

August 30, 2021

Secretary Xavier Becerra
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Texas Healthcare Transformation and Quality Improvement Program Demonstration Extension Request

Dear Secretary Becerra,

The undersigned organizations appreciate the opportunity to comment on Texas's proposal for a ten-year extension of its section 1115 demonstration, the "Texas Healthcare Transformation and Quality Improvement Program."

We also applaud your commitment to transparency in the 1115 demonstration process in allowing public comment on the state's request. Meaningful public input is an important part of the 1115 demonstration design process, and the public was never given an opportunity to provide comments to the federal application approved in January 2021. We believe that CMS should very rarely, if ever, forgo public comment periods due to emergencies, and this was not such a situation. As a number of our organizations wrote to your predecessor in January, the underlying demonstration was still nearly two years away from expiring and the proposed changes, even if approved, would have only a minimal and indirect impact on the public health emergency.¹ The required public comment period will strengthen, not weaken, Texas's ability to respond to COVID-19.

As we explain in our comments below, a ten-year extension is not allowable under federal law and for that reason it should not be approved. Instead, an extension should be for three years as federal law requires. We also urge that continued approval of uncompensated care pool funds be for individuals who have no other statutory pathway to coverage. Finally, the complexity of and lack of transparency in the demonstration presents many questions that should be considered in the coming years.

Ten-Year Section 1115 Demonstration Project Extensions are Not Permitted Under Federal Law

Section 1115 of the Social Security Act allows the Secretary to approve state demonstration projects that promote the objectives of Medicaid. Section 1115 demonstrations can only be approved "for the period...necessary" for the state to carry out the project and are generally approved for no more than five years.² Subsections (e) and (f) of section 1115 are clear that initial and subsequent extensions of an approved demonstration are limited to three to five-year periods.

¹ Letter from 21 national organizations to Secretary Azar, January 11, 2021, https://ccf.georgetown.edu/wp-content/uploads/2021/01/Texas-1115-Demo-Extension_Letter-1.pdf.

² Social Security Act § 1115(a)(1).

Despite the clear direction from Congress that extensions be limited to periods no longer than three to five years, the Centers for Medicare & Medicaid Services (CMS) issued guidance in November 2017, stating that CMS “may approve the extension of routine, successful, non-complex section 1115(a) waiver and expenditure authorities in a state for a period up to 10 years.”³ Even absent a statutory prohibition on extensions longer than three to five years, Texas’s 10-year extension request would still have to be denied under CMS’ policy, because as shown below it is very far from being a “non-complex” demonstration.

Instead, the state’s extension request, subject to some modifications recommended below, should be approved for three years, as is consistent with the statute, and which would still allow providers and beneficiaries certainty for the next few years while CMS develops a more permanent policy approach to supporting coverage as discussed further below. This is particularly true in light of proposed federal legislation regarding the Medicaid expansion coverage gap which could considerably change the federal funding landscape during this three-year period.

Paying Providers for Uncompensated Care Delivered to Uninsured People with Statutory Pathways to Coverage Does Not Promote Medicaid’s Objectives

The Texas proposal would continue and expand the state’s use of uncompensated care pools as a substitute for providing coverage, while acknowledging that the pools do “not make uninsured patients eligible for any benefits under the demonstration.” That statement itself shows that the uncompensated care pools do not promote the objectives of Medicaid, because they attempt to substitute payments to providers for coverage that people would have if Texas expanded Medicaid. Uncompensated care pools do not promote coverage for Medicaid-eligible individuals because Congress’s statute has clearly delineated how they should be covered – through Medicaid expansion. Nor do the pools have any continued experimental purpose.

In 2019, there were 766,000 uninsured Texans in the Medicaid coverage gap, and 71 percent of these individuals were people of color (56 percent Latino and 15 percent Black).⁴ Texans in the coverage gap have no pathway to coverage, and many rely on receiving care from the providers Texas pays through its uncompensated care pool. But many others may lack access to care because of where they live, a lack of transportation, the type of care they need, and other factors. Access to care for all Texans in the coverage gap falls short of what they would be entitled to under Medicaid even taking the new pool that would make payments to public providers of primary and behavioral health care services into account. As the state itself says in its proposal, these pools don’t make uninsured people eligible for any benefits. Expenditures under the pool are capped, so the pools provide no guarantee that people will get the health care they need, a guarantee they would have if they were enrolled in Medicaid.

