

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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|---|---|----------------|
| TEMPLE UNIVERSITY OF THE | : | |
| COMMONWEALTH SYSTEM OF | : | |
| HIGHER EDUCATION on behalf of its | : | |
| TEMPLE UNIVERSITY CLINICAL | : | |
| FACILITY PRACTICE PLANS | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | NO. 00-CV-1063 |
| v. | : | |
| | : | |
| JUNE GIBBS BROWN, | : | |
| Inspector General, Department of Health | : | |
| and Human Services, | : | |
| | : | |
| and | : | |
| | : | |
| DONNA E. SHALALA, | : | |
| Secretary of the Department of | : | |
| Health and Human Services, | : | |
| Defendants. | : | |
| _____ | : | |

MEMORANDUM AND ORDER

YOHN, J. August , 2001

Presently before the court is plaintiff’s motion to reconsider the court’s order dated February 22, 2001 (Doc. No. 25) dismissing plaintiff’s verified complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. The verified complaint (Doc. No. 1) was brought under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (1988), the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1988) and the Due Process Clause of the Fifth Amendment against June Gibbs Brown, Inspector General, United States Department of Health and Human Services (“HHS”), and against Donne E. Shalala, Secretary, HHS. The

complaint sought declaratory and injunctive relief arising from a Physicians at Teaching Hospitals (“PATH”) audit commenced at Temple by defendants. Specifically, plaintiff alleged that pursuant to directives promulgated by HHS’s General Counsel and implemented by the Inspector General (“IG”), it does not qualify for, and should thereby be excused from, any PATH audit.

The court’s memorandum and order dated February 22, 2001 set forth in detail the factual background relevant to this motion. To summarize, this action concerns Medicare Part B reimbursement standards. Specifically, in 1992, regulations went into effect which require a teaching physician’s personal presence before he or she may bill under Part B. *See* 42 C.F.R. § 405.521(b)(1) (1992); *see also Physicians at Teaching Hospitals (PATH) Audits: Hearing Before Subcommittee on Labor, Health and Human Services, Education and Related Agencies of Senate Committee on Appropriations, S. Hrg. Rep. 105-396, 105th Cong., 1st Sess. (1997) (“Hearing”)* (testimony of Michael Mangano, Principal Deputy Inspector General). Thereafter, in 1996, the HHS Office of Inspector General commenced the PATH audit initiative which focused, *inter alia*, on payment to teaching physicians for services that may have actually been performed by residents or interns.

After receiving complaints about the propriety of the PATH audits, however, the General Counsel of HHS, Harriet Rabb, addressed the initiative in a letter to the presidents of the Association of American Medical Colleges and the American Medical Association dated July 11, 1997. *See* Compl. at ¶¶ 15-16 & Ex. P. In this letter, counsel reasserted HHS’s physical presence standard, recognized that the standards for paying teaching physicians under Part B had not been clearly or consistently articulated, and set forth guidelines under which subsequent

PATH audits would be conducted. *See id.* At issue in the instant case is the third guideline which counsel explained as follows:

Third, the hospital approached by OIG will have the opportunity to show, as a matter of fact, that it or the teaching physicians at the institution received guidance from the carrier which the hospital views as contradictory to the [physical presence] standard referenced above. Until that opportunity has been provided and any submission reviewed, no additional information will be requested by OIG from the hospital nor will a PATH audit be conducted.

The decision whether clear guidance was given by carriers to teaching hospitals and physicians will be made by OIG. That determination is, necessarily, a fact bound one and will have to be made particularly and in each instance.

See id.

When the IG initiated a PATH audit at Temple, the hospital argued that pursuant to the Rabb letter, it was exempt from any PATH audit because it had received conflicting guidance from its Medicare carrier, Xact. *See Compl.* ¶ 28. Temple reasoned that although Xact's written 1983 guidelines required attending physicians to be present in order to bill under Part B and specified that counter-signatures of residents' notes were insufficient documentation unless those notes otherwise indicated that the attending physician was present, because Xact issued a 1995 audit report of Temple's Medicare billing practices that permitted counter-signatures of teaching physicians to suffice as documentation of physical presence, Temple had received the requisite conflicting guidance. *See Compl.* ¶¶ 24-33. Inspector General representatives concluded, however, that Xact had a physical presence policy and that its 1995 Temple audit report was a "limited review for the limited purpose of reviewing a specific procedure" and "did not address

nor pertain to issues associated with teaching physicians and made no representations or findings on the acceptability of countersignatures to support a physician service billable under Medicare Part B.” Compl. Ex. I.

