

April 2, 2019

Penny Thompson, MPA  
Chair  
Medicaid and CHIP Payment and Access Commission  
1800 M Street, N.W., Suite 650 South  
Washington, DC 20036

***RE: Treatment of Third-party Payment in the Definition of Medicaid Shortfall***

Dear Ms. Thompson:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinician partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) appreciates the opportunity to comment on the Medicaid and CHIP Payment and Access Commission’s (MACPAC) proposed recommendations related to the Medicaid Disproportionate Share Hospital (DSH) program.

MACPAC commissioners are currently debating whether third-party payments should be included in the definition of Medicaid shortfall. The Medicaid statute limits Medicaid DSH payments to a given hospital to no more than its Medicaid shortfall and uncompensated care costs. The statute expressly states that uncompensated care costs must be calculated net of Medicaid payment. The Centers for Medicare & Medicaid Services (CMS), however, adopted a policy to broaden the definition of payments that must be subtracted from uncompensated care costs. As such, the CMS policy identified payments received on behalf of Medicaid patients from third-party sources, including Medicare and private insurance (e.g., commercial insurance), to be included in the definition. For some hospitals, this policy effectively reduces their specific DSH payment limit. The agency communicated this policy through Frequently Asked Question (FAQ) guidance.

The agency’s policy is being challenged in courts across the country. Thus far, several courts have invalidated the agency’s position, finding that using FAQs instead of rulemaking violated the Administrative Procedures Act. CMS subsequently attempted to impose the same policy through notice-and-comment rulemaking. At that time, the AHA communicated to CMS its opposition to this policy. Additional legal challenges were filed in several district courts. Three courts have ruled that CMS’s policy is contrary to the



Medicaid statute and, as a result, vacated the final rule. The District Court of D.C. expressly stated that its decision to vacate the rule applied nationwide.

**The AHA urges MACPAC to delay making recommendations in light of the ongoing litigation.** Appeals are underway in the D.C. Court of Appeals, with oral argument scheduled concurrently with the April MACPAC meeting. We believe commissioners should wait until the court has concluded its deliberations before recommending any policy changes.

**The AHA also urges MACPAC commissioners to better understand the potential effects of such policy changes on hospitals and Medicaid beneficiaries' access to hospital care.** The AHA appreciates the Commission's careful deliberation on policy issues affecting Medicaid and the Children's Health Insurance Program (CHIP), including the consideration of potential effects on Medicaid beneficiaries, state and federal government, and providers. Data is key to assessing such policy changes. At the March MACPAC meeting, it was noted that there are not sufficient data to determine what effect potential DSH third-party payment recommendations might have on hospitals and Medicaid beneficiaries' access to hospital services. An intermediary step the commission could consider is to recommend that the Secretary of Health and Human Services collect and report data on third-party payments included in the calculation of Medicaid shortfall to better assess future policy recommendations.

The AHA appreciates this opportunity to share our comments with MACPAC. We look forward to working with the commission as it continues its vital role to review beneficiary access and payment policies for Medicaid and CHIP. Please contact me if you have questions or feel free to have a member of your team contact Molly Collins Offner, director of policy, at [mcollins@aha.org](mailto:mcollins@aha.org) or (202) 626-2326.

Sincerely,

/s/

Ashley B. Thompson  
Senior Vice President  
Public Policy Analysis and Development