



EVERY TEXAN

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To: Texas Health and Human Services Commission

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From: Every Texan

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Re: Comments on Texas HHSC May 2021 Extension Request for Texas Healthcare Transformation Quality Improvement Program waiver under section 1115 of the Social Security Act

Every Texan appreciates the opportunity to submit extended comments on Texas Health and Human Services' (HHSC) May 2021 Extension Request for the Texas Healthcare Transformation Quality Improvement Program waiver under section 1115 of the Social Security Act, as published at <https://www.hhs.texas.gov/laws-regulations/policies-rules/waivers/waiver-renewal>; and announced in the Texas Register at <https://www.sos.state.tx.us/texreg/archive/May282021/In%20Addition/In%20Addition.html#213>. We were pleased to also share abbreviated spoken comments on June 15, 2021 at one of HHSC's public hearings.

Overview

Our top-line requests of Texas HHSC, which we will also share with Centers for Medicare and Medicaid Services (CMS) in the federal comment period, are:

1. Revise the extension or renewal of this waiver to include coverage for adults up to 138% federal poverty level as provided for under the Affordable Care Act;
2. Approve the newly requested "Public Health Provider-Charity Care Program" (PHP-CCP) Uncompensated Care (UC) pool, and continue the current UC pool;
3. Apply the time period for the extension or renewal which is lawful under the Social Security Act;
4. Incorporate a new robust program of eligibility and recertification outreach and informing, featuring a strong focus on Texas' mixed-immigration-status families in which more than 1 in 4 Texas children live, and including coordination and updated staff training for all HHSC and US DHHS-funded application assisters; and
5. Address inequities in Texas Medicaid Managed Care between network adequacy standards and reimbursements for acute care versus Long Term Services and Supports, in particular the absence of parity of network adequacy for Personal Attendants and the lack of Directed Payment Programs to create a living wage for Personal Attendants.

Coverage Expansion should be added to the 1115 waiver

We deeply appreciate this public comment process in part because it provides an opportunity to express our support for transitioning to a more robust and beneficial approach to Texas Medicaid's 1115 waiver, to include real comprehensive Medicaid coverage for an estimated 1.4 million or more uninsured low-

wage adults with incomes up to 138% of the federal poverty level.ⁱ Many indicators show that Texans need channels through which to voice their preference for Medicaid expansion.

- Several [recent polls](#) show more than [2/3 of Texans](#) support Medicaid expansion. In addition to polling, in HHSC's **2019 DSRIP Transition input process**, a large majority of respondents expressed support for Medicaid coverage and concern about diminished access to services for the uninsured after the termination of DSRIP in October 2021.
- In April 2021, [188 Texas organizations banded together to urge state leaders](#) to provide a health insurance option for low-wage Texas adults.
- In March 2021, [Chambers of Commerce of Texas' eight largest metro areas](#) wrote to the Governor, Lt. Governor, and Speaker of the House expressing their support for covering more Texans "through a thoughtful waiver-based program drawing on innovative solutions adopted from states like Arizona, Arkansas, Iowa, Indiana, Montana" allowing more Texans "access to quality and affordable health care coverage."
- [A bill proposing a coverage expansion](#) under a Texas 1115 waiver was supported by 76 Representatives—a majority of the 150-member Texas House—in the current Texas Legislative session, but was not granted a hearing.

The federal requirements for state and federal public notice and comments on 1115 waivers (under section 1115(d)(2) of the Social Security Act and implementing regulations in 42 C.F.R. Part 431, Subpart G) help to ensure that this kind of majority opinion is made known to the state and federal governments, through a public process.

Other Transparency Issues

Our appreciation for this public comment process is not limited to that one very important issue. Open and transparent processes for developing Medicaid policy are important to the over 4 million Texans enrolled today, and to the health care systems that provide care to them.

