

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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WASHINGTON, DC 20515-6115

Majority (202) 225-2927
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August 4, 2017

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Verma:

As Ranking Members of the House Energy and Commerce Committee and Health Subcommittee, we have the responsibility and privilege of protecting the rights of more than 74 million Americans, including nearly 40 million women, who receive health care under the Medicaid program and Children's Health Insurance Program (CHIP). We are writing to express our deep concern regarding the recently submitted proposal from the state of Texas seeking a section 1115 demonstration waiver for a Medicaid family planning demonstration project. Granting this waiver application will decrease access to family planning and other preventive services for women, is in violation of statutory provisions required under the law, and is in conflict with longstanding Congressional intent for the Medicaid program. This proposal only furthers the misguided and harmful ideological goal of limiting access to family planning providers, including Planned Parenthood, while ignoring the public health needs of Texas women. The Centers for Medicare & Medicaid Services (CMS) must reject this proposal.

In 2007, Texas began a Medicaid family planning demonstration project which improved access to contraception and resulted in fewer unintended pregnancies and Medicaid-funded births.¹ However, when the demonstration period ended, Texas sought to renew the program with a concerning provision – a request to waive Medicaid's critical "freedom of choice" requirement, which ensures women have access to care from where they choose and from the qualified family planning provider they trust. CMS denied Texas' request to waive this important provision. Following this decision, instead of complying with the federal requirements of the Medicaid program, Texas chose to implement a wholly state-funded family planning program

¹ See, e.g., Texas Health and Human Services Commission, 2010 Annual Savings and Performance Report for the Women's Health Program, Austin: Health and Human Services Commission, 2011.

that excluded certain qualified providers that were deemed to perform or “promote” abortion services or were affiliated with providers that did so.

As a result, Texas women’s access to preventive health services significantly deteriorated. As of 2014, 55 percent of women in Texas reported at least one barrier to accessing reproductive health services, such as family planning services and cervical cancer screenings.² Use of long-acting reversible contraceptives (LARCs) – considered to be the most effective method of reversible contraception – declined by more than one-third,³ and the rate of Medicaid-funded births increased.⁴ Additionally, between the years of 2011 and 2014 the maternal mortality rate in Texas doubled,⁵ with even higher rates of pregnancy-related deaths among women of color.

However, instead of addressing the public health concerns that have resulted from restricting access to certain qualified providers, Texas is once again requesting federal funding for their family planning project while also attempting to waive the “freedom of choice” requirement. The project would exclude qualified providers who perform or promote abortion services as part of their scope of practice, as well as other providers that may be affiliated with them, as part of an overarching goal to eliminate access to legal abortion services in Texas. This program will only lead to more women losing access to reproductive health services, resulting in higher rates of unintended pregnancy and maternal mortality.

A section 1115 Medicaid demonstration waiver should never be granted for a program that has already been proven ineffective, as the purpose of these waivers is to test new ideas for delivering and financing health care services. Additionally, the Secretary has never granted a waiver of freedom of choice for family planning services for any reason, much less for a project designed specifically to exclude certain qualified providers. Ensuring the continued protection of the patient-provider relationship is consistent with Congressional intent and statutory requirements that have been in place in the Medicaid program for over three decades.

While section 1115 of the Social Security Act was designed to provide states with flexibility to consider new and innovative approaches for health care delivery for low-income individuals and families, Texas has already clearly shown that this program will not adequately serve the women in its state. We believe approving this project as proposed would be a clear violation of federal law, and would limit vitally needed health care services for women in the state.

² Texas Policy Evaluation Project Research Brief: Barriers to Family Planning Access in Texas, Evidence from a Statewide Representative Survey, May 2015.

³ Amanda J. Stevenson et al., “Effect of Removal of Planned Parenthood from the Texas Women’s Health Program,” *The New England Journal of Medicine*, Feb. 2016.

⁴ *Id.*

⁵ Marian F. MacDorman et al., “Recent Increases in the U.S. Maternal Mortality Rate,” *Journal of Obstetrics and Gynecology*, Sept. 2016.

Section 1902(a)(23) of the Social Security Act ensures Medicaid beneficiaries have the right to obtain medical services “from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide . . . such services.”⁶ Given the importance of family planning services and the sensitive nature of this provision of care, Congress has explicitly required states to retain freedom of choice for family planning services and supplies, including when implementing managed care programs.

Under section 1902(a)(23), states are not permitted to exclude providers based on reasons other than the state’s established provider qualification standards, which must be “. . . related to the fitness of the provider to perform covered medical services—*i.e.*, its capability to perform the required services in a professional competent, safe, legal, and ethical manner—or the ability of the provider to appropriately bill for those services.”⁷

CMS clarified and reiterated the importance of the provider of choice provision both in an informational bulletin to states issued in June 2011,⁸ and again in guidance issued in April 2016, noting that provider qualification standards must be applied in an “evenhanded manner” and may not deny qualification to a provider or group of providers for reasons unrelated to their ability to provide care. Additionally, CMS emphasized that states may not exclude family planning providers because they provide the full range of legally permissible gynecological and obstetric care, including abortion services, as part of their scope of practice.⁹

Texas’ demonstration waiver application seeking federal Medicaid funding while also excluding qualified family planning providers not only defies the state’s objective to increase access to family planning services and other preventive care for women, but it also violates the statutory requirements of federal Medicaid law and Congressional intent to ensure Medicaid enrollees have access to family planning services from their providers of choice. Excluding qualified family planning providers from Texas’ demonstration project will reduce access to care for patients and lead to worse public health outcomes. For these reasons, the Texas family planning project cannot be approved as proposed.

⁶ Social Security Act, § 1902(a)(23).

⁷ The Centers for Medicare & Medicaid Services, “State Medicaid Director Letter #16-005: Clarifying “Free Choice of Provider” Requirement in Conjunction with State Authority to take Action against Medicaid Providers,” Apr. 19, 2016. *See also Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012).

⁸ The Centers for Medicare & Medicaid Services, “CMCS Informational Bulletin: Update on Medicaid/CHIP,” June 1, 2011.

⁹ The Centers for Medicare & Medicaid Services, “State Medicaid Director Letter #16-005: Clarifying “Free Choice of Provider” Requirement in Conjunction with State Authority to take Action against Medicaid Providers,” Apr. 19, 2016.

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We urge you to swiftly deny this application as it clearly violates federal Medicaid law and Congressional intent.

Sincerely,



Frank Pallone, Jr.
Ranking Member



Gene Green
Ranking Member
Subcommittee on Health