

**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.	:	
_____	:	

MEMORANDUM AND ORDER

YOHN, J. February , 2001

Presently before the court is defendants’ motion to dismiss plaintiff’s verified complaint (Doc. No. 5) 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 seeks declaratory and injunctive relief arising from a

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

Also before the court is plaintiff’s motion to consolidate this action with miscellaneous case number 00-75 and for a preliminary injunction, and defendants’ responses thereto (Doc. Nos. 6, 8, 15, 16, 17).

FACTUAL BACKGROUND

A. The PATH Audits

Title XVII of the Social Security Act, commonly referred to as the Medicare Act, establishes a federally funded subsidized program that reimburses for medical services provided to qualified elderly and disabled persons. *See* 42 U.S.C. § 1395 *et seq.* The Medicare program consists of two parts. Medicare Part A covers inpatient hospital services. *See* 42 U.S.C. §§ 1395c-1395i-2.¹ Medicare Part B covers supplemental insurance benefits for other healthcare costs, including physicians’ services. *See* 42 U.S.C. §§ 1395j-1395w. Physicians participating under Part B submit bills to Medicare carriers, which process claims on behalf of the Secretary of HHS. *See* 42 U.S.C. § 1395u(a)(1).

Over the past few decades, HHS and Medicare carriers have issued statements about Medicare Part B reimbursement standards. The instant dispute concerns the requirements that authorize reimbursement for “attending physician services rendered to patients in a teaching setting.” 20 C.F.R. § 405.521(a) (subsequently recodified as 42 C.F.R. § 405.521). Under the

¹Medicare Part A services are not the subject of this case.

Medicare statute, a teaching physician who involved interns or residents in the treatment of his patients may not bill his work as a Part B physician's service unless "the physician render[ed] sufficient personal and identifiable physician's services to the patient to exercise full, personal control over the management of the portion of the case for which the payment is sought." 42 U.S.C. § 1395u(b)(7)(A)(i)(I). In 1992, regulations went into effect which provided that a teaching physician could not bill under Part B for services actually rendered by an intern or resident unless the teaching physician was the patient's "attending physician" and he "furnishe[d] personal and identifiable direction to interns and residents who [were] participating in the care of the patient." 42 C.F.R. § 405.521(b)(1) (1992). Moreover, the HHS Inspector General has interpreted these regulations to require a teaching physician's personal presence before he may bill under Part B. *See 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).

In 1996, the HHS Office of Inspector General commenced the PATH audit initiative to "ensure that Medicare pays only once for the same medically necessary service, and that payment fairly reflects the level of service actually provided." *Hearing*, at 2. One focus of the PATH initiative was on payment to teaching physicians for services that may have actually been performed by residents or interns. PATH audits could proceed on either of two tracks. A teaching hospital could elect a less onerous PATH II audit track whereby it "would hire an auditing firm to perform the initial audit, with the concurrence of OIG, and pay for all audit expenses. . . ." Compl. at ¶ 21. Alternatively, the hospital would undergo a PATH I audit

conducted on site solely by OIG auditors. *See generally* Compl. at ¶ 45.

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 and 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.

B. The Verified Complaint

When the IG initiated a PATH audit at Temple, the hospital elected to proceed under the PATH II program. At that time, Temple made an initial proffer to IG representatives that it believed it had received conflicting guidance from its Medicare carrier, Xact. *See* Compl. at ¶

28. Specifically, Temple conceded that 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. Temple argued, however, that despite these guidelines, 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. *See* Compl. at ¶¶ 24-33. Accordingly, Temple asserted that, under HHS guidelines, it should be exempt from any PATH audit. 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. Thereafter, Temple continued to contest this conclusion and to request a meeting with senior IG and HHS officials. Inspector General representatives repeatedly reaffirmed the initial conclusion that Temple had not received any conflicting guidance and instead interpreted Temple's numerous communications challenging the IG's factual determination as demonstrating Temple's lack of commitment to conducting a PATH II self-audit and as "deliberately creat[ing] an obstructive environment that is incompatible with the PATH II cooperative framework." Compl. Ex. P. Consequently, the IG determined that the Temple audit would proceed under PATH I. *See id.*

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 Commonwealth 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.), at ¶ 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 the instant verified complaint on February 29, 2000. On April 28, 2000, the United States Attorney, on behalf of the IG of HHS, initiated miscellaneous case number 00-75 by filing a Petition for Summary Enforcement of an Administrative Subpoena. Ripe for disposition today are defendants' motion to dismiss Temple's verified complaint and Temple's motion to consolidate this action with miscellaneous case number 00-75 and for a preliminary injunction.