The process in which the Centers for Medicare and Medicaid Services (CMS) and Texas HHSC approached the Texas HHSC November 30, 2020 extension request lacked transparency in certain ways that would have made full meaningful public comment impossible. Several major policy changes that were not included in the 11/30/20 Texas request, were approved in the 1/15/2021 CMS extension approval. These include:

- Texas requested a 5-year waiver extension, but received approval from CMS for a 10 year extension.
- Texas' 11/30/2020 request did not include a request to establish a new "Public Health Provider-Charity Care Program" (PHP-CCP) Uncompensated Care (UC) pool designed to help local health departments and mental health authorities pay for free care to the uninsured. This new waiver component was first made public in the CMS 1/15/2020 approval.
- Texas' 11/30/2020 extension request did not include description, details, or amounts of Directed Payment Programs (DPPs) that the state has proposed, outside of the formal 1115 structure, to mitigate the FY 2022 loss of DSRIP funding. The extension request did not articulate that establishing favorable terms for a high Budget Neutrality cap, including favorable rebasing assumptions, was critical not only to the future allowed amounts for the longstanding UC pool and the newly requested PHP-CCP. Nevertheless, this framework has been heavily emphasized by Texas HHSC since the April 2021 CMS rescission of the 1/15/2021 approval.

Because the above-listed policies were not included in Texas Medicaid's 11/30/2020 extension request, Texans could not have commented on them, even had the state fully adhered to the normally required public notice and comment framework for 1115 waivers.

Moreover, allowing this degree of departure from the proposed/requested extension terms would represent a major difference for 1115 processes compared to the standards applied to federal rules. As we understand it, while an agency's final rule can make changes from the proposed regulation (as published in the Notice of Proposed Rulemaking), policy changes negotiated and added post application/outside the proposal and without opportunity for public comment must be a "logical outgrowth" from the proposed rule. While 1115 demonstration program processes are not regulations, the lack of an opportunity for Texans to comment on and influence the 1115 waiver extension did not extend the same respect to public input that a regulation would have received.

Support for Extension Elements

Every Texan wishes to specify major aspects of the May 2021 Texas Medicaid extension request that we support. We strongly agree that HHSC should pursue an 1115 waiver extension.

Texas will continue to need the 1115 Uncompensated Care pool, which has principally reimbursed hospitals. We know that given the over 5 million uninsured Texans, even after extending Medicaid coverage to 1 to 1.5 million of the lowest-income uninsured Texans, hospitals will still bear billions in uncompensated care, including for Texans with incomes below 138% of the federal poverty level. Specifically, undocumented immigrant residents of Texas will continue to generate uncompensated hospital visits. Unfortunately, *because Texas is one of only six states that also excludes "lawfully present" immigrant pregnant women and other "qualified alien" adults from Medicaid*, there is also potential for this authorized immigrant population to remain uninsured and have charity care visits.ⁱⁱ

Of note, the scope of "Emergency Medicaid" for non-citizens who are excluded from Medicaid due to immigration status is limited to exclude many life-saving therapies and completely excludes critical management of chronic illnesses. In addition, absent Medicaid Expansion, "Emergency Medicaid" is not available for most adults under 138% of the federal poverty level, because it mirrors the limits that apply to the state's categorically eligible persons; thus, most immigrant adults are excluded from Emergency Medicaid just as their US citizen counterparts are. In general, only services to immigrant pregnant women and parents with incomes below 18% of the federal poverty level are eligible for reimbursement under Texas' Emergency Medicaid.

Given those facts as they affect Texas Medicaid, HHSC and CMS may wish to consider incorporating a method of targeting or tracking the portion of UC payments for costs of care to undocumented residents that are unreimbursed by "Emergency Medicaid."

In addition, until major gaps in the Affordable Care Act (ACA) affordability programs are resolved (including the "family glitch" and adequacy of premium subsidies and cost-sharing reductions after the American Rescue Plan Act Extensions expire), Texas hospitals will continue to provide uncompensated care visits to low-income citizens and non-citizens above the ACA's Medicaid expansion income cap.

It should further be recognized that until a robust effort is made by both federal and state Medicaid agencies to reassure Texans in mixed-immigration-status families—26% of Texas children have a non-citizen parent—that participation in Medicaid, CHIP, or ACA affordability programs will not result in negative immigration consequences, too many eligible Texans will remain uninsured.

Every Texan also supports the Texas HHSC proposal to establish a new, smaller "Public Health Provider-Charity Care Program" UC pool designed to help local health departments and mental health authorities pay for free care to the uninsured, and we hope CMS can expedite approval to allow that pool to begin operations in October 2021 as requested by HHSC.

Despite our support for those important extension elements, Every Texan also joins many other commenters in calling for Texas' extension application to be strengthened by the addition of a coverage expansion for adults.