Despite the IG’s determination, Temple continued to contest this conclusion and to request a meeting with senior IG and HHS officials. *See, e.g.*, Compl. ¶¶ 30-33, 35-41, 48, 57, 61 (citing Exs. J, L, N, S, V, BB). On one occasion, Temple wrote IG representatives to set forth what it believed to be another instance of conflicting guidance: the Fair Hearing officer’s decision of May 3, 1996 which reviewed a portion of the 1995 Xact audit results and found reimbursable thirteen claims that were “provided by a resident while no attending physician was present and had not countersigned the resident-physician note.” Compl. ¶ 31. Nevertheless, Inspector General representatives repeatedly reaffirmed the initial conclusion that Temple had not received any conflicting guidance from Xact. *See, e.g.*, Compl. Ex. P. On another occasion, Temple even wrote to Ms. Rabb arguing that she should intervene with the proposed Temple PATH audit because Temple had received the requisite conflicting guidance. *See* Compl. ¶ 48 & Ex. S. Ms. Rabb declined to intervene, stating that “[t]he determination whether clear guidance was given by carriers to teaching hospitals and physicians . . . is a question of fact that the OIG must resolve in each instance in the exercise of its law enforcement authority.” Compl. ¶ 57 & Ex. V.

On January 11, 2000, the IG of HHS issued a written request to Temple for production of Medicare-related documents in connection with its PATH I audit. *See* Pet. for Summ. Enforcement of an Administrative Subpoena (Doc. No. 1), *United States v. Temple Univ. of the Commw. Sys. of Higher Educ. ex rel. Temple Univ. Clinical Faculty Practice Plans Temple Univ.*

Sch. of Med., Misc. Case No. 00-75 (E.D. Pa.), ¶ 6. On February 16, 2000, after Temple failed to respond to this document request, the IG served a subpoena *duces tecum* on the Custodian of Records for Temple. *See id.* Temple filed its verified complaint on February 29, 2000. On April 28, 2000, the United States Attorney, on behalf of the IG of HHS, initiated miscellaneous civil action number 00-75 by filing a petition for summary enforcement of an administrative subpoena. On February 22, 2001 this court granted defendants' motion to dismiss Temple's verified complaint. Temple filed the instant motion to reconsider this order on March 7, 2001. Oral argument on the motion to reconsider was held on July 23, 2001.

I. STANDARD OF REVIEW

“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). “Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.” *Burger King Corp. v. New England Hood & Duct Cleaning Co.*, No. 98-3610, 2000 WL 133756, *2 (E.D. Pa. Feb. 4, 2000) (citation omitted). As such, district courts will grant a motion for reconsideration in any of three situations: (1) the need to correct a clear error of law or to prevent injustice; (2) the availability of new evidence not previously available; and (3) an intervening change of controlling law. *See NL Indus., Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n.8 (3d Cir. 1995); *New Chemic, Inc. v. Fine Grinding Corp.*, 948 F. Supp. 17, 18-19 (E.D. Pa. 1996).

II. DISCUSSION

Temple argues that the court should reconsider its order dated February 22, 2001 so that Temple may present evidence regarding the devastating impact it will suffer to comply with any

PATH audit and because Temple alleges that the court made several errors of law or fact in its memorandum and order. I conclude, however, that Temple's proffered new evidence still fails to demonstrate that the PATH audit would have an immediate impact on Temple's day-to-day operations. Moreover, because my legal determinations, that the court is without subject matter jurisdiction to entertain Temple's APA claims and that no due process claim exists because Temple has not established a protected property interest, rest upon whether a direct impact on day-to-day operations was shown, Temple's motion for reconsideration will be denied.