STANDARD OF REVIEW

Once a defendant has raised a jurisdictional defense, the burden shifts to the plaintiff to prove that the relevant jurisdictional requirements are met. *See Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992); *Gehling v. St. George's Sch. of Medicine, Ltd.*, 773 F.2d 539, 542 (3d Cir. 1985). A motion to dismiss under Rule 12(b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. *See Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial challenge contests the existence of subject matter jurisdiction on the face of a complaint, while a factual challenge contests the existence of subject matter jurisdiction in fact. *Id.*

In the case of a factual challenge to subject matter jurisdiction, the court is free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on the jurisdictional issue. *See Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997). Moreover, all

factual and legal issues must be addressed as jurisdictional issues, rather than on their merits. *See White v. United States Gov't Dep't of Treasury*, 969 F. Supp. 321, 323 (E.D. Pa.) (citing *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277 (3d Cir. 1993)), *aff'd*, 135 F.3d 768 (1997), *cert. denied*, 524 U.S. 960 (1998).

As for the defendants' motion to dismiss for failure to state a claim upon which relief may be granted, the purpose of such a motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a Rule 12(b)(6) motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989)). Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Finally, claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Id.*

SUBJECT MATTER JURISDICTION

Defendants' primary argument for dismissal is that the court lacks jurisdiction under the case or controversy clause of Article III of the Constitution. Specifically, defendants argue that this action is not reviewable under the Administrative Procedure Act ("APA"), that plaintiff has failed to exhaust administrative remedies as required by 42 U.S.C. § 405(h) and § 1395ii, and that plaintiff's claims are not ripe for review. Plaintiff asserts that defendants' jurisdictional argument is moot because the subpoena enforcement proceeding initiated by defendants invokes

the same issues as raised in plaintiff's verified complaint.² Plaintiff further maintains that defendants have acted in an arbitrary and capricious manner so as to warrant review under the APA, that the APA's jurisdictional requirements have been met, that exhaustion is not required, and that its claims are fit for judicial decision.

A. Review under the APA

The APA permits suits against the United States only where certain prerequisites are met. Among other things, the agency action complained of must be final, *see* 5 U.S.C. § 704, the plaintiff must have "no other adequate remedy in a court," *id.*, and the action must not be "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Plaintiff argues that defendants' failure to abide by their own rules and procedures, namely guideline three contained in the Rabb letter, warrants review under the APA. However, before a district court may test the sufficiency of that claim, it must first determine whether certain threshold jurisdictional requirements have been met. Therefore, I must consider whether the agency's action was final, whether plaintiff has an adequate alternative legal remedy, and whether the action was committed to the agency's discretion by law. As discussed below, I find that plaintiff's APA claim fails to meet each of these jurisdictional requirements. Accordingly, the court is without jurisdiction to entertain Count II of plaintiff's verified complaint.³ Moreover, because the court lacks subject matter

²I reject plaintiff's mootness argument outright. First, I remind plaintiff that despite its attempts to blur the lines between the instant case and miscellaneous action 00-75, they are two separate actions brought for two very distinct purposes. It does not follow that because the court has jurisdiction to consider a petition to enforce a subpoena, it likewise has jurisdiction to review agency action under either the APA or Declaratory Judgment Act, even if both cases present similar issues arising on similar facts.

³Because I find that plaintiff has failed to meet the threshold jurisdictional requirements of the APA, I do not reach defendants' alternate argument that plaintiff's failure to exhaust

jurisdiction over this claim, I do not reach defendants' Rule 12(b)(6) challenge.