Uncompensated Care funding is not a substitute for health coverage for low-wage Texans

Uncompensated Care (UC) pools are not an acceptable policy alternative to comprehensive coverage under Medicaid expansion (whether via State Plan Amendment or 1115 waiver), and are of limited benefit to the uninsured Texas adults who could be covered under ACA Medicaid Expansion. A hospital getting paid afterwards for an uninsured working parent's Emergency Room visit does not help that parent access preventive care, ongoing treatment and monitoring of chronic conditions like asthma, high blood pressure, or diabetes, or even get cancer treatment. It won't pay for a follow-up visit, or the medications or medical supplies they need. Moreover, UC payments to providers will never substitute for the financial security and protection from high medical bills and debt that the entire family benefits from when an adult is insured.

The uninsured adults in Texas who could be covered under such an expansion include hundreds of thousands of Texans with serious and chronic illness diagnoses that fall just short of meeting thresholds for SSI disability benefits and related Medicaid, including many adults with chronic mental health issues.ⁱⁱⁱ Indeed, the rescinded 1/15/2021 CMS extension approval emphasizes that Uncompensated Care pools are not providing coverage, and that Texas hospitals' uncompensated care load remain high.

Unlike the UC pools, ensuring comprehensive coverage for the potential Medicaid expansion would target federal Medicaid dollars for that group to demonstrated beneficiary medical needs, including primary, specialty, and chronic care that are not supported through the UC structure.

We emphasize again that Every Texan supports a continued role for UC funding in this waiver. However, we do not believe that maintaining UC funding for care provided to Texans who could be covered by Medicaid expansion should take precedence over providing affordable comprehensive health coverage for those low-wage adults, who are excluded from the Affordable Care Act's Marketplace subsidies, and for whom Texas could be receiving both a 90% federal match, and a bonus under ARPA estimated by USHHS at \$3.9 billion for Texas.

Given that section 1115 of the Act directs that state demonstration projects must promote the objectives of the Medicaid program, and the United States Court of Appeals for the District of Columbia's recent decision in *Gresham v. Azar* held that the "statute and the case law demonstrate that the primary objective of Medicaid is to provide access to medical care," Every Texan urges Texas HHSC and CMS to recognize that comprehensive coverage for the expansion-eligible population is by far the stronger and more effective policy vehicle. To echo the Episcopal Health Foundation's recent comments, "comprehensive health care for Medicaid-eligible adults, consistent with the Medicaid statute, can and must be given equal footing with financing structures to support safety net institutions."

Budget Neutrality and Rebasing Assumptions in Texas Medicaid Extension Request

Texas HHSC seeks through the extension request to secure advance approval of favorable terms establishing upper limits for Budget Neutrality calculations, including favorable rebasing assumptions. While future approval of new and revised Directed Payment Programs (DPP) is outside the bounds of this 1115 waiver, Texas HHSC sought through the terms of the since-rescinded 1/15/2021 extension approval to safeguard Budget Neutrality "headroom" sufficient to allow for robust future growth in the longstanding UC pool, the newly requested PHP-CCP, as well as for the proposed DPPs.

As longtime advocates for both uninsured Texans and for current Medicaid enrollees, Every Texan recognizes the value of improving payment rates for Medicaid providers, which is beneficial in ensuring

adequate numbers of providers accept Medicaid patients. ***Still, we must also note that the proposed rate enhancements through the DPPs do not benefit uninsured Texans.***

In the absence of clear executive branch authority to pursue coverage expansion, the Directed Payment Programs (DPPs) that Texas HHSC has proposed outside of the formal 1115 structure will help Texas to mitigate the abrupt FY 2022 loss of DSRIP funding. The Agency's DPP design should be credited for its emphasis on quality and performance measures. However, it is not without flaws, as it does not guarantee equitable statewide rate supplements for all Medicaid providers, and the amounts estimated for non-hospitals are very modest in comparison to the institutional allocation. It is not clear that office-based physicians, non-physician mental health providers outside of the public sector, or critical providers including Physical, Occupational, and Speech therapists and Personal Attendants will benefit from the rate enhancement structure, despite being among the most-needed providers for the children, seniors, and people with disabilities who make up 88% of Texas Medicaid enrollment.

While Every Texan does not oppose Texas' pursuit of increased Medicaid spending authority for either U.C. pools or DPPs, **we do reject the premise that seeking that funding approval should take precedence** over providing affordable comprehensive health coverage for Texas' low-wage adults who are excluded from the Affordable Care Act's Marketplace subsidies, and for whom Texas could be receiving a 90% federal match and the estimated \$3.9 billion bonus under ARPA for a new expansion. Instead, Texas allows over a million uninsured adults to remain without a Medicaid or ACA coverage option, accepting only a ~62% federal match and leaving the burden of the 38% "non-federal" share to local governments whose obligation could have been reduced from 38% to 10%.

