

116TH CONGRESS  
1ST SESSION

# S. 18

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.

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IN THE SENATE OF THE UNITED STATES

JANUARY 3, 2019

Mr. RUBIO introduced the following bill; which was read twice and referred to the Committee on Finance

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## 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 2019”, or the  
4 “SAFE Hospitals Act of 2019”.

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 2021”;

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 2021” after “each succeeding fiscal year”;

18 (C) in subparagraph (C)(ii), by inserting  
19 “through fiscal year 2021” 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 sserting “THROUGH FISCAL YEAR 2021”; and

4 (B) in clause (iii), by inserting “through  
5 fiscal year 2021” after “any subsequent fiscal  
6 year”;

7 (4) in paragraph (6)—

8 (A) in clause (vi) of subparagraph (A)—

9 (i) in the clause heading, by striking  
10 “2025” and inserting “2021”; and

11 (ii) by striking “fiscal year 2025” and  
12 inserting “fiscal year 2021”; and

13 (B) in clause (iii) of subparagraph (B)—

14 (i) in the clause heading, by inserting  
15 “THROUGH FISCAL YEAR 2021” after “SUC-  
16 CEEDING FISCAL YEARS”; and

17 (ii) in subclause (II)—

18 (I) in the subclause heading, by  
19 inserting “THROUGH FISCAL YEAR  
20 2021” after “SUCCEEDING FISCAL  
21 YEARS”; and

22 (II) by inserting “through fiscal  
23 year 2021” after “each fiscal year  
24 thereafter”;

1           (5) by striking paragraphs (7) and (8) and in-  
2           serting the following:

3           “(7) STATE DSH ALLOTMENTS FOR FISCAL  
4           YEARS AFTER FISCAL YEAR 2021.—

5           “(A) IN GENERAL.—Subject to subpara-  
6           graphs (B), (C), and (D), beginning with fiscal  
7           year 2022, the DSH allotment for a State and  
8           fiscal year shall be the amount equal to the  
9           product of—

10           “(i) the State poverty ratio (as deter-  
11           mined under subparagraph (E)(ii)) for the  
12           State and fiscal year; and

13           “(ii) the DSH allotment cap (as de-  
14           termined under subparagraph (E)(i)) for  
15           the fiscal year.

16           “(B) PHASE-IN OF POVERTY-BASED FOR-  
17           MULA.—

18           “(i) IN GENERAL.—During the period  
19           of fiscal years described in clause (ii), the  
20           Secretary shall phase in the application of  
21           the determination of DSH allotments  
22           under subparagraph (A) in a manner that  
23           ensures that—

24           “(I) in no case is the DSH allot-  
25           ment for a State for a fiscal year dur-

1 ing such period less than 90 percent  
2 of the DSH allotment for the State  
3 for the previous fiscal year (without  
4 regard to whether the State used the  
5 full amount of the DSH allotment for  
6 the previous fiscal year); and

7 “(II) the total amount of DSH  
8 allotments made to all States for any  
9 fiscal year during such period does  
10 not exceed the DSH allotment cap de-  
11 termined for the fiscal year under  
12 subparagraph (E)(i).

13 “(ii) PHASE-IN PERIOD.—The period  
14 of fiscal years described in this clause is  
15 the period that begins with fiscal year  
16 2022 and ends with—

17 “(I) fiscal year 2031; or

18 “(II) at the Secretary’s discre-  
19 tion, any of fiscal years 2032 through  
20 2036.

21 “(iii) DEVELOPMENT OF METHOD-  
22 OLOGY.—The Secretary shall promulgate  
23 final regulations that establish the method-  
24 ology for determining State DSH allot-

1           ments under clause (i) not later than Jan-  
2           uary 1, 2021.

3           “(C) STATE ALLOTMENT FLEXIBILITY OP-  
4           TION.—

5                   “(i) IN GENERAL.—A State may elect  
6                   to increase or reduce the amount of the  
7                   DSH allotment for the State and a fiscal  
8                   year (as otherwise determined under this  
9                   paragraph) for the purpose of providing  
10                  certainty or more consistent DSH funding  
11                  in subsequent fiscal years in accordance  
12                  with this subparagraph.

13                   “(ii) STATE OPTION TO RESERVE AL-  
14                   LOTMENT AMOUNTS.—For any fiscal year  
15                   after fiscal year 2021, a State may request  
16                   that the DSH allotment for the State and  
17                   fiscal year (as otherwise determined under  
18                   this paragraph) be reduced by an amount  
19                   that shall not exceed 10 percent of the  
20                   amount of the allotment as so determined.

21                   “(iii) STATE OPTION TO INCREASE  
22                   DSH ALLOTMENT FROM ALLOTMENT RE-  
23                   SERVE.—For any fiscal year after fiscal  
24                   year 2022, a State may request that the  
25                   DSH allotment for the State and fiscal

1 year (as otherwise determined under this  
2 paragraph) be increased by an amount  
3 that shall not exceed the DSH reserve  
4 amount for the State and fiscal year.

5 “(iv) DSH RESERVE AMOUNT.—

6 “(I) IN GENERAL.—Subject to  
7 subclause (II), the DSH reserve  
8 amount for a State and fiscal year  
9 shall be equal to the sum of the  
10 amounts, if any, of any reductions to  
11 the State’s DSH allotment (as other-  
12 wise determined under this para-  
13 graph) made in each of the preceding  
14 5 fiscal years pursuant to a request  
15 under clause (ii).