1. Final Agency Action

To determine whether an agency's action is final, "the core question is whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The finality element is interpreted in a pragmatic way. *See Abbott Laboratories*, 387 U.S. 136, 149 (1967). Moreover, in assessing the finality of an agency's action, the Third Circuit has considered a number of factors: "1) whether the decision represents the agency's definitive position on the question; 2) whether the decision has the status of law with the expectation of immediate compliance; 3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; 4) whether the decision involves a pure question of law that does not require further factual development; and 5) whether immediate judicial review would speed enforcement of the relevant act." *CEC Energy Co., Inc. v. Public Serv. Comm'n of the Virgin Islands*, 891 F.2d 1107, 1110 (3d Cir. 1989) (citation omitted).

Defendants argue that the IG's decision to audit plaintiff does not constitute final agency action because the agency has not completed its decision making process and because the audit, consisting of a review of past billing practices, will not affect the immediate operation of plaintiff's day-to-day business. Plaintiff responds that defendants have misunderstood the challenged agency action. Plaintiff asserts that it does not present a global challenge to PATH audits, but instead contests the IG's decision to pursue the Temple audit, despite Temple's conflicting carrier guidance. Moreover, plaintiff claims that this more narrow agency action was

administrative remedies likewise requires a dismissal of plaintiff's nonconstitutional claims.

final because defendants will not reconsider their position and because the Temple audit will disrupt the hospital's teaching and patient care operations.

In support of their argument, defendants cite two district court decisions that have considered challenges to PATH audits and have dismissed them, *inter alia*, for lack of finality. *See 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), *appeal pending*. Plaintiff submits that defendants' reliance on these cases is misplaced as both cases present only global challenges to the PATH audit program.

In *Greater New York Hospital*, a group of hospitals sued for declaratory and injunctive relief seeking to prevent planned PATH audits at hospitals in the greater New York area. *See Greater New York Hospital*, at *3. Despite the hospital association's argument that their Medicare carrier's publication did not represent its official standards, the OIG concluded that the carrier had informed its hospitals of the physical presence requirement for billing attending physicians' services under Medicare Part B. *See id.* at 4. Consequently, the OIG determined that those hospitals would be subject to PATH audits. *See id.* On a 12(b)(1) motion to dismiss the APA claims, the court concluded that because the audits do not establish definitively the liability of the hospitals and because the agencies have not completed their decision making processes regarding the audits, "the announced PATH audits do not constitute a final agency decision by OIG or HHS." *Id.* at *5. Moreover, the court rejected the plaintiffs' argument that the decision to audit was final because it subjected them to potential liability under the False Claims Act ("FCA") finding that "too much conjecture is required for the court to conclude that [plaintiffs] will suffer injury from the audits." *Id.* at *6. Finally, the court stressed that review of the

agency's decision to conduct the PATH audit could be obtained if and when plaintiffs incurred liability stemming from the PATH audits. *See id.*

The *Association of American Medical Colleges* ("AAMC") case, however, arose on slightly different facts than *Greater New York Hospital*. As Temple points out, the plaintiffs in the AAMC case did not object to a specific PATH audit because it violated agency guidelines. Rather, the AAMC plaintiffs challenged as violative of the APA and Medicare Act numerous standards employed during the PATH audit process. *See AAMC*, 34 F. Supp. 2d at 1190. On a motion to dismiss for lack of subject matter jurisdiction, the court concluded that because the PATH audit program does not present any direct effect on hospitals subjected to audits until the government brings a FCA enforcement action, the agency action was not sufficiently final under the APA. *See id.* at 1192. The court further reasoned that the challenged audits produced no direct effect on a hospital's day-to-day operations because the audit program was initiated to review only past billing practices. *See id.* Accordingly, the court determined that it was without jurisdiction to consider plaintiffs' APA claims.

While plaintiff attempts to distinguish these cases, I find their facts comparable to the instant case. First, the situation faced by Temple here is not dissimilar to that faced by the hospitals in the greater New York area: the OIG determined that their Medicare carrier had communicated a physical presence standard, despite arguments from the hospitals to the contrary. Second, while Temple does challenge a more narrow application of the PATH initiative than the AAMC plaintiffs, in substance, it nonetheless seeks the very same relief: a determination of its rights with respect to a government investigation. Thus, I also find that the reasoning of those district courts informs my decision in this case.