Opposition to Texas HHSC's request for a 10-year extension

Every Texan was surprised to learn that Texas HHSC is requesting a 10-year extension of the waiver. Texas HHSC's November 2020 application for extension requested only the 5-year extension which has been the standard period for 1115 initial approvals and renewals, and subsections (e) and (f) of section 1115 are clear that initial and subsequent extensions of an approved demonstration are limited to three-year periods.

We understand that despite this explicit statutory limit, 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." We recognize that the 10-year timeline in the since-rescinded waiver extension may be a policy that CMS and the Secretary of Health and Human Services will wish to reconsider. In the case of our Texas waiver, Every Texan believes that a 10-year request, apart from exceeding the specific statutory limit of 3 years, is especially inappropriate given the major policy changes made after the 11/30/2020 application. We agree with the Episcopal Health Foundation's position that "10 years is too long to lock in a delivery system that is premised on funding institutions for uncompensated care rather than providing coverage to individuals so they can access care." Given the extreme complexity of the Texas methods of finance, the potential winners and losers under the proposed waiver when considered along with the state's DSRIP Transition Plan, and the urgent need for coverage expansion, we cannot support the HHSC request for a 10-year extension.

Texas Medicaid Should Devote Resources to Robust Outreach, Informing, and Enrollment Activities

As noted above, Texans broadly have not had the opportunity previously to recommend to HHSC their priorities for enhancements and transformations to Medicaid through future 1115 waiver changes. Critical to improving the effectiveness of Texas Medicaid and to reducing Texas worst-in-nation uninsured rate (for both children and adults) would be enhanced federal funding for robust and proactive enrollment and retention efforts for Medicaid, and setting expectations for those systems to have strong coordination with CHIP and ACA Marketplace enrollment activities and entities.

In Texas, establishing active and ongoing coordination between HHSC's eligibility division, the agency's Community Partners Program, federal Navigator grantees, Certified Application Counselor organizations, and other community-based entities that enroll Texans in health care benefits would help reduce Texas' relatively high numbers of eligible but unenrolled children, and could reduce delays in beginning prenatal care.

In addition, U.S. Census data indicate that more than one in four Texas children has at least one non-citizen parent (of any immigration status). Given that fact, Texas Medicaid outreach and enrollment materials should be updated, and eligibility staff should be trained to assist mixed immigration status families so that all potentially eligible Texans are effectively reached and enrolled. Robust outreach and informing should include updated information on federal Public Charge policies, and clear understandable information on eligibility policy and processes for non-citizens, and for members of the families that include them.

Enhanced Data Collection is Needed to Support Racial and Ethnic Equity

U.S. Census data show that 75% of the uninsured Texas adults who could be covered under Medicaid expansion are Texans of color.^{iv} In addition, Texas remains one of only 6 states that exclude lawfully present and "qualified alien" adult immigrants (including pregnant women) who entered the U.S. after the 8/22/1996 enactment of the Personal Responsibility and Work Opportunity Reform Act (PRWORA). However, Texas' capacity to monitor and document access to care and gaps in participation by race, ethnicity, tribal affiliation, and immigration status through actual program data is currently very limited.

Other key opportunities to improve information that will inform and enable improved access include renewed commitment to collection of EPSDT program data that is stratified by age, and disaggregated by race and ethnicity. Every Texan strongly urges Texas HHSC and CMS to consider waiver elements that will enable improved disaggregated and stratified data on these measures, along with urban and rural disaggregation. We also recommend that these disaggregated analyses be incorporated into the design of the robust evaluation Texas HHSC has proposed for the 1115 waiver.

Texas Medicaid Managed Care and Long Term Services and Supports

Most of Texas' Medicaid Managed Care programs are operated under authority of this waiver. Every Texan staff serve on the Texas HHSC Statewide Medicaid Managed Care Advisory Committee, and we wish to endorse several recommendations made by Texas disability advocates. Texas 1115 waiver governs not only STAR (covering Acute Services for income-based Medicaid enrollees), but also STAR PLUS (covering Acute and Long Term Services & Supports (LTSS) and STAR KIDS (for children with SSI-linked Medicaid or LTSS needs under the special income limit).