A. The February 22, 2001 Order

Because Temple goes to great lengths to scrutinize nearly every aspect of the court's February 22, 2001 order, it becomes necessary to provide a short summary. First, the court determined that Temple's APA claim failed to meet each of the jurisdictional requirements imposed by the APA. The court looked to two district court cases where plaintiffs had presented similar challenges to the PATH audit initiative. *See* Doc. No. 25 at 10-11 (citing *Greater New York Hosp. Ass'n v. United States*, No. 8 Civ. 2741, 1999 WL 1021561, *5 (S.D.N.Y. Nov. 9, 1999) & *Association of Am. Med. Coll. v. United States*, 34 F. Supp.2d 1187, 1192 (1998), *aff'd in relevant part*, 217 F.3d 770 (2000)). Next, applying the five-factor test enunciated in *CEC Energy Co., Inc. v. Public Serv. Comm'n of the Virgin Islands*, 891 F.2d 1107, 1110 (3d Cir. 1989), the court found that the IG's decision to audit Temple was not a final agency action. *See id.* at 12-13. Significantly, the court determined that the initiation of a PATH audit at Temple would not have an immediate impact on the hospital's daily operations. *See id.* (citing *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 241 (1980) & *CEC Energy*, 891 F.2d at 1110).

Second, the court found that because plaintiff had not established that it was without

adequate alternative legal remedy, review under the APA was not available. *See id.* at 13-14 (citing 5 U.S.C. § 704). Specifically, Temple argued that it was without an adequate legal remedy for its claim that defendants have acted arbitrarily and capriciously in pursuing the PATH audit for two reasons: (1) because it is unclear whether Temple, arguably a state agency, could be subjected to a false claims action, and (2) because defendants' guidelines (as set forth in the Raab letter and stated by Mangano in his testimony before a congressional appropriations committee) afford Temple the right to avoid a PATH audit altogether. *See id.* at 14. The court rejected these arguments because they, in effect, were defenses to any false claims action that might be brought. *See id.*

Finally, the court determined that review under the APA was unavailable to Temple because the agency's decision whether and how to undertake an audit of Temple, even in light of the Rabb letter, was committed to the agency's discretion. *See id.* at 14-16. The court pointed out that the language of the relevant statute afforded the IG the discretion whether and how to undertake an audit. *See id.* at 15. Moreover, the court interpreted the plain meaning of the Rabb letter and concluded that the IG maintained the discretion to determine as a fact whether a hospital had received conflicting guidance from its Medicare carrier. *See id.* at 16.

In addition to finding that plaintiff's claims were not reviewable under the APA, the court also found them to be unripe. The court based this conclusion on two determinations: (1) because the agency's decision was not final, that decision is not fit for judicial decision, *see id.* at 17 (citing *New Jersey Hosp. Ass'n*, 23 F. Supp.2d at 502 & *CEC Energy*), and (2) because Temple failed to demonstrate that the audit would have a "sufficiently direct and immediate" impact on Temple's operations, *see id.* (citing *Abbott Laboratories*, 387 U.S. 136, 152 (1967) &

A.O. Smith Corp. v. FTC, 530 F.2d 515, 522 (3d Cir. 1976)).

Next, stressing that the Declaratory Judgment Act does not provide an independent basis for federal jurisdiction and that federal courts have the discretion to determine whether to entertain an action for declaratory judgment, the court declined to take up Temple's DJA claim. *See id.* at 18-19. The court based this decision on its determinations that review was unavailable under the APA and precluded pursuant to the doctrine of ripeness. *See id.*

Finally, the court held that Temple did not state a due process claim because it failed to articulate a cognizable liberty interest. *See id.* at 20-21. The court alternatively stated that even if Temple had articulated a protected property interest, it nevertheless had not stated a procedural due process claim because Temple had ample opportunity to present reasons why it believed it was exempt from any PATH audit. *See id.* at 22.