Moreover, evaluating finality under this circuit's factors also produces the same result. First, the decision to audit the hospital, even after concluding that the "conflicting guidance" exception did not apply, does not represent the definitive position of the agency in this matter. A PATH audit is only the beginning of a process which may or may not end in the agency's decision to pursue, *inter alia*, an action under the FCA. Mere "reason to believe" that a party has violated some statute is not the final statement of an agency position, but rather "represents a threshold determination that further inquiry is warranted" *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241 (1980).

Second, while initiating a PATH audit necessarily requires the hospital's immediate compliance, it does not carry quite the same status of law as would lodging a FCA complaint. Arguably, the hospital would face consequences for noncompliance with an audit. On balance, however, even though this factor alone may weigh in favor of finality, consideration of the five factors as a whole readily leads to the conclusion that the instant agency action was not final.

Third, the initiation of a PATH audit at Temple would not have immediate impact on the hospital's daily operations. Indeed, the very nature of a PATH audit requires review of the hospital's past Medicare billing records. Additionally, while plaintiff alleges that the audit will result in disruption to its physician and administrative staff and in "irreparable damage to its reputation," these are not the types of immediate impact required to establish finality. *See generally Standard Oil*, 449 U.S. at 243 (finding that the FTC's issuance of a complaint constituted "disruptions that accompany any major litigation" and not the requisite immediate effect on daily business); *CEC Energy*, 891 F.2d at 1110 (evaluating the impact of agency's decision to investigate effect of contract between electricity provider and the Water and Power

Agency and determining that “the only affirmative obligation imposed . . . is the obligation to respond to the [agency’s] further inquiries,” which is “different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action.”) (citing *Standard Oil*).

Fourth, the dispute in the instant action does not concern a pure question of law. As already mentioned, the initiation of an audit merely commences an intensely factual review of Temple’s past Medicare Part B billing practices.

Fifth, plaintiff’s pre-enforcement challenge will not serve to speed enforcement of the relevant statute. Rather, intervention by the court at this time would frustrate the agency’s enforcement efforts and create an unnecessary burden for the courts. *See generally Standard Oil*, 449 U.S. at 242 (concluding that judicial review of the issuance of a complaint would interfere with proper functioning of the agency and burden the courts). Accordingly, inasmuch as plaintiff is unable to satisfy the threshold finality requirement, the court is without jurisdiction to review its APA claim. Therefore, defendants’ motion to dismiss this count will be granted.

2. Adequate Alternative Legal Remedy

Even assuming plaintiff had met its finality burden, plaintiff has not established that it is without adequate alternative legal remedy. Review under the APA is precluded unless “there is no other adequate remedy in a court . . .” 5 U.S.C. § 704. Defendants argue that plaintiff has such a remedy because it may defend any FCA charges should the government chose to pursue them. Plaintiff counters that it is without an adequate legal remedy for its claim that defendants have acted arbitrarily and capriciously in pursuing the PATH audit because it is unclear whether Temple, arguably a state agency, can be subjected to a false claims action, *see Vermont Agency of*

Natural Resources v. United States, 120 S. Ct. 1858 (2000), and because defendants’ guidelines afford Temple the right to avoid a PATH audit altogether.

Both of plaintiff’s arguments, however, present a defense to any FCA action that might be brought. First, in *Vermont Agency of Natural Resources*, the Supreme Court held “that the False Claims Act does not subject a State (or state agency) to liability in such actions.” 120 S. Ct. at 1871. Accordingly, in defense to a FCA action, should Temple prove that it is a state agency, it may escape FCA liability. Second, the argument that plaintiff received conflicting guidance also sets forth a defense to any FCA action. Consequently, armed with these viable defense options, plaintiff does have an adequate legal remedy. *See Greater New York Hospital*, at *8 (“Courts that have previously addressed hospitals’ PATH audit challenges have concluded that the hospitals have a number of adequate legal remedies available to them other than APA claims.”) (citations omitted); *New Jersey Hosp. Ass’n v. United States*, 23 F. Supp .2d 497, 501 (D.N.J. 1998) (finding that a defense to FCA action provides adequate remedy in court so as to preclude APA jurisdiction); *AAMC*, 34 F. Supp. 2d at 1193 (same). Moreover, because the lodging of a FCA complaint is speculative at this point, this is not the appropriate time to consider the viability of these defenses. Therefore, the court likewise lacks jurisdiction over plaintiff’s APA claim because plaintiff does have an adequate alternative legal remedy.

