



June 21, 2019

The Honorable Lamar Alexander
Chair
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

On behalf of the American College of Physicians (ACP), I am writing to share our additional input about your collaborative efforts to protect health care consumers/patients and to lower health care costs. The College appreciates the opportunity to comment on your bipartisan legislation, as introduced on June 19th, entitled the Lower Health Care Costs (LHCC) Act of 2019, S. 1895, which addresses the issues of surprise medical bills, lowering the cost of prescription drugs, promoting transparency, improving public health, and bolstering the exchange of health information. On June 5th, ACP offered its [recommendations](#) on the bipartisan discussion draft of the LHCC Act, as released on May 23rd. In that letter, ACP expressed its strong preference for the “Subtitle B—Option 2: Independent Dispute Resolution,” alternative to resolve surprise bills that are greater than \$750, where the health plan or the facility or “practitioner” could choose to begin an independent dispute resolution process, using a certified third-party arbiter. The College would like to offer its perspective specifically on the modified surprise medical billing provisions of the LHCC Act, S. 1895, as we believe that using a “benchmark” standard to resolve surprise medical bills inappropriately skews payments toward insurers, shielding them from any responsibility to pay fairly for services and ensure network adequacy. We reiterate our view that an arbitration process is a better and fairer approach to protecting patients from surprise bills.

The American College of Physicians is the largest medical specialty organization and the second largest physician group in the United States. ACP members include 154,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

OVERVIEW AND ACP POLICY

Surprise billing, or unexpected bills patients receive as the result of receiving care from an out-of-network physician or facility or unexpected in-network service charges, can be a financial

burden on patients that contributes to medical/consumer debt. Medical debt is a growing concern, even for those who are insured. The Kaiser Family Foundation found that more than 25 percent of adults reported that they or someone in their household have challenges created by medical debt, including 20 percent of insured individuals under the age of 65.

Reports of high and unanticipated “surprise” medical bills, especially in emergency situations for patients who do have health insurance coverage and were treated at in-network facilities, have resulted in calls for the federal government to take both legislative and regulatory action. We appreciate that lawmakers in both chambers, as well as the administration, are now heeding this call and are working in a bipartisan fashion to develop legislation to address this growing problem.

ACP’s guiding policy on surprise medical bills is outlined in its position paper entitled, [“Improving Health Care Efficacy and Efficiency Through Increased Transparency.”](#) Specifically:

ACP supports efforts to provide greater protections for patients from unexpected out-of-network health care costs, particularly for costs incurred during an emergency situation or medical situation in which additional services are provided by out-of-network clinicians without the patient’s prior knowledge. While the College reaffirms the right of physicians to establish their own fees and to choose whether or not to participate as an in-network clinician, ACP supports establishing processes to reduce the risk for “surprise” bills for out-of-network services for which a patient was unable to obtain estimates for services prior to receipt of care or was not given the option to select an in-network clinician. Health plans also have an affirmative obligation to pay fairly and appropriately for services provided in- and out-of-network, and regulators should ensure network adequacy in all fields, including emergency care.

Efforts to reduce the negative impact of surprise billing should be made at the state and federal levels. Legislation aiming to limit surprise billing should, at a minimum, include one or more of the following components:

- *Support for increased pricing and out-of-pocket cost transparency;*
- *Dispute resolution process;*
- *Assessment of economic impact on patients, clinicians and non-physician “provider’s,” and payers.*

ACP COMMENTS ON THE SURPRISE BILLING PROVISIONS OF THE LHCC ACT, S. 1895

Emergency/Nonemergency Situations: Section 102 of the LHCC Act, S. 1895, essentially holds patients harmless from surprise medical bills in both emergency situations and nonemergency situations. Patients are responsible for the in-network cost-sharing amount for out-of-network emergency care. At in-network facilities, as so defined in the bill, patients are responsible only for the in-network cost-sharing amount rate for out-of-network, ancillary, non-emergency services, including referrals for diagnostic services. Balance billing is prohibited for any amount above the in-network cost-sharing amount.

(While the terms “provider” and “practitioner” are used throughout the LHCC Act, S. 1895, as is customary for legislation, ACP for its own purposes uses the term physician when referring to physicians, or clinician when referring to physicians and other health care professionals; accordingly, we have put “providers” and “practitioners” in quotes in the following comments to clarify when we are referring to the language of the discussion draft.)

ACP Comment: ACP continues to support this approach. In emergency situations, there simply is not enough time for the patient to know which clinicians are in- or out-of-network. In nonemergency situations at in-network facilities, without any prior notice, patients would assume that all of their care would be considered in-network. It is critical that a patient be given the knowledge up front that a clinician he/she will see is out-of-network so that the patient can make an informed choice before the care is rendered.

Notice and Consent after patient stabilized: Section 102 of the LHCC Act, S. 1895, requires that after stabilization of a patient when entering a facility through the emergency room, the patient must be provided advance notice of any out-of-network care, an estimate of the patient’s costs for out-of-network care, and referrals for alternative options for in-network care. The LHCC Act protects the patient be from surprise bills or out-of-network cost sharing if adequate notice is not given.

ACP Comment: ACP supports the intent establishing ways to hold patients harmless for “surprise” bills for out-of-network services for which a patient was unable to obtain estimates for services prior to the receipt of care or was not given the option to select an in-network clinician or “provider.” While ACP believes that patients should be clearly informed whether a clinician or is in-network or out-of-network and their estimated out-of-pocket payment responsibilities, we are concerned that health care facilities may not have the capability of determining whether a clinician is in-network or out-of-network, and absent transparency by insurers, may not be able to estimate out-of-pocket payment responsibilities. We are concerned that this would be particularly burdensome on academic medical centers that take care of a disproportionate share of patients with urgent and severe medical problems.

Insurers have the information about whether a clinician is participating *in its network and accepting its network rates*, and how much the patient may be liable for if a clinician is out-of-network (the difference between what the insurer pays for in-network and out-of-network services). *Therefore, we believe the principal responsibility for providing notice of such information should fall on the payer, not the facility.* We are supportive, though, of establishing a collaborative approach where both the insurer and the health care facility work together to provide the required information in a timely, useful, and practical manner.

Benchmark for Payment: Section 103 of the LHCC Act, S. 1895, sets a benchmark for payment to resolve a disagreement between the health insurer or plan and the “provider” or “practitioner.” The benchmark would require that for surprise bills, the health plan will pay the “practitioner” or facility based on the local median contracted commercial amount that insurers have negotiated with other providers and agreed upon in that geographic area. The LHCC Act, S. 1895, would direct the Department of Health and Human Services (HHS) to utilize the

rulemaking process to define geographic areas and establish a consistent methodology for health plans to use in calculating their own median contracted rates. In situations where health plans do not have sufficient data in a geographic area, HHS would be able to use unbiased external sources, such as a state's all-payer claims database (APCD), to derive an appropriate median rate for the geographic market.

ACP Comment: ACP policy reaffirms the right of physicians to establish their own fees and to choose whether or not to participate as an in-network physician. *ACP does not support the provisions in the bill that would impose caps on payment for physicians treating out-of-network patients, thereby shielding insurers for any responsibility to pay fairly, appropriately and competitively for services and ensure network adequacy. Instead, we reaffirm our recommendation that legislation establish a process to allow an independent arbitrator to establish an appropriate and fair payment level between the insurers' in-network rate and the clinician's charge.*

While providing adequate relief for patients is necessary, ensuring that physicians and clinicians receive appropriate and fair payment for services also must be fully considered. Unfortunately, Section 103 of the LHCC Act, S. 1895, establishes guidelines and limits what out-of-network clinicians are paid, and permits health plans to pay "providers" only the median in-network rate, which is the local median contracted commercial amount that insurers have negotiated with other providers and agreed upon in that geographic area. *Payment rates to clinicians should not be based on in-network rates, which would eliminate the need for insurers to negotiate contracts in good faith.*

If Congress were to require benchmark rates be part of the process of determining payments for out-of-network services, ACP believes an independent data source, such as a state APCD, would be a fairer and more appropriate way to benchmark reimbursement instead of the median in-network rate. The LHCC Act, S. 1895, only utilizes an independent data source if the health plan has insufficient available data. However, even if an independent data source such as an APCD was used to set clinician rates, ACP would still be concerned by the lack of an independent dispute resolution process.

Report: Section 106 of the LHCC Act, S. 1895, requires HHS in consultation with the Federal Trade Commission and the Department of Justice to conduct a study on the effects of the surprise billing provisions on the vertical and horizontal integration of the health-care system, overall health-care costs, and recommendations for enforcement.

ACP Comment: While the potential benefit and effects of eliminating surprise and balance billing for patients are seemingly apparent, there still needs to be adequate additional review and analysis to avoid unintended consequences and impacts on the health-care system. Accordingly, legislation should take into consideration the overall economic impact on patients, physicians, payers, and the state and/or federal government. ACP supports the provision that requires a report to study the possible effects of the surprise billing provisions.

Network Adequacy: The LHCC Act, S. 1895, continues to remain silent on the issue of network adequacy as a possible contributing factor in surprise medical billing.

ACP Comment: How network adequacy and the fair payment of services for physicians may contribute to the increase in patients receiving out-of-network care should also be examined to ensure an appropriate number of available in-network physicians, especially in the emergency setting. Health plans also have an affirmative obligation to pay fairly and appropriately for services provided in- and out-of-network, and regulators should ensure network adequacy in all fields, including emergency care. Evidence exists that narrow networks contribute to out-of-network costs. Adequate access to all types of care in the health plan's network could help reduce surprise billing and the need for out-of-network services. Many patients may have no choice but to utilize out-of-network facilities and services, such as in emergency situations. The Department of Health and Human Services Notice of Benefit and Payment Parameters for 2017 included a provision related to network adequacy and cost sharing. The rule requires issuers to "count the cost sharing charged to the enrollee for certain out-of-network services at an in-network facility by an ancillary 'provider' toward the enrollee's annual limitation on cost sharing," effective starting in 2018. ACP has long encouraged stringent quantitative network adequacy criteria; ongoing monitoring and oversight of "provider" networks; transparent "provider" network development criteria; accurate, easily accessible and up-to-date "provider" directories; and requirements that Qualified Health Plans should be prohibited from excluding health care clinicians whose practices contain substantial numbers of patients with expensive medical conditions. Further consideration of proposals to ensure levels of network adequacy is needed.

In closing, thank you for your shared commitment in wanting to address the growing problem of health care costs, including surprise medical billing. As you continue to move forward with a markup and possible Senate floor action on the LHCC Act of 2019, S. 1895, the College appreciates your consideration of our views urges you to change course regarding using a "benchmark" standard to resolve surprise medical billing. We look forward to providing additional input as needed. If you have any questions, please contact Jared Frost at jfrost@acponline.org or 202-261-4526.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert M. McLean". The signature is fluid and cursive, with the first name being the most prominent.

Robert M. McLean, MD, FACP
President