



Reverend Al Sharpton, President & Founder
Reverend Dr. W. Franklyn Richardson, Chairman of the Board

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June 16, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

**Re: Medicaid Program; Medicaid and Children's Health Insurance Program (CHIP)
Managed Care Access, Finance, and Quality (CMS-2439-P)**

Dear Secretary Becerra and Administrator Brooks-LaSure:

For decades, the National Action Network (NAN) has embodied the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice and decency for all people. NAN accomplishes this goal by advancing policies and practices that expand human and civil rights and ensure equal opportunity, regardless of race, religion, ethnicity, citizenship, criminal record, economic status, gender, gender expression, or sexuality. Your agency plays a critical role in developing and enforcing policies vital to well-being of our those we strive to protect. We celebrate the laudable work your team performs each day, and we write to express our hope that the agency will continue to keep a steady eye on the impact of its policies on society's marginalized members.

The need for this focus is keen as the agency revisits its position on the financial systems that keep the medical safety net afloat. In the *Medicaid Program; Medicaid and Children's Health Insurance Program (CHIP) Managed Care Access, Finance, and Quality Proposed Rule* (the



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“Proposed Rule”¹ released on May 3, the Centers for Medicare & Medicaid Services (CMS) proposes several changes to the existing landscape for financing of the Medicaid-providing hospitals. I write to identify three primary areas of concern: 1) lack of impact analysis on the poor and minority patient population, 2) misuse of a civil rights legal standard to defend an off-base policy, and 3) deprivation of court access.

A. The Need for Impact Analysis

The proposed preamble threatens to take away federal financial support based on private financing practices that occur long after the dollars leave government hands. The impact of any changes to the current Medicaid finance rules cannot be understated for the Black and minority communities NAN defends.

Medicaid statistics are staggering. In many states, over 60% of babies born to Black families and families of color use Medicaid. The federal government’s Medicaid funding funnels to the communities where Medicaid is utilized most—often to areas that are majority-minority and economically disenfranchised. If the hospitals in these communities lose access to essential federal funds, these lifesaving centers will close.

Already, our country battles the scourge of closures in areas with dense populations of poor Black people and persons of color. In 2019, Hahnemann Hospital in Philadelphia went bankrupt and shuttered its doors. Just last year, lack of resources forced Atlanta’s Wellstar Hospital System to close last year. At the same time, Cleveland’s St. Vincent Charity Medical Center converted to outpatient only, leaving residents without emergency care. Many systems persist through the grim financial realities of serving the poor only because federal resources keep them afloat. Policy changes that worsen the already dire landscape have no place in this Administration.

Absent from the Proposed Rule rule is any analysis addressing the harsh reality of resource impacts for the hospitals that serve our country’s poorest citizens. Missing from the proposal is any breakdown of which hospitals stand to lose most by the proposed policy change, which populations they serve, and which services must cease without federal funding to sustain them. Already, we have heard from bipartisan legislators in Texas that their expectation is that the preamble to the proposed rules threatens to cost Congressman Al Green’s (D-Houston) congressional district approximately \$1.6 billion per year. Similarly, Congresswoman Jasmine

¹ 88 *Fed. Reg.* 28092 (May 3, 2023).



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Crocket's (D-Dallas) district stands to lose approximately \$900 million per year. Both members represent inner cities, and both have districts with a significant number of Blacks and Hispanics.

The mere possibility of these communities being impacted in this manner demands that the risk to all major safety-net systems across the country be examined.

As an agency charged with ensuring Americans have access to health care, CMS cannot and should not take any action affecting the medical safety net without a full examination of the impact proposals will have on access to care for Black Americans and persons of color. Unless and until the agency can quantify the impact, the proposed change cannot occur. Deprivation of federal resources will create a gaping hole for the systems that serve our poor. We cannot leave them victim to needlessly hasty action.

B. Using the "Net Effect" Standard to Improve Healthcare Equity and Promote Social Justice

In 2019, President Trump's Administration proposed the Medicaid Fiscal Accountability Regulation (MFAR), which sought to eliminate funding tools that have promoted access to care for the poor for over decades. The Trump Administration's MFAR blatantly attempted to shrink the Medicaid program and make it harder to support the hospitals that cater to the poor and voiceless. In crafting the MFAR proposal, the Trump Administration invoked a legal test—the "net effect" test—that advocates of civil rights have celebrated for decades. The Trump Administration perverted this sword in the battle for justice and used it as a weapon against the populations it was designed to protect.

In the new Proposed Rule, CMS mimics and revives the language of the Trump Administration's MFAR in its preamble. The agency threatens that it will take away funding access based on the "net effect" of any funding transfers between hospitals. NAN strongly objects to the agency using this test to undermine the safety net for Black and minority patients. In our decades of work to defend minority communities, our legal advocate allies have invoked the "net effect" standard countless times to challenge facially neutral laws inspired by malicious, discriminatory intent. Until the arrival of this standard, minorities who faced disproportionate harm had no avenue to fight back against laws that appeared neutral on their face. But the "net effect" standard gave victims a path to look behind the words on paper to expose the hateful and unlawful motivations behind the policy. Black people and persons of color used this test to get their day in court and force governmental actors to defend and justify facially neutral laws whenever the victims could prove the disparate impact on the marginalized and minority communities. In the courtroom, the "net effect" test changed the civil rights landscape. It opened the floodgates for relief. And since that time, the test consistently and correctly has unearthed



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and demolished sexism, racism, ageism, and institutional injustice. We cannot let this test's legacy be compromised by its proposed misuse here.

We ask the agency to refocus its attention on the right “net effect”: the impact on the poor and disabled Medicaid enrollees in urban centers where hospitals struggle to keep doors open. These patients are the ones who most need the agency to protect and preserve their health care systems.

President Biden campaigned against MFAR in 2019. Vice President Harris joined twenty-seven of her Senate colleagues in signing a letter noting MFAR “would be devastating to providers across the country and the vulnerable low-income patients who rely on them.” This Administration must return to its first instinct and abandon the misuse of the “net effect” standard to harm the vulnerable.

C. Curtailing Access to the Court

In the same spirit, we ask that the agency abandon any proposal that would deprive affected parties of access to federal courts. We believe the agency should instead promote policies that broaden individuals' and states' right to bypass any administrative process and gain access to federal court if there is even a scintilla of evidence suggesting a rule tied to Medicaid could have a disparate impact.

We know well that a federal courtroom is an incomparable forum for championing the cause of equality. Beginning in the 1930s, advocates for racial equality systematically used the courts to take down Jim Crow laws, ultimately leading to the landmark victory for civil rights in the era: *Brown v. Board of Education*. Our history has taught us that the courtroom's well-established rules and procedures afford parties strong protections as they make their case. Blind justice has a chance to prevail when the judge is a neutral arbiter and when the forum is fair. Any effort to divert cases away from the halls of justice must be examined. Deprivation of access to court is at odds with the cause of equality.



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Thank you for your service and for your actions to bring to bear President Biden’s vision of improving access to equitable care for the most vulnerable patients in our country. Your work each day ensures that Black people, persons of color, and economically disadvantaged Americans continue to access the medical care they need to thrive. We support your dedication, and we invite collaboration in our shared mission of advancing policies that undercut systems creating racial and economic injustice.

Regards,

Reverend Al Sharpton
Founder, National Action Network