3. Committed to the Agency’s Discretion

Review under the APA is also unavailable when the challenged action is one “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). “[U]nder § 701(a)(2), even where Congress has not affirmatively precluded judicial oversight, ‘review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise

of discretion.”” *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Thus, this section requires careful examination of the statute under which the claim of illegal agency action arose. *See id.* at 600. Defendants urge that the decision of the IG to undertake an audit is one committed to agency discretion by law because the statute empowering the IG uses the language of broad discretion and because the purpose of the IG’s statutory responsibilities is to safeguard government interests. Plaintiff asserts that while the IG may have discretion to initiate an audit, she does not have discretion to ignore HHS’s rules, procedures, and guidelines relating that that audit.

The Inspector General Act of 1978 established an Office of Inspector General for several federal departments and agencies, including the HHS. *See* 5 U.S.C. app. 3 §§ 2, 11(2). Section 6(a)(2) of that Act sets forth the authority of the IG “to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, in the judgment of the Inspector General, necessary or desirable.” *Id.* at § 6(a)(2). By the very use of the word “judgment,” this section expressly leaves any investigation by the IG to her discretion. Moreover, the only phrase that arguably informs the exercise of that judgment is “necessary or desirable.” The structure of the sentence, however, leaves to the IG the determination of what is “necessary or desirable.” Thus, I find that the language and structure of § 6(a)(2) of the Inspector General Act indicate that Congress intended to afford the IG enforcement discretion, including the discretion regarding whether and how to undertake an audit.

However, as I understand plaintiff’s argument, it does not challenge the authority to undertake an audit, but rather challenges the appropriateness of the audit undertaken in this case

and the manner in which it is conducted. Specifically, plaintiff asserts that the IG does not have the discretion to proceed with a PATH audit of Temple where the hospital has received conflicting carrier guidance. Plaintiff's argument, however misses the point. First, as evidenced by the language of the relevant statute, the IG does have the discretion whether and how to undertake the audit. Second, the guidelines to which plaintiff refers leaves the factual determination whether a hospital has received conflicting guidance from its Medicare carrier to the discretion of the IG. Specifically, the Rabb letter stated that the hospital will have the opportunity to present evidence it believes demonstrates conflicting guidance, but that the ultimate factual determination will be made by the IG. In the instant case, the IG exercised that discretion and determined that despite Temple's arguments to the contrary, Temple had not received any such conflicting guidance. Therefore, for the reasons stated, § 701(a)(2) precludes judicial review of the challenged IG decisions under the APA and defendants' motion to dismiss Count II of plaintiff's verified complaint is granted.

RIPENESS DOCTRINE

“Application of the ripeness doctrine prevents the entanglement of the courts in administrative policy disagreements and protects the agencies from judicial interference until decisions are formalized and their effects felt in a concrete way.” *CEC Energy Co.*, 891 F.2d at 1109. In determining whether an agency's decision is ripe for review, a court must evaluate both the “fitness of the issues for judicial decision” and the “hardship to the parties of withholding court consideration.” *Ohio Forestry Assoc., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Further, in making this determination, a court should consider the following factors: “(1) whether delayed review would cause hardship to plaintiffs; (2) whether judicial intervention

would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Id.*

After evaluating these factors, I find that plaintiff’s complaint is neither fit for judicial decision nor would the parties suffer the requisite hardship if judicial consideration is withheld at this time. First, because the agency’s decision is not final, judicial intervention would inappropriately interfere with further agency action. “A controversy is ripe for judicial review when the threat of prosecution is ‘credible, and not merely speculative.’” *New Jersey Hosp. Ass’n*, 23 F. Supp. 2d at 502 (citing *Gross v. Taylor*, 1997 WL 535872, at *9 (E.D. Pa 1997)). In the instant case, the agency has merely initiated a PATH audit after determining that plaintiff qualifies for such audit. As yet, the agency has not had the opportunity to decide whether, in fact, Temple’s Medicare Part B billing practices violated the promulgated standards. Therefore, the agency’s “decision constitutes no more than a determination that an investigation will commence, a prerequisite to definitive agency action.” *CEC Energy*, 891 F.2d at 1110.

