Congress of the United States

Washington, DC 20515

July 21, 2022

The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independence Ave SW
Washington, DC 20201

Dear Secretary Becerra:

We write to share our concerns about Critical Access Hospitals' (CAHs) ability to continue providing high quality care to rural Americans after the COVID-19 Public Health Emergency (PHE) expires. While many PHE flexibilities helped CAHs weather the impacts of the pandemic, waiving and deprioritizing enforcement of the 96-hour rule has brought certainty to CAH operations, both before and during the pandemic.

The 96-hour rule[1] was established through the Balanced Budget Act of 1997 (P.L. 105-33) and requires CAHs to certify inpatients will be discharged or transferred to another hospital within 96 hours of admission. A related condition of participation[2] also requires hospitals to ensure inpatient stays remain below 96 hours, but only on an annual average basis. While both conditions remain codified, enforcement of the condition of payment was deprioritized by the Department of Health and Human Services (HHS) in 2018 due to the financial burden it posed to CAHs, and in 2020 HHS waived the condition of participation as part of its response to the COVID pandemic.

Enforcement of the 96-hour condition of payment was particularly problematic for CAHs in the past, resulting in CAHs either refusing care, forgoing payment, or being forced into an unnecessary and expensive transfer of a patient to a larger facility. The situation became significantly more problematic during the pandemic when large numbers of patients faced long hospital stays for COVID symptoms. In fact, a recently published study analyzing the hospital stays of COVID patients found the median length of stay in hospital for a COVID patient was six days, and a COVID patient admitted to the ICU spent a median five days just in intensive care.[3]

Had these conditions of payment been in place, it would have essentially precluded any CAH from treating COVID patients, which would have had catastrophic consequences on an already stressed health care system. Even after the PHE formally ends, COVID and other respiratory diseases are likely to cause some patients to need hospitalizations lasting longer than 96 hours. These and other patients who can safely and effectively be treated in their local hospital deserve the option of receiving care closer to their homes, families, and usual doctors.

CAHs remain a vital source of care in many rural communities, and reinstatement of the 96-hour rule would unnecessarily take decisions about a patient's care away from the patient and their physician. While the 96-hour conditions for participation or payment have not been enforced in the last several years, the eventual and necessary end of the PHE raises concerns that one or both elements could be prioritized for enforcement. As such, we are writing to ask you to clarify the administration's future enforcement plans regarding the 96-hour rule. Please provide answers to the following questions, in writing, by September 9, 2022.

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[1] 42 USC 1395f(a)(8)

[2] 42 CFR § 485.620(b)

[3] Ohsfeldt, R.L., Choong, C.KC., Mc Collam, P.L. *et al.* Inpatient Hospital Costs for COVID-19 Patients in the United States. *Adv Ther* **38,** 5557–5595 (2021).

1. Upon termination of the COVID-19 PHE, do you intend to reinstate enforcement of the 96-hour conditions of participation or payment?
2. What rationale was employed in determining whether the condition(s) would be enforced following the PHE?
3. If either condition will be enforced after the end of the PHE, will there be a grace or phase-in period before penalties will be applied to CAHs that fail to meet the condition(s)?
4. What impact do you believe enforcement would have on the outcomes of patients hospitalized for treatment of COVID-19, pneumonia, and other acute respiratory infections?
5. Do you support legislative efforts to repeal either or both of the 96-hour conditions?

We appreciate your attention and look forward to working with you to ensure CAHs continue to provide high quality health care to rural Americans across the country.

Sincerely,

Adrian Smith
Member of Congress

Terri A. Sewell
Member of Congress

Markwayne Mullin
Member of Congress

Earl L. "Buddy" Carter
Member of Congress

Tom O'Halleran
Member of Congress

Elise M. Stefanik
Member of Congress

Mike Bost
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Kelly Armstrong
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Tracey Mann
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