

118TH CONGRESS
1ST SESSION

S. 407

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

FEBRUARY 14, 2023

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 2023” or the
4 “SAFE Hospitals Act of 2023”.

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 2025”;

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 2025” after “each succeeding fiscal year”;

18 (C) in subparagraph (C)(ii), by inserting
19 “through fiscal year 2025” 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 2025”; and

4 (B) in clause (iii), by inserting “through
 5 fiscal year 2025” after “any subsequent fiscal
 6 year”;

7 (4) in clause (iii) of paragraph (6)(B)—

8 (A) in the clause heading, by inserting
 9 “THROUGH FISCAL YEAR 2025” after “SUC-
 10 CEEDING FISCAL YEARS”; and

11 (B) in subclause (II)—

12 (i) in the subclause heading, by insert-
 13 ing “THROUGH FISCAL YEAR 2025” after
 14 “SUCCEEDING FISCAL YEARS”; and

15 (ii) by inserting “through fiscal year
 16 2025” after “each fiscal year thereafter”;

17 (5) by striking paragraphs (7) and (8) and in-
 18 serting the following:

19 “(7) STATE DSH ALLOTMENTS FOR FISCAL
 20 YEARS AFTER FISCAL YEAR 2025.—

21 “(A) IN GENERAL.—Subject to subpara-
 22 graphs (B), (C), and (D), beginning with fiscal
 23 year 2026, the DSH allotment for a State and
 24 fiscal year shall be the amount equal to the
 25 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 during 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

1 not exceed the DSH allotment cap de-
 2 termined for the fiscal year under
 3 subparagraph (E)(i).

4 “(ii) PHASE-IN PERIOD.—The period
 5 of fiscal years described in this clause is
 6 the period that begins with fiscal year
 7 2026 and ends with—

8 “(I) fiscal year 2035; or

9 “(II) at the Secretary’s discre-
 10 tion, any of fiscal years 2036 through
 11 2040.

12 “(iii) DEVELOPMENT OF METHOD-
 13 OLOGY.—The Secretary shall promulgate
 14 final regulations that establish the method-
 15 ology for determining State DSH allot-
 16 ments under clause (i) not later than Jan-
 17 uary 1, 2025.

18 “(C) STATE ALLOTMENT FLEXIBILITY OP-
 19 TION.—

20 “(i) IN GENERAL.—A State may elect
 21 to increase or reduce the amount of the
 22 DSH allotment for the State and a fiscal
 23 year (as otherwise determined under this
 24 paragraph) for the purpose of providing
 25 certainty or more consistent DSH funding

1 in subsequent fiscal years in accordance
2 with this subparagraph.

3 “(ii) STATE OPTION TO RESERVE AL-
4 LOTMENT AMOUNTS.—For any fiscal year
5 after fiscal year 2025, a State may request
6 that the DSH allotment for the State and
7 fiscal year (as otherwise determined under
8 this paragraph) be reduced by an amount
9 that shall not exceed 10 percent of the
10 amount of the allotment as so determined.

11 “(iii) STATE OPTION TO INCREASE
12 DSH ALLOTMENT FROM ALLOTMENT RE-
13 SERVE.—For any fiscal year after fiscal
14 year 2026, a State may request that the
15 DSH allotment for the State and fiscal
16 year (as otherwise determined under this
17 paragraph) be increased by an amount
18 that shall not exceed the DSH reserve
19 amount for the State and fiscal year.

20 “(iv) DSH RESERVE AMOUNT.—

21 “(I) IN GENERAL.—Subject to
22 subclause (II), the DSH reserve
23 amount for a State and fiscal year
24 shall be equal to the sum of the
25 amounts, if any, of any reductions to

1 the State's DSH allotment (as other-
2 wise determined under this para-
3 graph) made in each of the preceding
4 5 fiscal years pursuant to a request
5 under clause (ii).

6 “(II) SUBTRACTION OF IN-
7 CREASES FROM DSH RESERVE
8 AMOUNT.—The amount of any in-
9 crease to a State's DSH allotment for
10 a fiscal year made pursuant to a re-
11 quest under clause (iii) shall be sub-
12 tracted from the State's DSH reserve
13 amount for such year and shall not be
14 available to the State in subsequent
15 fiscal years.

16 “(III) RULE OF APPLICATION.—
17 In the case of an increase to a State's
18 DSH allotment for a fiscal year that
19 is less than the State's DSH reserve
20 amount for such year, the Secretary
21 shall apply subclause (II) in a manner
22 that maximizes the DSH reserve
23 amount that will remain available to
24 the State in subsequent fiscal years.

1 “(v) DISREGARD OF ADJUSTMENTS.—

2 Any increase or reduction under this sub-
 3 paragraph to the DSH allotment of a
 4 State for a fiscal year shall be disregarded
 5 when otherwise determining State DSH al-
 6 lotments under this paragraph.

7 “(D) TREATMENT OF WAIVERS.—

8 “(i) IN GENERAL.—Subject to clause
 9 (ii), with respect to a State and a fiscal
 10 year, if the State has in effect on the date
 11 of enactment of the SAFE Hospitals Act
 12 of 2023 a statewide waiver of requirements
 13 of this title under section 1115 or other
 14 law and any part of the fiscal year occurs
 15 during the period of the waiver (as ap-
 16 proved as of such date), the DSH allot-
 17 ment determined under this paragraph for
 18 such State and fiscal year shall not be less
 19 than the DSH allotment that would have
 20 been determined for such State and fiscal
 21 year under this section as in effect on the
 22 day before the date of enactment of the
 23 SAFE Hospitals Act of 2023, reduced, in
 24 the case of each of fiscal years 2026
 25 through 2029, by the amount of the

1 State's share of the reductions which
 2 would have been applicable for the fiscal
 3 year under paragraph (7) of this sub-
 4 section (as so in effect), as estimated by
 5 the Secretary.

6 “(ii) TOTAL ALLOTMENTS NOT TO EX-
 7 CEED DSH ALLOTMENT CAP.—The Sec-
 8 retary shall apply this subparagraph in
 9 such a manner that the total amount of
 10 DSH allotments determined for all States
 11 for a fiscal year under this paragraph does
 12 not exceed DSH allotment cap determined
 13 for the fiscal year under subparagraph
 14 (E)(i).

15 “(iii) NONAPPLICATION.—Clause (i)
 16 shall not apply—

17 “(I) with respect to a State that
 18 has in effect a waiver described in
 19 such clause if the State elects,
 20 through a revision of such waiver,
 21 that such clause will not apply; or

22 “(II) with respect to any part of
 23 a fiscal year that occurs after the ex-
 24 piration (determined without regard
 25 to any extension approved after the

1 date of the enactment of the State Ac-
2 countability, Flexibility, and Equity
3 for Hospitals Act of 2023) of such a
4 waiver.

5 “(iv) NO EFFECT ON WAIVER AU-
6 THORITY.—Nothing in this subsection shall
7 be construed as preventing the Secretary
8 from approving a waiver under section
9 1115 or other law with respect to require-
10 ments under this title related to a State’s
11 use of its DSH allotment for a fiscal year.

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

13 “(i) DSH ALLOTMENT CAP.—The
14 term ‘DSH allotment cap’ means, with re-
15 spect to a fiscal year, the amount equal to
16 the total amount of the DSH allotments
17 that would have been determined for all
18 States for the fiscal year under this section
19 as in effect on the day before the date of
20 enactment of the SAFE Hospitals Act of
21 2023, reduced, in the case of fiscal years
22 2026 through 2029, by the aggregate
23 amount of the reductions which would have
24 been applicable for the fiscal year under

1 paragraph (7) of this subsection (as so in
2 effect).

3 “(ii) STATE POVERTY RATIO.—The
4 term ‘State poverty ratio’ means, with re-
5 spect to a State and fiscal year, the ratio
6 of—

7 “(I) the number of individuals in
8 the State in the most recent fiscal
9 year for which census data are avail-
10 able whose income (as determined
11 under section 1902(e)(14) (relating to
12 modified adjusted gross income) and
13 without regard to whether an individ-
14 ual’s income eligibility for medical as-
15 sistance is determined under such sec-
16 tion) was less than 100 percent of the
17 poverty line (as defined in section
18 2110(c)(5)) applicable to a family of
19 the size involved; to

20 “(II) the number of individuals
21 in all States in the most recent fiscal
22 year for which census data are avail-
23 able whose income (as so determined)
24 was less than 100 percent of the pov-

erty line (as so defined) applicable to
the family of the size involved.”; and
(6) by redesignating paragraph (9) as para-
graph (8).

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

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

(1) in subsection (a)(2)(D), by inserting
“(which, as of October 1, 2025, shall meet the re-
quirements of subsection (k))” after “methodology”;

(2) in subsection (e), by striking “and (g)” and
inserting “, (g), and, beginning on October 1, 2025,
(k)”;

(3) in subsection (d)(2)(A)—

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

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

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

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

1 (4) by adding at the end the following new sub-
 2 section:

3 “(k) STATE METHODOLOGY REQUIREMENTS.—

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

8 “(A) the methodology is uniformly applied
 9 statewide;

10 “(B) the methodology identifies each hos-
 11 pital in the State that is described in a dis-
 12 proportionate share hospital tier (as defined in
 13 paragraph (2)); and

14 “(C) in making payments to dispropor-
 15 tionate share hospitals, the methodology meets
 16 the requirements of paragraph (3).

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

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

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

1 “(ii) one or more of the following cri-
2 teria:

3 “(I) The hospital has a Medicaid
4 inpatient utilization rate (as defined
5 in subsection (b)(2)) that is not less
6 than 2 standard deviations above the
7 mean Medicaid inpatient utilization
8 rate for hospitals receiving Medicaid
9 payments in the State.

10 “(II) The hospital has a low-in-
11 come utilization rate (as defined in
12 subsection (b)(3)) of not less than 40
13 percent.

14 “(III) More than 70 percent of
15 the inpatient days for which payments
16 are received by the hospital are paid
17 for under the Medicare program
18 under title XVIII, the Medicaid pro-
19 gram under this title, or the Chil-
20 dren’s Health Insurance Program
21 under title XXI.

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

1 “(i) is not described in the previous
2 subparagraph; and

3 “(ii) satisfies one or more of the fol-
4 lowing criteria:

5 “(I) The hospital has a Medicaid
6 inpatient utilization rate (as defined
7 in subsection (b)(2)) that is not less
8 than 1.5 standard deviations above
9 the mean Medicaid inpatient utiliza-
10 tion rate for hospitals receiving Med-
11 icaid payments in the State.

12 “(II) The hospital has a low-in-
13 come utilization rate (as defined in
14 subsection (b)(3)) of not less than 35
15 percent.

16 “(III) The hospital has the larg-
17 est number of inpatient days attrib-
18 utable to individuals entitled to bene-
19 fits under the State plan of any hos-
20 pital in such State for the previous
21 State fiscal year.

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

1 “(i) is not described in a previous sub-
2 paragraph; and

3 “(ii) satisfies one or more of the fol-
4 lowing criteria:

5 “(I) The hospital has a Medicaid
6 inpatient utilization rate (as defined
7 in subsection (b)(2)) that is not less
8 than the mean Medicaid inpatient uti-
9 lization rate for hospitals receiving
10 Medicaid payments in the State.

11 “(II) The hospital has a low-in-
12 come utilization rate (as defined in
13 subsection (b)(3)) of not less than 25
14 percent.

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

18 “(i) is not described in a previous sub-
19 paragraph; and

20 “(ii) satisfies the requirement de-
21 scribed in subsection (d)(3).

22 “(3) PAYMENT METHODOLOGY REQUIRE-
23 MENTS.—

24 “(A) PRIORITIZATION OF HOSPITALS.—In
25 making disproportionate share hospital pay-

ments, a State methodology shall prioritize hospitals in the following order:

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

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

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

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

“(B) FACTORS.—The methodology specifies the factors that will be considered in determining the amount of a disproportionate share hospital payment to be made to a hospital, which may include—

“(i) the hospital’s net operating margins (including past net operating margins);

“(ii) past disproportionate share hospital payments to the hospital;

“(iii) whether the hospital was affected by a major disaster (as declared by the President under section 401 of the Robert T. Stafford Disaster Relief and

Emergency Assistance Act) in the 12 months prior to the payment; and

“(iv) other relevant factors, as determined by the State (subject to the approval of the Secretary).

“(C) CONSIDERATION OF FINANCIAL CIRCUMSTANCES OF HIGH TIER HOSPITALS.—

“(i) IN GENERAL.—The State shall certify that the State methodology adequately considers the unique financial circumstances of tier 1 hospitals and tier 2 hospitals, and takes necessary steps to mitigate net operating losses by such hospitals.

“(ii) GUIDANCE.—

“(I) IN GENERAL.—Not later than 18 months after the date of enactment of the SAFE Hospitals Act of 2023, the Secretary shall issue guidance to States outlining methods that States may use to satisfy the requirement of this subparagraph.

“(II) STATE ALTERNATIVES.—

Subject to the approval of the Secretary, a State may develop an alter-

1 native method for satisfying the re-
 2 quirement of this subparagraph.

3 “(D) TREATMENT OF IMDS AND CAHS.—

4 The State shall specify how the methodology
 5 prioritizes institutions for mental diseases and
 6 critical access hospitals (as defined in section
 7 1861(mm)(1)), but in no case shall institutions
 8 for mental diseases or critical access hospitals
 9 receive a higher priority than tier 1 hospitals.

10 “(E) STATE AUTHORITY TO RECLASSIFY

11 HOSPITALS.—Subject to the approval of the
 12 Secretary, for purposes of prioritizing dis-
 13 proportionate share payments under a State
 14 methodology under this subsection, a State may
 15 treat up to 15 percent of all disproportionate
 16 share hospitals in the State, excluding institu-
 17 tions for mental diseases, as belonging to a dif-
 18 ferent disproportionate share hospital tier than
 19 the tier in which the hospitals are described
 20 under paragraph (2).

21 “(F) RULE OF CONSTRUCTION.—Nothing

22 in this subsection shall be construed as requir-
 23 ing a State to apply a uniform payment meth-
 24 odology to all hospitals within a dispropor-
 25 tionate share hospital tier.

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

3 “(A) IN GENERAL.—In the case of a State
4 that has fewer than 15 disproportionate share
5 hospitals, the State shall use the methodology
6 for identifying and making payments to dis-
7 proportionate share hospitals that is developed
8 by the Secretary under subparagraph (B).

9 “(B) DEVELOPMENT OF METHODOLOGY.—
10 Not later than 18 months after the date of en-
11 actment of the SAFE Hospitals Act of 2023,
12 the Secretary shall develop a methodology for
13 identifying and making payments to dispropor-
14 tionate share hospitals for States that have
15 fewer than 15 disproportionate share hospitals
16 that prioritizes DSH payments to hospitals with
17 disproportionately high volumes of Medicaid pa-
18 tients and low-income patients.

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

1 (b) MODIFICATION OF CAP ON INDIVIDUAL DSH
 2 PAYMENTS.—Section 1923(g)(1)(A)(i) of the Social Secu-
 3 rity Act (42 U.S.C. 1396r-4(g)(1)(A)(i)) is amended by
 4 inserting “(including any costs incurred by the hospital
 5 during the year that are associated with subsidizing a phy-
 6 sician or a clinic or other health center that is owned and
 7 operated by, controlled by, or in common control with the
 8 hospital for the purpose of providing care to such individ-
 9 uals)” after “individuals described in subparagraph (B)”.

10 (c) MODIFICATION OF DSH QUALIFICATION RE-
 11 QUIREMENTS.—

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

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

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

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

3 (2) EFFECTIVE DATE.—The amendments made
4 by this subsection shall take effect on October 1,
5 2025.

○