Regarding the hardship factor, the Supreme Court requires that the impact on the plaintiff be “sufficiently direct and immediate.” *See Abbott Laboratories*, 387 U.S. at 152; *see also A.O. Smith Corp. v. FTC*, 530 F.2d 515, 522 (3d Cir. 1976). For example, in *Abbott Laboratories*, the Court found that pre-enforcement review of agency regulations was necessary because the regulations at issue were immediately effective and forced plaintiff to chose between costly compliance and the risk of severe criminal and civil penalties for failure to comply. *See id.* at 152-53. In the instant case, however, plaintiff has failed to point to some way in which the challenged action would force it to modify or alter its behavior in order to avoid future adverse legal consequences. While plaintiff contends that without judicial intervention it will be forced

to endure a costly and disruptive PATH audit, such costs are not the type of direct and immediate change required to establish ripeness. *See generally Standard Oil*, 449 U.S. at 243 (finding that the FTC’s issuance of a complaint constituted “disruptions that accompany any major litigation” and not the requisite immediate effect on daily business); *AAMC*, 34 F. Supp. 2d at 1194-95 (finding that because plaintiffs have failed to establish a threat to their on-going operations by impending PATH audits, the pre-enforcement challenge to the audits was not ripe for review). Thus, plaintiff’s claimed “hardships” are insufficient to overcome the ripeness hurdle. Accordingly, because I find that plaintiff’s APA claim is not ripe for review, defendants’ motion to dismiss Count II will be granted.

THE DECLARATORY JUDGMENT ACT

The Declaratory Judgment Act (“DJA”) enlarged the remedies available in federal courts by providing that district courts “may declare the rights and other legal relations of any interested party seeking such declaration. . . .” 28 U.S.C. § 2201; *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The DJA, however, is procedural in nature and does not provide an independent basis for federal jurisdiction. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995); *Skelly Oil*, 339 U.S. at 671. Moreover, 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). The Supreme Court has explained:

The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. . . . Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. ‘A declaratory

judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.’

Public Affairs Assoc., Inc. v. Rickover, 369 U.S. 111, 112 (1962) (citation omitted).

Furthermore, this discretion exists even where the action otherwise satisfies the subject matter jurisdiction requirements. *See Wilton*, 515 U.S. at 282.

The court concludes that it should decline to so adjudicate the rights of the parties for several reasons. First, plaintiff has failed to establish jurisdiction over its APA claims and the DJA does not provide an independent basis for jurisdiction. Second, as I have already determined that plaintiff’s claims are not ripe for review, it follows that a declaration at this time will not serve to resolve the issues giving rise to the instant controversy. Third, the availability of other remedies, namely those already discussed under the APA alternative legal remedy requirement, counsels against the exercise of jurisdiction. *See generally United States v. Pennsylvania*, 923 F.2d 1071, 1075 (3d Cir. 1991) (setting forth considerations to evaluate when deciding whether to exercise discretion to review claim for declaratory relief under DJA while a related state action was pending). Accordingly, defendants’ motion to dismiss Count I likewise will be granted.

DUE PROCESS CLAIM

In order to establish entitlement to procedural process, plaintiff must first prove that it has a protected life, liberty or property interest. *See generally Board of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Plaintiff alleges that it has “a protected property and liberty interest to be free from the unwarranted governmental invasion of its facilities and intrusion into its business operations that will be necessarily caused by the PATH audit process” both of which originated

from the “conflicting carrier guidance” guideline articulated in the aforementioned Raab letter and subsequent HHS publications and Congressional testimony. *See* Compl. at ¶¶ 84, 87; Pl.’s Br. in Opp’n. at 31. Moreover, plaintiff asserts that it has a property interest in maintaining its eligibility to participate in the Medicare program. *See* Pl.’s Br. in Opp’n at 31.⁴ Finally, plaintiff complains that HHS has not provided it a “meaningful” opportunity to be heard on the issue of conflicting carrier guidance, thereby depriving it of these liberty and property rights. I find, however, that because plaintiff has failed to articulate any cognizable liberty or property interest, procedural due process protections have not been triggered.

