

United States Senate

WASHINGTON, DC 20510

August 4th, 2017

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

Dear Administrator Verma:

We are writing to express our concern regarding Texas' proposal to seek federal funding for a Medicaid family planning demonstration project. Permitting Texas to implement the project as proposed would provide women with substandard access to family planning and other preventive care for women, fail to meet with statutory requirements, and run counter to Congress' longstanding intent for the Medicaid program. Texas's waiver request is a continuation of longstanding organized efforts to undermine access to family planning providers, including Planned Parenthood, to advance ideological goals without concern for the health and well-being of the women of Texas. This proposal must be rejected.

Texas started a Medicaid family planning demonstration in 2007. The project improved access to contraception, and, as a result, reduced unintended pregnancies and Medicaid-funded births.¹ As the demonstration period expired, Texas asked the Secretary of the Department of Health and Human Services to renew the project with a troubling restriction – a waiver of Medicaid's longstanding "freedom of choice" provision that ensures that patients can see the qualified family planning provider who they trust. The Centers for Medicare & Medicaid Services (CMS) declined to waive this crucial patient protection and, rather than comply with federal requirements for Medicaid funding, Texas implemented a solely state-funded family planning project in 2013 that excluded a number of qualified providers who were deemed to perform or "promote" abortion services or affiliate with providers who do so.

This decision had serious negative consequences for Texan women's access to health services. Although research has shown long-acting reversible contraceptives (LARCs) to be the most effective method of reversible contraception, after Texas excluded qualified family planning providers from its project, LARC use among beneficiaries declined by more than one-

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

third.² In addition, the rate of Medicaid-funded births increased.³ As of 2014, 55% of women in Texas reported at least one barrier to accessing reproductive health services, including family planning services and cervical cancer screening.⁴ Maternal mortality rates in Texas also doubled between 2011 and 2014, a time frame that largely coincides with the state eliminating access to Planned Parenthood.⁵ Pregnancy-related deaths were even higher among women of color, further exacerbating stark health disparities in the state.

Now, rather than addressing the problems that have arisen from restricting beneficiaries' choice of provider, Texas is again seeking federal Medicaid funding to operate its family planning project with a waiver of the longstanding freedom of choice requirement. The state's request is intended to single out providers who provide or promote—or are affiliated with those who provide or promote—abortion services as part of their scope of practice, with the ultimate goal of making legal abortion services unavailable in Texas. It is also clear that the program will continue to result in women losing access to critical care, which in turn will result in high rates of unintended pregnancy and maternal mortality.

The Secretary has never granted a waiver for a program that has already proven to be ineffective, nor has the Secretary granted a waiver of freedom of choice for family planning services for any purpose, much less one that purposefully targets certain qualified providers. Protecting the patient-provider relationship in this manner is consistent with Congressional intent and statutory requirements that have been in place for over thirty years.

Section 1115 of the Social Security Act provides states flexibility to explore new approaches to further health care access for low-income individuals and families. Texas has already demonstrated that its program will not serve women in its state. Approving this project as proposed would be a clear violation of federal law.

In addition, the freedom of choice provision in section 1902(a)(23) of the Social Security Act gives Medicaid enrollees 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.” Recognizing the sensitive and valuable nature of family planning services, Congress explicitly requires states to retain freedom of choice for family planning services and supplies, even when implementing managed care programs.

Moreover, under section 1902(a)(23), states cannot exclude providers based on criteria other than the state's established provider qualification standards. These standards must be “...related to the fitness of the provider to perform covered medical services—*i.e.*, its capability

² Amanda J. Stevenson et al., “Effect of Removal of Planned Parenthood from the Texas Women's Health Program,” *The New England Journal of Medicine*, February 2016.

³ *Id.* at 858.

⁴ Tex Policy Evaluation Project Research Brief: Barriers to Family Planning Access in Texas, Evidence from a Statewide Representative Survey, May, 2015.

