmed the district court's nationwide injunction, reasoning that "refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation." *Nat'l Min. Ass'n*, 145 F.3d at 1409.

In this case, the *Texas Children's* Order makes clear that CMS and the Department of Health and Human Services are "ENJOINED from enforcing, applying, or implementing FAQ No. 33 pending further Order of this Court." *See* Order, *Texas Children's*, No. 14-02060, ECF No. 19. Nothing in the Opinion indicates that there are particularities of the Medicaid DSH program in these two States that would distinguish application of FAQ 33 in these States from any other State. Nonetheless, CMS continues to enforce, apply, and implement FAQ No. 33 in calculating DSH funding for Missouri. In fact, CMS has taken the additional step of threatening to "disallow federal financial participation if a state does not comply with the policy articulated in FAQ No. 33." *See* SMF ¶ 7; Bond Decl., Ex. 2. By threatening Missouri's federal Medicaid funding, CMS is effectively compelling Missouri to assist CMS in violating this Court's injunction.

CMS's refusal to follow the injunction issued in *Texas Children's* will result in considerable harm to the State of Missouri and its Medicaid program. The original 2011 DSH payments were made to hospitals in accordance with state law and regulation, according to a methodology approved by CMS. *See* Mo. Rev. Stat. § 208.152.1(1); Mo. Code Regs. Ann. tit. 13, § 70-15.220. Recovery of payments—often quite sizeable—made several years previously can be very destabilizing to hospitals, which are crucial providers in the Medicaid program.

Consequently, Missouri has no desire to take DSH payments back from hospitals unless it is required to do so by federal law. Moreover, any attempt by the State to recover "overpayments" based on application of the policy articulated in FAQ 33 places the State at substantial risk of suit by one or more hospitals claiming that the State's action is in violation of federal law, as interpreted by this Court in *Texas Children's.* On the other hand, if Missouri follows the *Texas Children's* Order and disregards CMS's mandate to the contrary, it would face a disallowance of federal Medicaid funding. *See* SMF ¶ 7; Bond Decl., Ex. 2. As this Court explained in *Texas Children's,* state agencies' "funding is contingent on compliance with the defendants' directives." *Texas Children's,* 76 F. Supp. 3d at 247. Further, this Court found that CMS applies FAQ No. 33 as a "substantive change to the formula for calculating a hospital's DSH limit" that "binds state Medicaid agencies." *See id.* at 241. If Missouri does not follow CMS's instruction, Missouri will be forced to pay to the federal government the federal share of payments made to DSH-eligible hospitals that exceeded what CMS believes they should have been paid based on FAQ No. 33. *See* SMF ¶ 3.

In short, CMS has failed to comply with this Court's Order in *Texas Children's,* and CMS's position will result in significant financial consequences for Missouri's Medicaid program. Missouri faces the choice of either following CMS's instructions and making payments to hospitals that violate this Court's Order in *Texas Children's,* or complying with this Court's Order in *Texas Children's* and suffering a disallowance of federal DSH funding from CMS. CMS's position thus plainly impacts Missouri's DSH-eligible hospitals and, more broadly, negatively impacts Medicaid recipients in Missouri. Therefore, this Court should issue a declaratory judgment that its Order in *Texas Children's* that enjoined CMS and the other

Defendants from enforcing, applying, or implementing the policy established in FAQ No. 33 applies to Missouri.

V. Conclusion

For the foregoing reasons, this Court should enter summary judgment in favor of Missouri and issue a declaratory judgment that the *Texas Children's* Order applies to Missouri.

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