B. New Evidence

Temple avers that during an off-the-record, preliminary pretrial conference on September 7, 2000, the court stated that the parties would be on forty-eight hours notice to be prepared to present oral argument or other information regarding the case. Temple argues that it interpreted this statement to mean that the court would conduct at least oral argument, if not a hearing, so that Temple could substantiate information in its complaint. Accordingly, Temple argues that it was not afforded the opportunity to demonstrate the devastating impact a PATH audit would have on the hospital and the community it served. While the court does not recall the informal discussion in that manner, because of the possible confusion, I held oral argument on the motion to reconsider and permitted Temple to submit affidavits in support of its position at the argument. As a result, Temple submitted two affidavits as new evidence for purposes of this

motion. Specifically, those two affidavits are: (1) Supplemental Declaration of Anna Marie Maikner, dated March 7, 2001 (Doc. No. 27); and (2) Declaration of Estelle B. Richman, undated and submitted at oral argument.

After reviewing both of these affidavits, I conclude that Temple still does not proffer any evidence that would demonstrate an immediate impact on its day-to-day operations. Indeed, the affidavits do nothing more than establish that Temple is in a difficult financial situation, as are almost all hospitals at this point in time, and that the audit would have an impact on the work of the one individual who would be responsible for responding to the audit subpoena(s). The affidavits do not in any way specify, other than in the broadest terms, what the total impact of the PATH audit would be, and in no way suggest that the audit would impact on the ability of Temple to care for its patients or impact on Temple's day-to-day operations, other than the work load of one person. Additionally, at oral argument, counsel for Temple was unable to proffer any such evidence. Indeed, an audit by definition entails the review of past records, not a change in present day operations. Consequently, because Temple does not make an offer of proof that would meet the standard set forth in *CEC Energy, i.e.*, an immediate impact on Temple's day-to-day operations, a hearing on the evidence included in the affidavits would be futile.

C. Alleged Errors of Law or Fact

Temple identifies several instances where it believes the court made errors of law or fact that require the court to reconsider its order dismissing Temple's verified complaint. As conceded by counsel at oral argument, the crux of Temple's position is as follows: Temple interprets the language in the Raab letter, "will have the opportunity to show" to mean that the IG's office was required to grant Temple a *hearing* to demonstrate that it received conflicting

carrier guidance.¹ Temple argues that a face-to-face meeting, many letters, and several telephone conversations with IG representatives that proceeded for nearly two years before the government issued its administrative subpoena were insufficient to meet this “opportunity to show” requirement. Temple adds that the Rabb letter only affords the IG the discretion to determine whether carrier guidance is conflicting, and not the discretion to determine whether to conduct a hearing so that a hospital may have “the opportunity to show” such conflicting guidance. As such, Temple maintains that because the agency acted in contravention of its “rules” in proceeding with a PATH audit at Temple despite Temple’s contention that it received conflicting carrier guidance, jurisdiction lies under the APA and Temple has stated a procedural due process claim. In short, Temple does not challenge the agency’s authority to audit; rather, it challenges the IG’s authority to audit in the face of the Rabb letter. Finally, although Temple concedes that it is a factual matter whether Temple has demonstrated the requisite impact on its day-to-day

¹In addition to the Rabb letter, Temple relies on the testimony of Michael Mangano, Principal Deputy Inspector General, Department of Health and Human Services, at a hearing before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of Senate Committee on Appropriations. *See* Compl. ¶ 16 & Ex. C (citing S. Hrg. Rep. 105-396, 105th Cong., 1st Sess. (1997)). Temple summarizes Mr. Mangano’s testimony as follows:

At that hearing, Michael Mangano . . . testified that the protocol for the PATH audit process would first examine the carrier guidance regarding the physical presence standard. When questioned by Chairman Spector, Mr. Mangano stated that *OIG did not intend to enforce guidelines that had not been consistently interpreted*. Furthermore, Mr. Mangano testified that OIG would only conduct a PATH audit in the limited circumstances where the carrier had issued long-standing and clear (*i.e.*, not conflicting) guidance regarding the physical presence standard.

Id. (internal citations omitted) (emphasis in original).

I conclude, however, that the testimony of Mr. Mangano merely duplicates and does not go beyond the guidelines announced in the Rabb letter. As such, the court’s discussion of the Rabb letter necessarily includes consideration of the Mangano testimony.

operations, Temple argues that it has met that burden.

