

December 8, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
7500 Security Blvd
Baltimore, MD 21244

Marvin Figueroa
Director
Office of Intergovernmental & External Affairs
U.S. Department of Health & Human Services

Daniel Tsai
Deputy Administrator and Director
Centers for Medicaid & CHIP Services
7500 Security Blvd
Baltimore, MD 21244

Julia Lothrop
Region 6 Director
Office of Intergovernmental & External Affairs
U.S. Department of Health & Human Services

Re. Texas Medicaid funding and resolution of 1115 waiver impasse

We, the members of the Texas Senate Democratic Caucus, write to you as allies in the cause of making healthcare accessible to all Americans, and as elected leaders who profoundly value the federal-state Medicaid partnership. Indeed, since the inception of the Affordable Care Act (“ACA”) Democrats in the Texas Senate have called for expansion of the state Medicaid program to provide health insurance coverage to more than a million eligible Texans. To our immense dismay and consternation, Texas Republicans have repeatedly rejected expansion. Like the Centers for Medicare & Medicaid Services (“CMS”), we aim for a better overall approach to Texas’s indigent healthcare system.

We believe, however, that CMS’s sudden opposition to how Texas finances the non-federal share of state Medicaid costs, *i.e.*, Texas’s Local Participation Provider Funds (“LPPF”), will cause immediate and permanent harm to millions of Texans and to the healthcare systems that serve their medical needs. As explained below, we appeal to you to immediately reinstate the suspended payments to the Texas Medicaid program, and to re-engage in discussions with Texas concerning how best to structure and operate our valued federal-state Medicaid partnership.

We had hoped to discuss these issues directly with individuals at HHS and CMS, and appreciate the initial willingness to meet virtually with us for this purpose. Alas, we understand that HHS and CMS have determined not to meet with Texas elected officials due to concerns over the pending litigation between Texas HHSC and CMS.¹

¹ We note that CMS’s *Sur-Reply in Opposition to Motion to Enforce Preliminary Injunction* (filed yesterday, December 6, 2021), states that “This question [regarding Texas’s proposed LPPF financing of state directed payment programs] ... is entirely unrelated to the underlying merits of this lawsuit.” *Sur-Reply at p.3.*

The broad context of this letter is the current impasse between CMS and Texas Health and Human Services Commission (“HHSC”) over Texas’s section 1115 waiver and the related state directed payment programs (“DPPs”). The Texas 1115 waiver was approved by CMS in the waning days of the Trump administration, along with a commitment from CMS to work with Texas to finalize approval of the DPPs. The 1115 waiver approval was rescinded by CMS under this presidential administration three months later, in April 2021.

Texas immediately filed suit in federal court seeking a reversal of the rescission. On August 20th, the court preliminarily enjoined enforcement of the rescission, and ordered CMS and HHSC to resume negotiating the DPPs pursuant to the terms of the 1115 waiver.

Despite much initial progress, discussions effectively stalled this Fall. In September, CMS ceased Medicaid payments to Texas under the expired Uniform Hospital Rate Increase Program (“UHRIP”) or its proposed replacement, the Comprehensive Hospital Increased Reimbursement Program (“CHIRP”), threatening the ability of Texas safety net hospitals to provide care now and in the future.

It bears mentioning here that CMS itself seems to have recognized the harm to individual Texans that would be caused by terminating funding for Texas safety net hospitals. In the course of the Fall negotiations, CMS offered a one-year extension of two expired programs – UHRIP and the Delivery System Reform Incentive Payment program (“DSRIP”) – which would have continued funding the safety net hospitals while negotiations continued on the DPPs.

Oddly, the section 1115 waiver application does not itself appear to be the primary obstacle to breaking the impasse, nor even, do the related DPPs. Instead, CMS’s primary concern appears to be opposition to the LPPF system.

Whatever CMS may believe or think about the LPPF system of Medicaid finance, whatever the legal basis for sustaining or reforming it, it *is* currently an essential mechanism for financing Medicaid matching payments in Texas. That cannot be changed quickly. Meanwhile, millions of Texans need healthcare, and the safety net hospitals that provide indigent care depend on restoration of federal Medicaid funding for current operations and for purposes of establishing statutory baselines for future Medicaid funding streams.

