

Congress of the United States
House of Representatives
Washington, D.C. 20515

October 21, 2020

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Avenue S.W.
Washington, DC 20201

Re: Notice of Proposed Rule Making Entitled, “Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; New Categories for Hospital Outpatient Department Prior Authorization Process; Clinical Laboratory Fee Schedule: Laboratory Date of Service Policy; Overall Hospital Quality Star Rating Methodology; and Physician-Owned Hospitals” 85 Fed. Reg. 48772 (August 12, 2020)

Dear Administrator Verma:

We write to express our strong concerns regarding the proposal to modify the regulatory framework currently limiting the expansion of Physician Owned Hospitals (POHs) and ask that you not include this proposal in the final rule. As you know, Congress placed a moratorium on the expansion of POHs as a result of concerns with these facilities cherry-picking patients, self-referring, increasing costs and utilization, and adversely affecting quality of care. Such concerns have previously been highlighted by the Medicare Payment Advisory Commission (MedPAC) and the Office of the Inspector General (OIG).^{1,2} Under current law, a POH must meet certain reasonable tests to expand its capacity. The Centers for Medicare & Medicaid Services’ (CMS) proposal would roll back the agency’s current policy by eliminating requirements on the frequency and size of expansion for certain POHs; and it would effectively eviscerate the statutory moratorium on expansion. We urge you to reconsider this proposal because of its potential to exacerbate existing inequities and further erode the health care safety net in underserved communities.

¹Medicare Payment Advisory Commission. *Physician-Owned Specialty Hospitals* (March 2005). (www.medpac.gov/docs/default-source/reports/Mar05_SpecHospitals.pdf?sfvrsn=0)

² US Department of Health and Human Services, Office of Inspector General. *Physician Owned Specialty Hospitals’ Ability to Manage Medical Emergencies*. Washington, DC: US Department of Health and Human Services (2008).

No justified reason for the change. CMS proposes this change in policy as a part of its “Patients Over Paperwork” initiative. While it asserts that current regulations “impose unnecessary burden on high Medicaid facilities,” CMS also states that it continues to believe that current regulations “are consistent with the Congress’ intent to prohibit expansion of physician-owned hospitals generally.” In addition, the Proposed Rule neither points to any particular high Medicaid facility that has been or would be harmed under current law, nor does it describe the nature of the alleged “burden.” Most importantly, it also fails to explain how this change would better serve Medicare or Medicaid beneficiaries.

Misleading analysis of who is affected. While CMS claims that only one facility per year will request the proposed expansion exception, another analysis estimates that approximately 24 facilities currently or could soon qualify as high Medicaid facilities. CMS should provide a complete analysis of the number of POHs that currently qualify or may soon qualify for this exception as well as the Medicaid discharge percentages of these facilities. Such analysis is needed to determine the impact of this proposal.

Proposed test for expansion eviscerates the statutory moratorium and provides opportunity for gaming. According to the proposal, once a hospital meets the definition of a high Medicaid facility, there will be no limits on size, scope, or duration of its expansion. Facilities could exponentially increase beds and services offered, undermining the patient caseload and mix of community facilities, skimming off the profitable cases, and leaving those deemed to be less financially desirable for other providers in the community. POHs would no longer be limited to the confines of their main campus and, thus, could expand to off-campus locations as well. While CMS proposes this POH exception for high Medicaid facilities, this proposal could impact all facilities in a community. The proposal does not link the time during which the exception is granted and the time of expansion, meaning that a POH could begin and complete its expansion after it no longer qualifies as a high Medicaid facility. Whether a facility qualifies as high Medicaid is relative, and some facilities that might qualify have quite low overall Medicaid numbers. Additionally, any facility that expands can do so without any requirement to maintain its high Medicaid status. Perversely, this proposal could jeopardize sustained operations of facilities that actually make caring for Medicaid patients and the uninsured their mission in the very communities that depend on them the most.

Proposed elimination of community input is concerning. Finally, CMS states in the Proposed Rule that obtaining community input on expansion “could delay or add complexity” to the approval of an expansion request and therefore proposes eliminating the opportunity for community input. This proposed elimination of community input in the POH expansion process undermines Congressional intent and would prevent important voices from participating in the process. CMS does not identify any instances in which the requirement to seek community input has prolonged the application process. Patients and communities deserve a voice in the design of their local health care system, and we strongly oppose any removal or limitation of the community input requirement.

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Simply put, CMS' proposal to allow POHs to expand without guardrails is detrimental to the health of the very communities they serve, and contrary to Congressional intent. We urge you to reconsider this ill-advised proposal.

Thank you for your timely attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard E. Neal".

Richard E. Neal
Chairman
Committee on Ways and Means

A handwritten signature in blue ink, appearing to read "Frank Pallone, Jr.". The signature is written in a cursive style with a prominent "F" and "P".

Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce