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1ST SESSION

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To amend title XIX of the Social Security Act to establish a methodology for determining State allotments for Medicaid disproportionate share hospital payments that is based on State poverty levels, to require States to prioritize disproportionate share hospital payments on the basis of Medicaid inpatient utilization and low-income utilization rates, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 10, 2021

Mr. RUBIO introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend title XIX of the Social Security Act to establish a methodology for determining State allotments for Medicaid disproportionate share hospital payments that is based on State poverty levels, to require States to prioritize disproportionate share hospital payments on the basis of Medicaid inpatient utilization and low-income utilization rates, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “State Accountability,
3 Flexibility, and Equity for Hospitals Act of 2021” or the
4 “SAFE Hospitals Act of 2021”.

5 **SEC. 2. DETERMINATION OF STATE DSH ALLOTMENTS**
6 **BASED ON STATE POVERTY LEVELS.**

7 Section 1923(f) of the Social Security Act (42 U.S.C.
8 1396r-4(f)) is amended—

9 (1) in paragraph (3)—

10 (A) in the paragraph heading, by striking
11 “YEAR 2003 AND THEREAFTER” and inserting
12 “YEARS 2003 THROUGH 2023”;

13 (B) in subparagraph (A)—

14 (i) by striking “, (7), and (8)” and in-
15 serting “and (7)”; and

16 (ii) by inserting “through fiscal year
17 2023” after “each succeeding fiscal year”;

18 (C) in subparagraph (C)(ii), by inserting
19 “through fiscal year 2023” after “each suc-
20 ceeding fiscal year”; and

21 (D) in subparagraph (E)(i)(III), by insert-
22 ing “or paragraph (7), as applicable,” after
23 “this paragraph”;

24 (2) in paragraph (4)(C), by inserting “or para-
25 graph (7), as applicable,” after “paragraph (3)”;

26 (3) in paragraph (5)(B)—

1 (A) in the subparagraph heading, by strik-
 2 ing “AND SUBSEQUENT FISCAL YEARS” and in-
 3 serting “THROUGH FISCAL YEAR 2023”; and

4 (B) in clause (iii), by inserting “through
 5 fiscal year 2023” after “any subsequent fiscal
 6 year”;

7 (4) in paragraph (6)—

8 (A) in clause (vi) of subparagraph (A)—

9 (i) in the clause heading, by striking
 10 “2025” and inserting “2023”; and

11 (ii) by striking “fiscal year 2025” and
 12 inserting “fiscal year 2023”; and

13 (B) in clause (iii) of subparagraph (B)—

14 (i) in the clause heading, by inserting
 15 “THROUGH FISCAL YEAR 2023” after “SUC-
 16 CEEDING FISCAL YEARS”; and

17 (ii) in subclause (II)—

18 (I) in the subclause heading, by
 19 inserting “THROUGH FISCAL YEAR
 20 2023” after “SUCCEEDING FISCAL
 21 YEARS”; and

22 (II) by inserting “through fiscal
 23 year 2023” after “each fiscal year
 24 thereafter”;

(5) by striking paragraphs (7) and (8) and inserting the following:

“(7) STATE DSH ALLOTMENTS FOR FISCAL YEARS AFTER FISCAL YEAR 2023.—

“(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), beginning with fiscal year 2024, the DSH allotment for a State and fiscal year shall be the amount equal to the product of—

“(i) the State poverty ratio (as determined under subparagraph (E)(ii)) for the State and fiscal year; and

“(ii) the DSH allotment cap (as determined under subparagraph (E)(i)) for the fiscal year.

“(B) PHASE-IN OF POVERTY-BASED FORMULA.—

“(i) IN GENERAL.—During the period of fiscal years described in clause (ii), the Secretary shall phase in the application of the determination of DSH allotments under subparagraph (A) in a manner that ensures that—

“(I) in no case is the DSH allotment for a State for a fiscal year dur-

ing such period less than 90 percent of the DSH allotment for the State for the previous fiscal year (without regard to whether the State used the full amount of the DSH allotment for the previous fiscal year); and

“(II) the total amount of DSH allotments made to all States for any fiscal year during such period does not exceed the DSH allotment cap determined for the fiscal year under subparagraph (E)(i).

“(ii) PHASE-IN PERIOD.—The period of fiscal years described in this clause is the period that begins with fiscal year 2024 and ends with—

“(I) fiscal year 2033; or

“(II) at the Secretary’s discretion, any of fiscal years 2034 through 2038.

“(iii) DEVELOPMENT OF METHODOLOGY.—The Secretary shall promulgate final regulations that establish the methodology for determining State DSH allot-

ments under clause (i) not later than January 1, 2023.

“(C) STATE ALLOTMENT FLEXIBILITY OPTION.—

“(i) IN GENERAL.—A State may elect to increase or reduce the amount of the DSH allotment for the State and a fiscal year (as otherwise determined under this paragraph) for the purpose of providing certainty or more consistent DSH funding in subsequent fiscal years in accordance with this subparagraph.

“(ii) STATE OPTION TO RESERVE ALLOTMENT AMOUNTS.—For any fiscal year after fiscal year 2023, a State may request that the DSH allotment for the State and fiscal year (as otherwise determined under this paragraph) be reduced by an amount that shall not exceed 10 percent of the amount of the allotment as so determined.

“(iii) STATE OPTION TO INCREASE DSH ALLOTMENT FROM ALLOTMENT RESERVE.—For any fiscal year after fiscal year 2024, a State may request that the DSH allotment for the State and fiscal

1 year (as otherwise determined under this
2 paragraph) be increased by an amount
3 that shall not exceed the DSH reserve
4 amount for the State and fiscal year.

5 “(iv) DSH RESERVE AMOUNT.—

6 “(I) IN GENERAL.—Subject to
7 subclause (II), the DSH reserve
8 amount for a State and fiscal year
9 shall be equal to the sum of the
10 amounts, if any, of any reductions to
11 the State’s DSH allotment (as other-
12 wise determined under this para-
13 graph) made in each of the preceding
14 5 fiscal years pursuant to a request
15 under clause (ii).

16 “(II) SUBTRACTION OF IN-
17 CREASES FROM DSH RESERVE
18 AMOUNT.—The amount of any in-
19 crease to a State’s DSH allotment for
20 a fiscal year made pursuant to a re-
21 quest under clause (iii) shall be sub-
22 tracted from the State’s DSH reserve
23 amount for such year and shall not be
24 available to the State in subsequent
25 fiscal years.

1 “(III) RULE OF APPLICATION.—

2 In the case of an increase to a State’s
3 DSH allotment for a fiscal year that
4 is less than the State’s DSH reserve
5 amount for such year, the Secretary
6 shall apply subclause (II) in a manner
7 that maximizes the DSH reserve
8 amount that will remain available to
9 the State in subsequent fiscal years.

10 “(v) DISREGARD OF ADJUSTMENTS.—

11 Any increase or reduction under this sub-
12 paragraph to the DSH allotment of a
13 State for a fiscal year shall be disregarded
14 when otherwise determining State DSH al-
15 lotments under this paragraph.

16 “(D) TREATMENT OF WAIVERS.—

17 “(i) IN GENERAL.—Subject to clause
18 (ii), with respect to a State and a fiscal
19 year, if the State has in effect on the date
20 of enactment of the SAFE Hospitals Act
21 of 2021 a statewide waiver of requirements
22 of this title under section 1115 or other
23 law and any part of the fiscal year occurs
24 during the period of the waiver (as ap-
25 proved as of such date), the DSH allot-

1 ment determined under this paragraph for
2 such State and fiscal year shall not be less
3 than the DSH allotment that would have
4 been determined for such State and fiscal
5 year under this section as in effect on the
6 day before the date of enactment of the
7 SAFE Hospitals Act of 2021, reduced, in
8 the case of each of fiscal years 2024
9 through 2027, by the amount of the
10 State’s share of the reductions which
11 would have been applicable for the fiscal
12 year under paragraph (7) of this sub-
13 section (as so in effect), as estimated by
14 the Secretary.