Individuals with coverage under Medicaid have access to the full range of health services needed to stay healthy – including wellness and preventive care, as well as chronic, specialty, rehabilitative, habilitative, and acute care. Uncompensated care pools do *not* provide an individual

³ Center for Medicaid and CHIP Services, “Section 1115 Demonstration Process Improvements,” November 6, 2017, <https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/cib110617.pdf>.

⁴ Gideon Lukens and Breanna Sharer, “Closing Medicaid Coverage Gap Would Help Diverse Group and Narrow Racial Disparities,” Center on Budget and Policy Priorities, updated June 14, 2021, <https://www.cbpp.org/research/health/closing-medicaid-coverage-gap-would-help-diverse-group-and-narrow-racial>.

with that full range of coverage. For example, uncompensated care funding supports only a fraction of the unmet need for prescription drug coverage. Without true coverage, individuals dependent upon charity care go without most of the health services they need to stay healthy, and even the services that are eligible often result in insurmountable bills and bankruptcies, or great stress until the debt is forgiven, if they are lucky enough to qualify for charity care.⁵ Simply put, reimbursing uncompensated care is a grossly inadequate way to provide health care to individuals. That is why Congress designed Medicaid as a *coverage* program. Furthermore, Medicaid coverage payments sustain the providers that enrollees prefer based on the high-quality and accessible services that they offer, whereas uncompensated care pool payments often reward providers based on opaque factors disconnected from what enrollees truly value.

Section 1115 provides authorization for the Secretary of Health and Human Services to approve demonstration projects that are likely to assist in promoting Medicaid's objectives. It's not surprising that Texas' demonstration proposal does not explain how the uncompensated care pools serve such a purpose, because there can't be a proper demonstration that substitutes capped payments to providers for health coverage that entitles people to the health care services they need.

The lack of a demonstration purpose is evident from the proposal itself. The only evaluation question relevant to the pools is question number 10 with two hypotheses:

- Evaluation Question 10. How do the funding pools administered through the Demonstration support providers and overall Medicaid program sustainability?
- H10.1 The Demonstration leverages savings in healthcare service expenditures to administer quality-based payment systems and supplemental funding pools.
- H10.2 The quality-based payment systems and supplemental funding pools administered through the Demonstration support Medicaid provider operations and sustainability.

The fact these questions focus on *providers* rather than the *people* who should be the beneficiaries of the Medicaid program shows the pools don't promote Medicaid's objectives.

We are not suggesting that uncompensated care pools should never be approved as part of a demonstration, but that they should not be used to provide limited access to health care for people who could have Medicaid coverage and get the care they need when they need it. If Texas expanded Medicaid, there would still be large numbers of Texans who would not qualify for Medicaid or other public coverage, so mechanisms such as uncompensated care pools may be appropriate to ensure the financial viability of safety net providers who serve uninsured Texans and to make sure that Texans who are ineligible for any form of coverage can get their health care needs addressed. But payments for uncompensated care should be carefully designed and targeted for this purpose and should not be used as a substitute for direct coverage for people who would be eligible for Medicaid if Texas expanded.

CMS should develop metrics to evaluate whether uncompensated care pool policies improve health equity, and when, as a substitute for coverage, they worsen health equity. Prioritizing coverage is also in the long-term interest of providers: when individuals have coverage, a much broader range of providers, including pediatricians, obstetricians, gynecologists, FQHCs, nurses, behavioral health

⁵ Jennifer Tolbert *et al.*, "Key Facts about the Uninsured Population," Kaiser Family Foundation, November 6, 2020, <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population>.

providers, and dental and vision providers, are reimbursed for all of the valuable services they provide.

The Secretary Should Address the Significant Questions that Exist in the Operation of the Demonstration

The Texas THTQIP demonstration is large and complex. Texas's amended demonstration would include managed care, changes to home- and community-based services (HCBS), two uncompensated care pools, and directed payments (while phasing out a large DSRIP program), all authorized through a dozen waivers and expenditure authorities. The demonstration is projected to spend over \$37 billion in fiscal year 2021 alone. Given the scope of the proposed demonstration and spending, CMS should carefully consider and work to address several questions that persist with respect to these types of demonstrations.

CMS identified a number of these issues in its August 13, 2021 letter to the state offering to extend Texas's current Delivery System Reform Incentive Program (DSRIP) for an additional year.⁶ For example, CMS noted that there are questions about how actuarial soundness is impacted by directed payments and how the State plans to finance the non-federal share of directed payment spending. We agree these and other issues raised by CMS are important questions and commend CMS for its approach: temporarily extending DSRIP funding to secure the safety net during the public health emergency *and* allow time to fully evaluate the directed payments proposal and CMS policy.

We recommend that CMS take a similar approach with the underlying demonstration as a whole. The current demonstration does not expire for more than a year, and with the DSRIP extension in place, CMS has time to consider these and other long-standing issues. As discussed earlier, CMS should develop standards to prevent uncompensated care pool funding from substituting for direct coverage funding that a state chooses not to utilize. CMS should also consider whether uncompensated care pools have any remaining experimental value, as required under section 1115, given that their function and results are well understood at this point.

As mentioned earlier, CMS should also evaluate how uncompensated care funding, particularly when it substitutes for coverage, impacts health equity. We applaud CMS for taking a small but important first step to evaluate health equity in the Texas DSRIP extension proposed in the August 13, 2021 letter. We recommend CMS strengthen this requirement by increasing the proportion of funding tied to metrics and eventually moving to metrics based on outcomes and not just data reporting and include it in any eventual approval or permanent policy.

CMS should also evaluate additional design elements of uncompensated care pools:

- What standards and transparency exist for the calculation and charging off of uncompensated care costs and the distribution of funding among providers? GAO and

⁶ Letter from Director of CMCS Daniel Tsai to Texas Medicaid Director Stephanie Stephens, August 13, 2021, <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/tx-healthcare-transformation-cms-ltr-state-08132021.pdf>.

MACPAC have raised similar concerns in the context of disproportionate share hospital funding and directed payments.⁷

- What are permissible sources of non-federal funding, and what is the acceptable balance of the non-federal share that is paid for by the state as compared to the share passed on to other entities such as local governments? For example, an OIG Report found that 97% of non-federal funding in a Florida uncompensated care pool was financed by local governments.⁸
- How can CMS oversee the distribution of uncompensated care funding based on true uncompensated care spending (by provider, type of provider, setting, geography, etc.), as opposed to other factors, such as source of non-federal financing? The same OIG report found that Florida made assurances to the local governments about the funding their providers would receive, based on their financing contribution.⁹ MACPAC has also raised identified this concern in the context of supplemental and directed payments.¹⁰

Conclusion

CMS should develop sustainable long-term policy for provider reimbursement that is consistent with the objective of the Medicaid program – to furnish high quality health coverage. CMS’s policies and demonstrations should not undermine coverage for individuals that could be eligible for Medicaid. We recommend that CMS issue a three-year approval for Texas’ demonstration consistent with these principles and, factoring in the potential DSRIP extension, use this time to prepare for its long-term policy solution.

Thank you for your willingness to consider our comments. If you need additional information, please contact Judy Solomon (Solomon@cbpp.org) or Joan Alker (jca25@georgetown.edu).

Sincerely,

Autistic Self Advocacy Network
Center for Law and Social Policy
Center on Budget and Policy Priorities
Center on Disability and Development
Dalun Zhang, Director, Center on Disability and Development
Families USA
Georgetown University Center for Children and Families
HIV Medicine Association
Justice in Aging
Mental Health America

⁷ Government Accountability Office, “Medicaid – States’ Use and Distribution of Supplemental Payments to Hospitals,” July 2019, <https://www.gao.gov/assets/gao-19-603.pdf>; MACPAC Comment Letter to CMS, January 14, 2019, <https://www.macpac.gov/wp-content/uploads/2019/01/MACPAC-Comments-on-Proposed-Medicaid-and-CHIP-Managed-Care-Rule.pdf>.

⁸ HHS Office of the Inspector General, “Florida Medicaid Paid Hundreds of Millions in Unallowable Payments to Jackson Memorial Hospital Under its Low Income Pool Program,” August 2019, <https://oig.hhs.gov/oas/reports/region4/41704058.pdf>.

⁹ *Ibid.*

¹⁰ MACPAC, “Directed Payments in Medicaid Managed Care,” August 2020, <https://www.macpac.gov/wp-content/uploads/2020/08/Directed-Payments-in-Medicaid-Managed-Care.pdf>.

National Alliance on Mental Illness

National Association of Pediatric Nurse Practitioners

National MS Society

Professor Pamela Herd, Professor of Public Policy, Georgetown University

Texas Center for Disability Studies