The Supreme Court has explained that “[l]iberty’ and ‘property’ are broad and majestic terms. They are among the ‘(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . .’” *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972). Consequently, the Court has not ventured to define with exactness the liberty or property interests guaranteed by the Due Process Clause. *See id.* at 572. Nonetheless, a protected liberty interest may arise directly from the Constitution or from federal or state statutes or regulations. *See generally Stephany v. Wagner*, 835 F.2d 497, 499 (1987). I find, however, that plaintiff has failed to articulate a cognizable liberty interest. While the Supreme Court has not defined precisely such a liberty interest, it has provided the following examples: “freedom from bodily restraint . . . the right of the individual to contract, to engage in any of the common occupations

⁴Without deciding whether plaintiff has a protected property interest in maintaining its eligibility to participate as a Medicare provider, I find that defendants’ PATH audit does not implicate this alleged right. Just because defendants have chosen to audit Temple, it does not follow that Temple’s Medicare provider status is jeopardized. A hospital’s Medicare provider eligibility necessarily depends upon the hospital’s own actions and compliance with the Medicare statute.

of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Board of Regents*, 408 U.S. at 572. The liberty to be free from a government audit where a hospital has chosen to participate in a government sponsored program, however, is unlike each of these examples. Accordingly, plaintiff has failed to state a due process claim premised upon a protected liberty interest.

Property interests, on the other hand, are not created by the Constitution, but “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents*, 408 U.S. at 577. Moreover, this circuit has instructed that “the dispositive question in deciding whether the statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of [complainant].” *Specter v. Garrett*, 971 F.2d 936, 955 (3d Cir.), *judgement vacated on other grounds*, 506 U.S. 969 (1992). In short, if the statute or regulation confers a benefit on an individual and sets forth “particularized standards or criteria [to] guide the . . . decisionmakers,” *id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)), then it creates a protectable property interest. Conversely, if the statute or regulation demonstrates an intent to bestow a benefit, but places no substantive limits on the decisionmakers, then it does not create a protectable property interest. *See id.* Assuming, without deciding, that the Raab letter has the force of a rule or regulation capable of creating a property interest, I find that because the conflicting carrier guidance guideline affords the IG considerable discretion, this guideline does not bestow a

protectable property interest upon plaintiff. *See supra*, A.3. (finding that both the IG statute and Raab guidelines commit to the IG's discretion whether and how to undertake an audit).

Accordingly, plaintiff has failed to state a due process claim.

In any event, even if plaintiff had articulated a protectable liberty or property interest, I find that plaintiff also has failed to state a procedural due process claim. Procedural due process affords a person notice and an opportunity to be heard before the deprivation of a protected interest. *See generally Loudermill*, 470 U.S. at 542. The Supreme Court has explained that an essential due process requirement is “the opportunity to present reasons, either in person or in writing, why proposed actions should not be taken.” *Id.* at 546. Because Temple's complaint points to numerous instances where Temple was afforded the opportunity to present the reasons it believed it was exempt from a PATH audit, I find, as a matter of law, that Temple was given the opportunity to be heard. While Temple may not agree with the decision reached by the agency regarding its receipt of conflicting carrier guidance, this argument does not raise due process concerns. Therefore, because I conclude that plaintiff has failed to state a due process claim, defendants' Rule 12(b)(6) motion to dismiss Count III will be granted.

Based upon these findings, the court will dismiss plaintiff's APA claim for lack of subject matter jurisdiction and as unripe for review. Consequently, the court must also decline to entertain plaintiff's request for declaratory relief. The court also will dismiss the due process claim because plaintiff has failed to state a claim upon which relief can be granted. Finally, plaintiff's motion to consolidate and for a preliminary injunction will be dismissed as moot.

**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 February, 2001, upon consideration of plaintiff's verified complaint (Doc. No. 1), defendants motion to dismiss (Doc. No. 5), plaintiff's response (Doc. No. 11), defendants' reply thereto (Doc. No. 18), plaintiff's motion to consolidate proceedings and for a preliminary injunction (Doc. No. 6), and defendants' opposition thereto (Doc. No. 15), it is hereby ORDERED AND DECREED that:

1. Defendants' motion to dismiss plaintiff's verified complaint is GRANTED;
2. Plaintiff's motion to consolidate is DENIED as moot;
3. Plaintiff's motion for preliminary injunction is DENIED as moot; and
4. The clerk is directed to close this case for statistical purposes.

William H. Yohn, Jr., Judge