15 “(ii) TOTAL ALLOTMENTS NOT TO EX-
16 CEED DSH ALLOTMENT CAP.—The Sec-
17 retary shall apply this subparagraph in
18 such a manner that the total amount of
19 DSH allotments determined for all States
20 for a fiscal year under this paragraph does
21 not exceed DSH allotment cap determined
22 for the fiscal year under subparagraph
23 (E)(i).

24 “(iii) NONAPPLICATION.—Clause (i)
25 shall not apply—

1 “(I) with respect to a State that
 2 has in effect a waiver described in
 3 such clause if the State elects,
 4 through a revision of such waiver,
 5 that such clause will not apply; or

6 “(II) with respect to any part of
 7 a fiscal year that occurs after the ex-
 8 piration (determined without regard
 9 to any extension approved after the
 10 date of the enactment of the State Ac-
 11 countability, Flexibility, and Equity
 12 for Hospitals Act of 2021) of such a
 13 waiver.

14 “(iv) NO EFFECT ON WAIVER AU-
 15 THORITY.—Nothing in this subsection shall
 16 be construed as preventing the Secretary
 17 from approving a waiver under section
 18 1115 or other law with respect to require-
 19 ments under this title related to a State’s
 20 use of its DSH allotment for a fiscal year.

21 “(E) DEFINITIONS.—In this paragraph:

22 “(i) DSH ALLOTMENT CAP.—The
 23 term ‘DSH allotment cap’ means, with re-
 24 spect to a fiscal year, the amount equal to
 25 the total amount of the DSH allotments

1 that would have been determined for all
2 States for the fiscal year under this section
3 as in effect on the day before the date of
4 enactment of the SAFE Hospitals Act of
5 2021, reduced, in the case of fiscal years
6 2024 through 2027, by the aggregate
7 amount of the reductions which would have
8 been applicable for the fiscal year under
9 paragraph (7) of this subsection (as so in
10 effect).

11 “(ii) STATE POVERTY RATIO.—The
12 term ‘State poverty ratio’ means, with re-
13 spect to a State and fiscal year, the ratio
14 of—

15 “(I) the number of individuals in
16 the State in the most recent fiscal
17 year for which census data are avail-
18 able whose income (as determined
19 under section 1902(e)(14) (relating to
20 modified adjusted gross income) and
21 without regard to whether an individ-
22 ual’s income eligibility for medical as-
23 sistance is determined under such sec-
24 tion) was less than 100 percent of the
25 poverty line (as defined in section

1 2110(c)(5)) applicable to a family of
2 the size involved; to

3 “(II) the number of individuals
4 in all States in the most recent fiscal
5 year for which census data are avail-
6 able whose income (as so determined)
7 was less than 100 percent of the pov-
8 erty line (as so defined) applicable to
9 the family of the size involved.”; and

10 (6) by redesignating paragraph (9) as para-
11 graph (8).

12 **SEC. 3. PRIORITIZING DISPROPORTIONATE SHARE HOS-**
13 **PITAL PAYMENTS BASED ON MEDICAID INPA-**
14 **TIENT UTILIZATION AND LOW-INCOME UTILI-**
15 **ZATION RATES.**

16 (a) IN GENERAL.—Section 1923 of the Social Secu-
17 rity Act (42 U.S.C. 1396r–4) is amended—

18 (1) in subsection (a)(2)(D), by inserting
19 “(which, as of October 1, 2023, shall meet the re-
20 quirements of subsection (k))” after “methodology”;

21 (2) in subsection (c), by striking “and (g)” and
22 inserting “, (g), and, beginning on October 1, 2021,
23 (k)”;

24 (3) in subsection (d)(2)(A)—

1 (A) in clause (i), by striking “; or” and in-
2 serting a semicolon;

3 (B) in clause (ii), by striking the period at
4 the end and inserting “; or”; and

5 (C) by adding at the end the following new
6 clause:

7 “(iii) that is an institution for mental
8 diseases.”; and

9 (4) by adding at the end the following new sub-
10 section:

11 “(k) STATE METHODOLOGY REQUIREMENTS.—

12 “(1) IN GENERAL.—Subject to paragraph (4), a
13 State methodology for identifying and making pay-
14 ments to disproportionate share hospitals meets the
15 requirements of this subsection if—

16 “(A) the methodology is uniformly applied
17 statewide;

18 “(B) the methodology identifies each hos-
19 pital in the State that is described in a dis-
20 proportionate share hospital tier (as defined in
21 paragraph (2)); and

22 “(C) in making payments to dispropor-
23 tionate share hospitals, the methodology meets
24 the requirements of paragraph (3).

1 “(2) DISPROPORTIONATE SHARE HOSPITAL
2 TIERS.—The term ‘disproportionate share hospital
3 tier’ means each of the following:

4 “(A) TIER 1 HOSPITALS.—A category of
5 hospitals (referred to in this section as ‘tier 1
6 hospitals’) in which each hospital satisfies—

7 “(i) each of the criteria described in
8 clause (ii) of subparagraph (B); and

9 “(ii) one or more of the following cri-
10 teria:

11 “(I) The hospital has a Medicaid
12 inpatient utilization rate (as defined
13 in subsection (b)(2)) that is not less
14 than 2 standard deviations above the
15 mean Medicaid inpatient utilization
16 rate for hospitals receiving Medicaid
17 payments in the State.

18 “(II) The hospital has a low-in-
19 come utilization rate (as defined in
20 subsection (b)(3)) of not less than 40
21 percent.

22 “(III) More than 70 percent of
23 the inpatient days for which payments
24 are received by the hospital are paid
25 for under the Medicare program

1 under title XVIII, the Medicaid pro-
2 gram under this title, or the Chil-
3 dren’s Health Insurance Program
4 under title XXI.

5 “(B) TIER 2 HOSPITALS.—A category of
6 hospitals (referred to in this section as ‘tier 2
7 hospitals’) in which each hospital—

8 “(i) is not described in the previous
9 subparagraph; and

10 “(ii) satisfies one or more of the fol-
11 lowing criteria:

12 “(I) The hospital has a Medicaid
13 inpatient utilization rate (as defined
14 in subsection (b)(2)) that is not less
15 than 1.5 standard deviations above
16 the mean Medicaid inpatient utiliza-
17 tion rate for hospitals receiving Med-
18 icaid payments in the State.

19 “(II) The hospital has a low-in-
20 come utilization rate (as defined in
21 subsection (b)(3)) of not less than 35
22 percent.

23 “(III) The hospital has the larg-
24 est number of inpatient days attrib-
25 utable to individuals entitled to bene-

1 fits under the State plan of any hos-
 2 pital in such State for the previous
 3 State fiscal year.

4 “(C) TIER 3 HOSPITALS.—A category of
 5 hospitals (referred to in this section as ‘tier 3
 6 hospitals’) in which each hospital—

7 “(i) is not described in a previous sub-
 8 paragraph; and

9 “(ii) satisfies one or more of the fol-
 10 lowing criteria:

11 “(I) The hospital has a Medicaid
 12 inpatient utilization rate (as defined
 13 in subsection (b)(2)) that is not less
 14 than the mean Medicaid inpatient uti-
 15 lization rate for hospitals receiving
 16 Medicaid payments in the State.

17 “(II) The hospital has a low-in-
 18 come utilization rate (as defined in
 19 subsection (b)(3)) of not less than 25
 20 percent.

21 “(D) TIER 4 HOSPITALS.—A category of
 22 hospitals (referred to in this section as ‘tier 4
 23 hospitals’) in which each hospital—

24 “(i) is not described in a previous sub-
 25 paragraph; and

1 “(ii) satisfies the requirement de-
2 scribed in subsection (d)(3).

3 “(3) PAYMENT METHODOLOGY REQUIRE-
4 MENTS.—

5 “(A) PRIORITIZATION OF HOSPITALS.—In
6 making disproportionate share hospital pay-
7 ments, a State methodology shall prioritize hos-
8 pitals in the following order:

9 “(i) Tier 1 hospitals shall receive the
10 highest priority.

11 “(ii) Tier 2 hospitals shall receive the
12 second-highest priority.

13 “(iii) Tier 3 hospitals shall receive the
14 third-highest priority.

15 “(iv) Tier 4 hospitals shall receive the
16 fourth-highest priority.

17 “(B) FACTORS.—The methodology speci-
18 fies the factors that will be considered in deter-
19 mining the amount of a disproportionate share
20 hospital payment to be made to a hospital,
21 which may include—

22 “(i) the hospital’s net operating mar-
23 gins (including past net operating mar-
24 gins);

1 “(ii) past disproportionate share hos-
 2 pital payments to the hospital;

3 “(iii) whether the hospital was af-
 4 fected by a major disaster (as declared by
 5 the President under section 401 of the
 6 Robert T. Stafford Disaster Relief and
 7 Emergency Assistance Act) in the 12
 8 months prior to the payment; and

9 “(iv) other relevant factors, as deter-
 10 mined by the State (subject to the ap-
 11 proval of the Secretary).

12 “(C) CONSIDERATION OF FINANCIAL CIR-
 13 CUMSTANCES OF HIGH TIER HOSPITALS.—

14 “(i) IN GENERAL.—The State shall
 15 certify that the State methodology ade-
 16 quately considers the unique financial cir-
 17 cumstances of tier 1 hospitals and tier 2
 18 hospitals, and takes necessary steps to
 19 mitigate net operating losses by such hos-
 20 pitals.

21 “(ii) GUIDANCE.—

22 “(I) IN GENERAL.—Not later
 23 than 18 months after the date of en-
 24 actment of the SAFE Hospitals Act
 25 of 2021, the Secretary shall issue

1 guidance to States outlining methods
 2 that States may use to satisfy the re-
 3 quirement of this subparagraph.

4 “(II) STATE ALTERNATIVES.—
 5 Subject to the approval of the Sec-
 6 retary, a State may develop an alter-
 7 native method for satisfying the re-
 8 quirement of this subparagraph.

9 “(D) TREATMENT OF IMDS AND CAHS.—
 10 The State shall specify how the methodology
 11 prioritizes institutions for mental diseases and
 12 critical access hospitals (as defined in section
 13 1861(mm)(1)), but in no case shall institutions
 14 for mental diseases or critical access hospitals
 15 receive a higher priority than tier 1 hospitals.

16 “(E) STATE AUTHORITY TO RECLASSIFY
 17 HOSPITALS.—Subject to the approval of the
 18 Secretary, for purposes of prioritizing dis-
 19 proportionate share payments under a State
 20 methodology under this subsection, a State may
 21 treat up to 15 percent of all disproportionate
 22 share hospitals in the State, excluding institu-
 23 tions for mental diseases, as belonging to a dif-
 24 ferent disproportionate share hospital tier than

1 the tier in which the hospitals are described
2 under paragraph (2).

3 “(F) RULE OF CONSTRUCTION.—Nothing
4 in this subsection shall be construed as requir-
5 ing a State to apply a uniform payment meth-
6 odology to all hospitals within a dispropor-
7 tionate share hospital tier.

8 “(4) METHODOLOGY FOR STATES WITH FEWER
9 THAN 15 DISPROPORTIONATE SHARE HOSPITALS.—

10 “(A) IN GENERAL.—In the case of a State
11 that has fewer than 15 disproportionate share
12 hospitals, the State shall use the methodology
13 for identifying and making payments to dis-
14 proportionate share hospitals that is developed
15 by the Secretary under subparagraph (B).

16 “(B) DEVELOPMENT OF METHODOLOGY.—
17 Not later than 18 months after the date of en-
18 actment of the SAFE Hospitals Act of 2021,
19 the Secretary shall develop a methodology for
20 identifying and making payments to dispropor-
21 tionate share hospitals for States that have
22 fewer than 15 disproportionate share hospitals
23 that prioritizes DSH payments to hospitals with
24 disproportionately high volumes of Medicaid pa-
25 tients and low-income patients.

1 “(5) NO EFFECT ON WAIVER AUTHORITY.—
 2 Nothing in this subsection shall be construed as pre-
 3 venting the Secretary from approving a waiver under
 4 section 1115 or other law with respect to require-
 5 ments under this subsection related to the method-
 6 ology used by States to identify and make payments
 7 to disproportionate share hospitals.”.

8 (b) MODIFICATION OF CAP ON INDIVIDUAL DSH
 9 PAYMENTS.—

10 (1) IN GENERAL.—Subparagraph (A)(i) of sec-
 11 tion 1923(g)(1) of the Social Security Act (42
 12 U.S.C. 1396r-4(g)(1)), as amended by section
 13 203(a) of the Consolidated Appropriations Act, 2021
 14 (Public Law 116-260), is amended by inserting
 15 “(including any costs incurred by the hospital during
 16 the year that are associated with subsidizing a phy-
 17 sician or a clinic or other health center that is owned
 18 and operated by, controlled by, or in common control
 19 with the hospital for the purpose of providing care
 20 to such individuals)” after “individuals described in
 21 subparagraph (B)”.

22 (2) CONFORMING AMENDMENT.—Section
 23 1923(g)(2)(A)(ii) of the Social Security Act (42
 24 U.S.C. 1396r-4(g)(2)), as amended by section
 25 203(a) of the Consolidated Appropriations Act, 2021

1 (Public Law 116–260), is amended by inserting
 2 “(except that, for purposes of this clause, such para-
 3 graph as in effect on such date shall be applied by
 4 inserting ‘, including any costs incurred by the hos-
 5 pital during the year that are associated with sub-
 6 sidizing a physician or a clinic or other health center
 7 that is owned and operated by, controlled by, or in
 8 common control with the hospital for the purpose of
 9 providing care to such individuals’ at the end of the
 10 first sentence)” before the period.

11 (3) EFFECTIVE DATE.—The amendments made
 12 by this subsection shall take effect on October 1,
 13 2021.

14 (c) MODIFICATION OF DSH QUALIFICATION RE-
 15 QUIREMENTS.—

16 (1) IN GENERAL.—Section 1923(d)(3) of the
 17 Social Security Act (42 U.S.C. 1396r–4(d)(3)) is
 18 amended by striking “unless the hospital” and all
 19 that follows through the period and inserting the fol-
 20 lowing: “unless the hospital—

21 “(A) has a Medicaid inpatient utilization
 22 rate (as defined in subsection (b)(2)) that is not
 23 more than 1 standard deviation below the mean
 24 Medicaid inpatient utilization rate for hospitals
 25 receiving Medicaid payments in the State;

1 “(B) has a low-income utilization rate (as
2 defined in subsection (b)(3)) that is not less
3 than 10 percent; or

4 “(C) is a critical access hospital (as de-
5 fined in section 1861(mm)(1)).”.

6 (2) EFFECTIVE DATE.—The amendments made
7 by this subsection shall take effect on October 1,
8 2023.

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