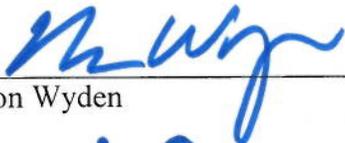
⁵ MacDorman, Marian F, et al. “Recent Increases in the U.S. Maternal Mortality Rate.” *Journal of Obstetrics and Gynecology*. (2016), *available at*

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to perform the required services in a professionally competent, safe, legal, and ethical manner—or the ability of the provider to appropriately bill for those services.”⁶ As clarified in April 2016 guidance issued by CMS, the provider qualification standards must be applied in an evenhanded manner and may not target a provider or group of providers for reasons unrelated to their ability to provide or bill for the Medicaid service. CMS further clarified that states cannot exclude providers from participation in their Medicaid programs because they provide the full spectrum of gynecological and obstetric care, including abortion services, as part of their scope of practice.⁷

Texas’s 1115 demonstration proposal to exclude qualified family planning providers from the Medicaid program while receiving federal Medicaid funding for such services runs directly counter to both the state’s stated objective -- increasing access to family planning and other preventive care for women -- as well as the purpose and statutory requirements of Section 1115 waivers and the Congressional intent underlying them: to ensure family planning access for Medicaid enrollees. There is no question that excluding these providers, namely Planned Parenthood, from the demonstration project reduced access to family planning services for enrollees. Thus, the family planning project is not approvable as proposed. We urge your swift rejection of this request that clearly violates federal law and Congressional intent.

Sincerely,



Senator Ron Wyden



Senator Patty Murray



Senator Sherrod C. Brown



Senator Richard Blumenthal

⁶ 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,’” April 19, 2016, available at <https://www.medicaid.gov/federal-policy-guidance/downloads/SMD16005.pdf>. See also *Planned Parenthood of Ind. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012).

⁷ *Id.*



Senator Kirsten Gillibrand



Senator Elizabeth A. Warren



Senator Edward J. Markey



Senator Jeanne Shaheen



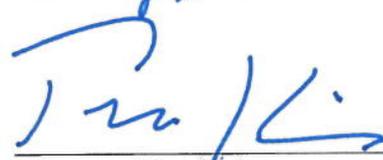
Senator Mazie K. Hirono



Senator Margaret Wood Hassan



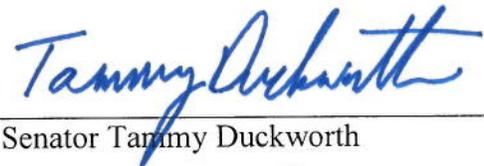
Senator Benjamin L. Cardin



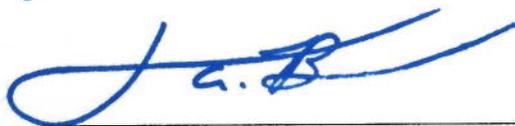
Senator Tim Kaine



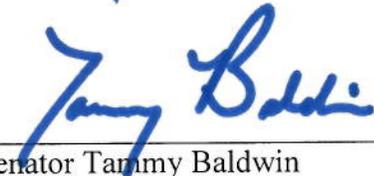
Senator Chris Van Hollen



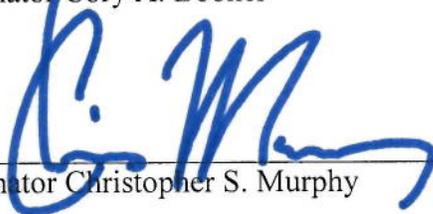
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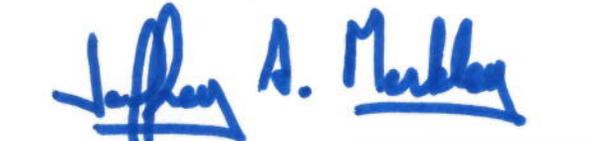
Senator Catherine Cortez Masto



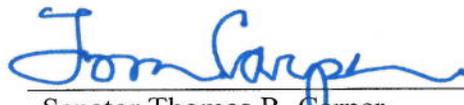
Senator Debbie A. Stabenow



Senator Dianne Feinstein



Senator Jeffrey A. Merkley



Senator Thomas R. Carper



Senator Bill Nelson



Senator Robert Merendez