Charles N. Kahn III
President and CEO

April 25, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Medicaid Program; Disproportionate Share Hospital Third-Party Payer Rule (CMS-2445-P)

Dear Administrator Brooks-LaSure,

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. The FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services.

We appreciate the opportunity to provide comment on the Centers for Medicare & Medicaid Services' (CMS) Medicaid Program; Disproportionate Share Hospital Third-Party Payer proposed rule. The principal purpose of the rule is to implement section 203 of the Consolidated Appropriations Act, 2021 (CAA, 2021), which relates to the treatment of third-party payments when calculating hospital-specific disproportionate share hospital (DSH) limits under the Medicaid program. Generally, Section 203 of the CAA, 2021 (Section 203), modified the calculation of the Medicaid portion of the hospital-specific DSH limit to only include costs and payments for services furnished to beneficiaries for whom Medicaid is the primary payer for those services – this excludes costs and payments for services furnished to Medicaid beneficiaries with other sources of coverage, such as Medicare and commercial insurance. However, Section 203 provided an exception to this rule for those hospitals in the 97th percentile

of all hospitals nationwide with respect to inpatient days made up of patients who, for such days, were entitled to Medicare Part A benefits and to supplemental security income (SSI) benefits. The hospital-specific limit for a DSH hospital that qualifies for the exception is equal to the higher of the limit as calculated under the methodology in effect before enactment of the CAA, 2021 or the limit as calculated under the methodology imposed by the CAA, 2021. Per statutory requirements, these changes would apply retroactively as of October 1, 2021.

The Medicaid DSH program is critical to the ability of safety net hospitals to serve their communities. Medicaid payment rates for hospitals are generally inadequate. They have not kept up with inflation nor do they adequately compensate for other costs incurred by hospitals in providing the range of care that vulnerable patient populations in the community require. Underfunding by payers, including state and federal government payers, results in the reduction or termination of vital services offered by hospitals to the communities they serve and threatens to result in closure of some hospitals that rely heavily on additional funding received through the Medicaid DSH program. When access to certain services furnished by a hospital is curtailed or terminated, patients must wait longer for those services or travel farther to receive those services; thus, they face added barriers and higher costs to access needed services. It also exacerbates health disparities. Closure of a hospital or specific services is detrimental to the overall well-being of a community. It is clear that the changes to the method for calculating the hospital-specific DSH limit will further increase the strain that hospitals face in trying to meet the health care demands of the patient populations they serve, many of whom are among the most vulnerable members of the community.

The FAH recognizes that the amendments made by Section 203 of the CAA, 2021, to section 1923(g) of the Social Security Act are reasonably specific and do not appear to afford CMS great flexibility in implementing those congressional mandates. We encourage CMS to provide as much flexibility as it can in its implementation of Section 203 in determining whether Medicaid is the primary payer for a claim for items and services, such as taking into account when coverage under another program (such as Medicare or another payer) is exhausted or where the other coverage does not apply to the claim for inpatient or outpatient hospital services.

The FAH appreciates the proposals in the rule that relate to establishing whether a hospital qualifies to be a 97th percentile hospital. Under the proposal, for each Medicaid State Plan Rate Year beginning on or after October 1, 2021, CMS would prospectively identify the 97th percentile hospitals using Medicare cost reporting and claims data sources as well as SSI eligibility data provided by the Social Security Administration. It would also publish lists identifying each 97th percentile hospital annually in advance of October 1 of each year. A hospital could qualify as a 97th percentile hospital in two ways—either based on the absolute number of Medicare SSI days or by the percentage of inpatient days that are Medicare SSI days. The FAH encourages CMS to publish the annual list of each 97th percentile hospital as soon as practicable and well in advance of October 1 of the year involved to afford hospitals sufficient time to prepare for potential cuts in DSH payments.

The FAH encourages CMS to closely monitor the impact of the changes Section 203 of the CAA, 2021 made to the hospital-specific DSH limit under the Medicaid DSH program. We believe these changes could have a profoundly detrimental impact on the ability of hospitals to

continue to appropriately care for members of their communities, and will complicate if not hinder ongoing efforts to improve health equity.

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The FAH appreciates the opportunity to offer these insights. We are committed to working with you to ensure that hospitals have the requisite resources to continue to properly care for the patients in their communities. If you have any questions or would like to discuss further, please do not hesitate to contact me or a member of my staff at (202) 624-1534.

Sincerely,