First, the court rejects Temple's interpretation of the Rabb letter. Nowhere in that letter does it state that the agency will afford a hospital a hearing to prove that it received conflicting carrier guidance. The letter merely states that a hospital "will have the opportunity to show." Moreover, although at oral argument Temple pointed the court to paragraphs 40, 43, and 45 of its verified complaint to support its contention that Temple had requested and was denied a hearing, the court has not found any evidence supporting this assertion in Temple's entire complaint, including in the attached exhibits. Indeed, Temple never asked for a "hearing," but requested a "meeting" with senior IG officials. This court concludes that Temple's face-to-face meeting with IG representatives, the many letters in which Temple each time recounted every single argument regarding its conflicting carrier guidance, and the several phone calls addressing the same provided more than an adequate "opportunity to show" what Temple believed to be conflicting carrier guidance. As such, even if the court were to conclude that the Rabb letter constituted agency regulations as contemplated by the APA (which issue the court found and still finds no need to reach), the agency did not act in contravention to the guidelines set forth in that letter.

I will now address each of Temple's specific allegations of error.

1. Alleged error because of misconception that present action is litigation under the False Claims Act.

Temple argues that the court's analysis is flawed because it rested upon the misconception that the instant action was litigation under the False Claims Act. The argument must be rejected outright because the court's memorandum and order never stated such and Temple's suggestion to the contrary seems a bit disingenuous. Indeed, Temple has not even

provided a citation to the court’s memorandum to support this allegation. At any rate, the court’s only mention of the False Claims Act occurred when the court rejected Temple’s arguments that it had no alternative legal remedy than to bring its verified complaint, thereby satisfying an APA jurisdictional requirement. The court reasoned that although the lodging of a FCA complaint was speculative at that point, because Temple’s arguments that as a state agency, it is not subject to FCA liability and that it received conflicting carrier guidance also present defenses to any FCA action that might be brought, Temple had an adequate alternative legal remedy. Clearly, the court was not under any misapprehension as to the nature of Temple’s complaint and therefore, Temple’s motion for reconsideration pursuant to this ground will be denied.²

2. Alleged error in relying on *Greater New York Hospital and AAMC* cases.

Temple argues that the court’s invocation of the *Greater New York Hospital* and *AAMC*³ cases is inapposite because the court failed to consider the context of those cases. Specifically, Temple argues that because both cases address a global challenge to the entire PATH program and not the role of the Rabb letter which is at issue here, the court “predicated” its analysis on

²I stress that *each* of the APA’s jurisdictional requirements must be met before review may be had under the APA. Because Temple does not meet the statute’s finality requirement, the court’s determination that Temple had an adequate alternative legal is merely cumulative.

³The Ninth Circuit Court of Appeals affirmed the *AAMC* court’s conclusion that the challenged agency actions, the PATH audit initiative, were not final for purposes of APA review. The court stated the following reasons for this determination: (1) “An investigation, even one conducted with an eye to enforcement, is quintessentially non-final as a form of agency action.” *AAMC*, 217 F.3d at 781 (citations omitted); (2) “[O]n the facts before this court it is an open question whether the PATH audits will actually result in findings of abuse or fraud.” *Id.*; and (3) “Although plaintiffs are currently subject to concrete agency action in the form of PATH audits . . . the actions are not final and their outcomes turn on contingencies which the court is ill-equipped to predict.” *Id.* at 782.

case authority which are not on point. Temple, however, is incorrect. First, I note that Temple raised this same argument in defending the motion to dismiss. The court considered and rejected it. Second, the court did not “predicate” its analysis on these cases. In fact, in analyzing the finality prong of the APA’s jurisdictional prerequisites, the court recognized that the cases were only “comparable” to the instant action and that the reasoning of those courts “inform[ed]” my decision in this case. In any event, the court then proceeded to apply the five factor test implemented by the Third Circuit in *CEC Energy* to determine whether the agency’s action was final. As such, Temple’s motion for reconsideration will not be granted on this ground.