Texas disability advocates from several leading organizations note that Personal Attendant network adequacy and payment rates have not benefited from the level of attention devoted to other features of the 1115 waiver. For example, Texas HHSC's DPPs do not include a provision to increase Personal Attendant rates, the lowest of which were \$8.11 per hour in 2020. It is estimated that about 178,000 Texas Medicaid enrollees use Attendant services. **Disability Rights Texas (DRTx)** has recommended through this comment process that a portion of savings assumed from this 1115 waiver be directed to increasing attendant wages. The **Coalition of Texans with Disabilities (CTD)** reports that the Texas Workforce Commission (TWC) will not refer jobseekers for Attendant care positions, because federal regulations require that job referrals lead to economic self-sufficiency, and these jobs do not.^v

While Texas HHSC responded to the Legislative directive to make recommendations to improve Recruitment and Retention of HCBS/Community Attendants in the "Rider 157 report", these recommendations have not yet been specifically reflected in Texas' 1115 extension request.

American Disabled for Attendant Programs Today (ADAPT) of Texas and the Personal Attendant Coalition of Texas (PACT) have strongly recommended the placement of the Rider 157 report

recommendations in the new 1115 Waiver extension submittal. Two Rider 157 report recommendations those organizations point to, and which Every Texan also supports, are (1) establishment of state and regional Attendant registries, based on an existing program in Massachusetts, the Mass PCA Directory; and (2) ending the current prohibition on hiring of family members to be HCBS/Community Attendants in all Texas HCBS/Community Services Programs.

ADAPT/PACT also strongly recommend a project to develop and implement meaningful HCBS/Community Services Network Adequacy requirements, noting that Medicaid Managed Care in Texas has numerous Network Adequacy requirements for Acute Services, but few if any Network Adequacy requirements for HCBS/Community services. Every Texan endorses this recommendation as well.

DRTx, CTD, ADAPT of Texas, and PACT all also endorse the addition of coverage expansion under the 1115 waiver, noting that the overwhelming majority of HCBS/Community Attendants have no health insurance or other benefits such as sick leave, Personal Time Off, or vacation time benefits while working as Community Attendants. Coverage programs for low-income Texans would mean many HCBS/Community Attendants would gain coverage while providing essential HCBS/Community Attendant services, which in turn would bolster the recruitment and retention of HCBS/Community Attendants.

ADAPT/PACT recommend that an ongoing diversion/relocation program be formally included in this 1115 Waiver. They suggest that Money Follows the Person funding may be a source of financing, and point to the Office of the Long Term Care Ombudsman program and the current practices of some Texas Managed Care Organizations which contract with Community Organizations for relocation services from Nursing Facilities/Institutions into the Community as promising components of any 1115 extension component designed to expand relocation services.

Every Texan appreciates the complex and intensive work that the Texas Healthcare Transformation Quality Improvement Program 1115 waiver has represented, and we acknowledge the tireless work of hundreds of HHSC employees in this extension process throughout the waiver's existence. We hope that our recommendations can help to make the program stronger than ever, and thank you for your consideration.

Any questions regarding these comments can be submitted to Anne Dunkelberg on our staff, via email at dunkelberg@everytexan.org.

Kaiser Family Foundation <https://www.kff.org/medicaid/fact-sheet/uninsured-adults-in-states-that-did-not-expand-who-would-become-eligible-for-medicaid-under-expansion/>; Texas fact sheet from this brief: <https://files.kff.org/attachment/fact-sheet-medicaid-expansion-TX>.

ⁱⁱ National Immigration law Center, Overview of Immigrant Eligibility for Federal Programs <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>.

ⁱⁱⁱ Kaiser Family Foundation, People with Disabilities Are At Risk of Losing Medicaid Coverage Without the ACA Expansion, <https://www.kff.org/medicaid/issue-brief/people-with-disabilities-are-at-risk-of-losing-medicaid-coverage-without-the-aca-expansion/>; Every Texan, https://everytexan.org/wp-content/uploads/2021/04/HW_2021_04_MedicaidExpansion_Factsheet2.pdf.

^{iv} **Kaiser Family Foundation** <https://www.kff.org/medicaid/fact-sheet/uninsured-adults-in-states-that-did-not-expand-who-would-become-eligible-for-medicaid-under-expansion/>; Texas fact sheet from this brief: <https://files.kff.org/attachment/fact-sheet-medicaid-expansion-TX>.

^v Coalition of Texans with Disabilities, <https://www.txdisabilities.org/community-attendants>.