Texas has employed its present LPPF system to fund the non-federal share of Medicaid costs throughout the operative existence of the ACA. Authorized by state statute, the LPPF system has been approved and continuously employed throughout the tenure of two prior presidential administrations. It sustains the medical safety net in Texas, which provides care to more than five million Texans, more than 65 percent of whom are people of color. LPPFs contribute more than \$1.5 billion to the non-federal share of Texas Medicaid funding.²

On November 15th, CMS declared that it would not restore hospital funding until Texas HHSC somehow managed to attest in writing that no private hospitals that participate in LPPFs have agreements,

² Importantly, the LPPF system funds indigent care vastly beyond the eligible Medicaid expansion population. Texas has four million uninsured people who would not be covered by expansion.

understandings, or even “reasonable expectations” concerning whether their provider tax payments would be matched by transfers of Medicaid “or other” payments, “directly or indirectly”. This requirement closely resembles the Trump administration’s proposed Medicaid Fiscal Accountability Rule (“MFAR”). At the time, CMS abandoned MFAR in response to a national outcry against it, fueled by the immense damage it would have caused and the difficult legal issues it presented.

Consider that in abandoning MFAR, CMS stated that it would “*re-examin[e] these important issues and explor[e] options and possible alternative approaches.*” CMS’s present approach toward Texas seems not to reflect further examination of the issues, or an attempt to explore alternative approaches, but to be essentially a return to what was, for good reason, abandoned.

Not only is CMS returning to the abandoned MFAR standard, the agency is also applying the MFAR standard uniquely to Texas. At least 14 states have, in the context of opposing MFAR, acknowledged to CMS the existence of agreements among private hospitals that may relate to provider taxes. At a minimum, there remain serious legal questions regarding whether CMS has regulatory authority to require the actions it demands of HHSC, whether CMS’s interpretation of section 1903(w) of the Social Security Act is correct, and whether HHSC has either the statutory authority or the practical means by which to comply.

CMS has indicated in correspondence that it would be interested exploring “future solutions” to the matter of non-federal Medicaid funding, and CMS and HHSC have exchanged preliminary thoughts. But while the future may hold many solutions, the present does not. There is no feasible alternative finance model that Texas³ could implement immediately. Texas regional LPPFs are created by statute, and the Texas Legislature does not meet in regular session again until January 2023. HHSC cannot instantaneously devise and implement a new system of hospital finance. Cutting off funding while alternatives are explored and negotiated gravely jeopardizes the entire safety net healthcare system in Texas, harming those to whom both Texas and CMS wish to provide care.

On behalf of the almost 30 million Texas residents, **we urge CMS to (i) immediately resume funding to Texas safety net hospitals; (ii) not require, as a precondition of CMS approval of the Texas DPPs and interim Medicaid funding (temporary extension of DSRIP and UHRIP), that HHSC take actions which it has neither the statutory authority nor the practical ability to take;⁴ and (iii) resume working with HHSC to resolve the questions of finance, function and scope of the Texas DPPs.**

We are confident that given time and flexibility in thinking – on both sides, HHSC and CMS can and will bridge their differences. As Legislators, we will do all we can to assist CMS and HHSC in that process.

Respectfully,



Carol Alvarado, Chair
Senate District 6



Nathan Johnson, Vice Chair
Senate District 16



John Whitmire
Senate District 15

³ or any of the many other states with similar Medicaid finance systems

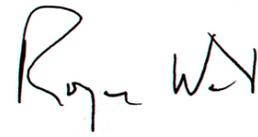
⁴ The HHS Office of Inspector General’s November 30th, 2021 announcement that it would audit the LPPFs perhaps allows CMS and HHSC to proceed past the question of Medicaid finance, and on to the matter of the as-yet-unapproved elements of Texas’s DPP application: CHIRP and TIPPS.



Judith Zaffirini
Senate District 21



Eddie Lucio, Jr.
Senate District 27



Royce West
Senate District 23



Juan Hinojosa
Senate District 20



Jose Menendez
Senate District 26



Borris Miles
Senate District 13



Beverly Powell
Senate District 10



Sarah Eckhardt
Senate District 14



Roland Gutierrez
Senate District 19



Cesar Blanco
Senate District 29

cc:

The Honorable Colin Allred, The Honorable Joaquin Castro, The Honorable Henry Cuellar, The Honorable Lloyd Doggett, The Honorable Veronica Escobar, The Honorable Lizzie Fletcher, The Honorable Sylvia Garcia, The Honorable Al Green, The Honorable Vicente Gonzalez, The Honorable Sheila Jackson Lee, The Honorable Eddie Bernice Johnson, The Honorable Marc Veasey, The Honorable Filemon Vela

Julie Chavez Rodriguez, Director, Office of Intergovernmental Affairs, White House