3. Alleged error in concluding that jurisdiction does not lie under the APA.

Temple argues that the court erred in finding that the IG’s decision to audit Temple was not final. Specifically, Temple submits that in accordance with the dictates of the Supreme Court in *Abbott Labs.*, the IG’s decision is final because the PATH audit will have a direct impact on Temple’s day-to-day operations, including the incurrence of “substantial costs.”⁴ Moreover, Temple argues that the court’s order seems to ignore the Supreme Court’s decision in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Temple alleges that instead of focusing on the test for finality expressed in *Franklin*, this court incorrectly compared the instant case to the Supreme Court decision in *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980) which held that the

⁴Temple also argues that the court failed to acknowledge or consider Ms. Maikner’s first declaration which supposedly sets forth the “anticipated devastating consequences for Temple” that a PATH audit would cause. *See* Mot. for Recons. at 7 & n.3. It is clear that the court considered and rejected as too general and unspecific the statements contained in that declaration. Indeed, after the issuance of the February 22, 2001 opinion, Temple filed a Supplemental Declaration of Anna Marie Maikner, dated March 7, 2001, which still did not set forth in sufficient detail any sufficiently direct and immediate impact on Temple’s day-to-day operations.

lodging of an administrative complaint did not cause the requisite effect on daily business so as to constitute final agency action. Consequently, Temple argues that because the court appeared to apply the incorrect legal standard, the court should reconsider its February 22, 2001 order.

In the court's February 22, 2001 memorandum and order, I concluded that the IG's decision to audit Temple, even in light of the Rabb letter, was not a final agency action because, *inter alia*, Temple had not shown the requisite impact on its daily operations. In addition to implementing the Third Circuit's five factor test for finality, I cited specifically the Supreme Court's decision in *Franklin*. In *Franklin*, the Supreme Court, quoting its decision in *Abbott Labs*, stated "[t]o determine when an agency action is final, we have looked to, among other things, whether its impact 'is sufficiently direct and immediate' and has a 'direct effect on ... day-to-day business.'" *Franklin*, 505 U.S. at 797. The Supreme Court then went on to characterize the question central to the finality determination: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.*

The Supreme Court, however, did not rewrite, but merely restated the *Abbott Labs*. test for finality. As such, when this court determined that Temple had not demonstrated the requisite impact on its day-to-day operations, this court applied the proper standard. Additionally, as the Ninth Circuit explained in reviewing AAMC's challenge to the PATH audit initiative, "[strictly speaking, plaintiffs' case falls outside the *Abbott Laboratories* rule since the PATH initiative is not a final rule and it relates to liability for past billing practices rather than requiring a change in present conduct." *AAMC*, 217 F.3d at 783. Further, despite Temple's post-order submission of two declarations and counsel's proffered evidence of the alleged impact of a PATH audit, I still

conclude that Temple has failed to demonstrate any significant impact on its day-to-day operations. *See supra*.

Finally, although Temple correctly points out that the *Standard Oil* case concerned an administrative complaint rather than an agency audit, Temple does not otherwise distinguish the relevance of the Court's reasoning in that decision. For the foregoing reasons, Temple's motion for reconsideration pursuant to this ground also will be denied.

4. Alleged exception to the APA's finality requirement.

Alternatively, Temple contends that the court has jurisdiction over its APA claims because it additionally has presented an exception to the APA's finality requirement. Temple argues that jurisdiction lies because the government has ignored completely the Rabb letter, thereby acting in contravention to its own rules. In support of this argument, Temple cites *Veldhoen v. United States Coast Guard*, 35 F.3d 222 (5th Cir. 1994). Further, Temple suggests that the court ignored the Supreme Court's holding in *Leedom v. Kyne*, 358 U.S. 184 (1958), "that a district court may take action in cases such as this where an agency's action is in plain contravention of a governmental mandate." Mot. for Recons. at 9 (citing *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir.) (citing *Leedom*), *cert. denied*, 414 U.S. 877 (1973)).

The government supposes that Temple first raised this argument "when it asserted that '[d]efendants violated their own rules and procedures in pursuing the Temple PATH audit,' and that 'review of that issue is not barred by agency discretion.'" Mem. in Opp. to Mot. for Recons. at 7-8. I do not, however, read Temple's brief in opposition to the defendants' motion to dismiss so generously. In fact, nowhere in Temple's brief did Temple ever argue that there was an "exception to the finality requirement." Indeed, Temple never cited the *Veldhoen*, *Coca-Cola* or

Leedom cases until now. As such, Temple may not raise this argument at this point. Moreover, none of the cases cited for the first time in this motion for reconsideration, the *Leedom* case decided in 1958, the *Coca-Cola* case decided in 1973, or the *Veldhoen* case decided in 1994, can even closely be construed as “new law” for purposes of a motion for reconsideration. As such, Temple’s argument must be denied.⁵

5. Alleged error in finding Temple’s claims not ripe for review.

Temple submits that the court incorrectly concluded that its claims were not ripe for review because the court mistakenly viewed the audit as the first step of the agency’s investigation. Of course this conclusion rests upon the court’s determination that the agency’s decision to initiate a PATH audit, even considering the Rabb letter, is not a final agency action. The court already has reviewed that finality determination and adheres to that analysis. Consequently, Temple’s motion to reconsider the court’s finding that Temple’s claims are not ripe for review will be denied.

Temple also submits that the court failed to heed the rule announced in *A.O. Smith Corp. v. FTC*, 530 F.2d 515 (3d Cir. 1976) that:

the court should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action’s validity, he must change his course of day-to-day conduct, for example, by undertaking substantial preliminary paper work, scientific testing and recordkeeping, or by destroying stock; alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence.

530 F.2d at 524. Temple, however, does not explain how this rule requires anything more than

⁵In any event, the court has reviewed these cases and found them to be inapposite.

the Supreme Court did in *Abbott Labs.* or than the Third Circuit did in *CEC Energy*. The plain meaning of the *A.O. Smith* rule requires a “final and clear-cut” agency action that “puts the complaining party on the horns of a dilemma.” In describing what it meant by “the horns of a dilemma,” the Third Circuit explained that the agency action must cause the complaining party to “change his course of day-to-day conduct.” The court fails to see how this requirement differs from the *Abbott Labs.* or *CEC Energy* requirement of sufficiently direct and immediate impact on the complaining party’s day-to-day operations. Moreover, the court has already considered and rejected Temple’s challenge to the court’s application of those cases. Accordingly, Temple’s motion for consideration pursuant to this ground likewise will be denied.

6. Alleged error to find that government did not concede court’s jurisdiction over Temple’s claims by initiating an action to enforce the administrative subpoena.

Temple next urges the court to reconsider its February 22, 2001 order because it was error for it to hold that the government did not concede jurisdiction over Temple’s claims by moving to enforce the administrative subpoena. In support of this argument, Temple points out that in a similar PATH-related proceeding in the District of New Jersey, the government argued that the plaintiffs had an adequate alternative legal remedy because “plaintiffs could raise their claim that the IG lacks statutory authority to audit them by challenging the subpoena for their Medicare billing records.” Pls. Br. in Opp. to Defs. Mot. to Dismiss (Doc. No. 11), Ex. 1 at 8.

First, I note that Temple made and the court rejected this exact argument at the motion to dismiss stage. At any rate, Temple still has not convinced the court that because the court has jurisdiction to consider a petition to enforce a subpoena, it likewise has jurisdiction to review an agency action under either the APA or DJA, even if both cases present similar issues arising on

similar facts. Moreover, I conclude that the government's prior argument does not in any way concede that Temple can overcome the jurisdictional hurdles imposed by the APA, thereby bestowing this court with jurisdiction to review Temple's claims. In fact, the government was arguing just the opposite, that review under the APA could not be had because an adequate alternative legal remedy existed. Accordingly, Temple's motion for reconsideration pursuant to this ground will be denied.

7. Alleged error in not recognizing that independent jurisdiction necessary to support an action under the Declaratory Judgment Act exists.

Next, Temple asserts that the court erred because it did not recognize that independent federal question jurisdiction exists in this case so as to support Temple's DJA claim. Because I have already determined that jurisdiction does not exist in this case, Temple's argument must fail. Moreover, I again stress that federal courts have the discretion to determine whether to entertain an action for declaratory judgment. *See Wilton*, 515 U.S. at 287-88; *Terra Nova Ins. Co., Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1222-23 (3d Cir. 1989). Accordingly, Temple's motion to reconsider the court's order on this ground will be denied.

8. Alleged error in finding that Temple did not state a due process claim.

Finally, Temple contends that the court erred in dismissing its due process claim. First, Temple alleges that the court's finding that Temple does not possess the requisite liberty interest ignored a series of Supreme Court cases to the contrary. *See* Mot. for Recons. at 13 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) & *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane*)). Moreover, Temple again argues that it "has both a

property and liberty interest to be free from the unwarranted governmental invasion of its facility and intrusion into its business operations that will be caused by the PATH audit process.” *Id.* at 14. Last, relying on *Lojeski v. Boandl*, 788 F.2d 196 (3d Cir. 1986), Temple submits that its due process rights indeed have been violated.

At the outset, I note that Temple reargues the same position it presented to defend the motion to dismiss, the same position that the court already considered and rejected. Furthermore, the Supreme Court cases which Temple now suggests that this court ignored are not helpful to Temple. Indeed, even as quoted by Temple, they merely stand for the unremarkable proposition that “[a]n essential principal of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Mot. for Recons.* at 13 (citations omitted). They do not establish that Temple has articulated a protectable liberty interest.

Finally, the *Lojeski* decision likewise is not helpful to Temple. In *Lojeski*, the Third Circuit recognized that a party’s procedural due process rights could be violated when an agency acts in violation of its rules and the party has detrimentally relied upon those rules. *See Lojeski*, 788 F.2d at 199. The court stressed that this would be “so even where the internal procedures are possibly more rigorous than otherwise would be required.” *Id.* (citing, *inter alia*, *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) & *Service v. Dulles*, 354 U.S. 363 (1957)).⁶ Even assuming,

⁶Temple additionally relies on the *Morton v. Ruiz* and *Services v. Dulles* cases for the proposition that if an agency has established a more rigorous standard than is otherwise required, that standard applies for due process analysis. Although I agree with Temple’s interpretation of these cases, under my interpretation of the Rabb letter, the letter does not establish a more rigorous standard, *i.e.*, it does not require that Temple be afforded an actual *hearing* to demonstrate that it may have received conflicting carrier guidance. Accordingly, these cases do not support Temple’s claim that its procedural due process rights have been violated.

without deciding, that the Rabb letter constitutes an agency rule, Temple could not have detrimentally relied upon that letter. The letter concerned guidelines that the agency would follow in conducting future PATH audits. By their very nature, however, PATH audits review *past* billing records reflecting *past* Medicare billing practices. As such, there is nothing that Temple could do (or has shown to have done) to detrimentally rely on that letter.

Therefore, for the foregoing reasons, Temple's motion for reconsideration of the court's order dated February 22, 2001 will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|----------------|
| TEMPLE UNIVERSITY OF THE | : | |
| COMMONWEALTH SYSTEM OF | : | |
| HIGHER EDUCATION on behalf of its | : | |
| TEMPLE UNIVERSITY CLINICAL | : | |
| FACILITY PRACTICE PLANS | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | NO. 00-CV-1063 |
| v. | : | |
| | : | |
| JUNE GIBBS BROWN, | : | |
| Inspector General, Department of Health | : | |
| and Human Services, | : | |
| | : | |
| and | : | |
| | : | |
| DONNA E. SHALALA, | : | |
| Secretary of the Department of | : | |
| Health and Human Services, | : | |
| Defendants | : | |
| _____ | : | |

ORDER

And now, this _____ day of August, 2001, upon consideration of Temple University's motion for reconsideration of the court's order dated February 22, 2001 (Doc. No. 26), defendants' opposition (Doc. No. 28), Temple's reply (Doc. No. 31), and oral argument held on July 23, 2001, it is hereby ORDERED AND DECREED that Temple's motion for reconsideration is DENIED. The clerk is directed to close this case for statistical purposes.

William H. Yohn, Jr., Judge