16 “(II) SUBTRACTION OF IN-  
17 CREASES FROM DSH RESERVE  
18 AMOUNT.—The amount of any in-  
19 crease to a State’s DSH allotment for  
20 a fiscal year made pursuant to a re-  
21 quest under clause (iii) shall be sub-  
22 tracted from the State’s DSH reserve  
23 amount for such year and shall not be  
24 available to the State in subsequent  
25 fiscal years.

1                   “(III) RULE OF APPLICATION.—

2                   In the case of an increase to a State’s  
3                   DSH allotment for a fiscal year that  
4                   is less than the State’s DSH reserve  
5                   amount for such year, the Secretary  
6                   shall apply subclause (II) in a manner  
7                   that maximizes the DSH reserve  
8                   amount that will remain available to  
9                   the State in subsequent fiscal years.

10                   “(v) DISREGARD OF ADJUSTMENTS.—

11                   Any increase or reduction under this sub-  
12                   paragraph to the DSH allotment of a  
13                   State for a fiscal year shall be disregarded  
14                   when otherwise determining State DSH al-  
15                   lotments under this paragraph.

16                   “(D) TREATMENT OF WAIVERS.—

17                   “(i) IN GENERAL.—Subject to clause  
18                   (ii), with respect to a State and a fiscal  
19                   year, if the State has in effect on the date  
20                   of enactment of the SAFE Hospitals Act  
21                   of 2019 a statewide waiver of requirements  
22                   of this title under section 1115 or other  
23                   law and any part of the fiscal year occurs  
24                   during the period of the waiver (as ap-  
25                   proved as of such date), the DSH allot-



1           ment determined under this paragraph for  
2           such State and fiscal year shall not be less  
3           than the DSH allotment that would have  
4           been determined for such State and fiscal  
5           year under this section as in effect on the  
6           day before the date of enactment of the  
7           SAFE Hospitals Act of 2019, reduced, in  
8           the case of each of fiscal years 2022  
9           through 2025, by the amount of the  
10          State’s share of the reductions which  
11          would have been applicable for the fiscal  
12          year under paragraph (7) of this sub-  
13          section (as so in effect), as estimated by  
14          the Secretary.

15               “(ii) TOTAL ALLOTMENTS NOT TO EX-  
16               CEED DSH ALLOTMENT CAP.—The Sec-  
17               retary shall apply this subparagraph in  
18               such a manner that the total amount of  
19               DSH allotments determined for all States  
20               for a fiscal year under this paragraph does  
21               not exceed DSH allotment cap determined  
22               for the fiscal year under subparagraph  
23               (E)(i).

24               “(iii) NONAPPLICATION.—Clause (i)  
25               shall not apply—

1           “(I) with respect to a State that  
2           has in effect a waiver described in  
3           such clause if the State elects,  
4           through a revision of such waiver,  
5           that such clause will not apply; or

6           “(II) with respect to any part of  
7           a fiscal year that occurs after the ex-  
8           piration (determined without regard  
9           to any extension approved after the  
10          date of the enactment of the State Ac-  
11          countability, Flexibility, and Equity  
12          for Hospitals Act of 2019) of such a  
13          waiver.

14          “(iv) NO EFFECT ON WAIVER AU-  
15          THORITY.—Nothing in this subsection shall  
16          be construed as preventing the Secretary  
17          from approving a waiver under section  
18          1115 or other law with respect to require-  
19          ments under this title related to a State’s  
20          use of its DSH allotment for a fiscal year.

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

22                 “(i) DSH ALLOTMENT CAP.—The  
23                 term ‘DSH allotment cap’ means, with re-  
24                 spect to a fiscal year, the amount equal to  
25                 the total amount of the DSH allotments

1 that would have been determined for all  
2 States for the fiscal year under this section  
3 as in effect on the day before the date of  
4 enactment of the SAFE Hospitals Act of  
5 2019, reduced, in the case of fiscal years  
6 2022 through 2025, by the aggregate  
7 amount of the reductions which would have  
8 been applicable for the fiscal year under  
9 paragraph (7) of this subsection (as so in  
10 effect).

11 “(ii) STATE POVERTY RATIO.—The  
12 term ‘State poverty ratio’ means, with re-  
13 spect to a State and fiscal year, the ratio  
14 of—

15 “(I) the number of individuals in  
16 the State in the most recent fiscal  
17 year for which census data are avail-  
18 able whose income (as determined  
19 under section 1902(e)(14) (relating to  
20 modified adjusted gross income) and  
21 without regard to whether an individ-  
22 ual’s income eligibility for medical as-  
23 sistance is determined under such sec-  
24 tion) was less than 100 percent of the  
25 poverty line (as defined in section

1                   2110(e)(5)) applicable to a family of  
2                   the size involved; to

3                   “**(II)** the number of individuals  
4                   in all States in the most recent fiscal  
5                   year for which census data are avail-  
6                   able whose income (as so determined)  
7                   was less than 100 percent of the pov-  
8                   erty line (as so defined) applicable to  
9                   the family of the size involved.”; and

10                   (6) by redesignating paragraph (9) as para-  
11                   graph (8).

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

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

18                   (1) in subsection (a)(2)(D), by inserting  
19                   “(which, as of October 1, 2021, shall meet the re-  
20                   quirements of subsection (k))” after “methodology”;

21                   (2) in subsection (c), by striking “and (g)” and  
22                   inserting “, (g), and, beginning on October 1, 2021,  
23                   (k)”;

24                   (3) in subsection (d)(2)(A)—

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

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

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

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

9 (4) by adding at the end the following new sub-  
10 section:

11 “(k) STATE METHODOLOGY REQUIREMENTS.—

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

16 “(A) the methodology is uniformly applied  
17 statewide;

18 “(B) the methodology identifies each hos-  
19 pital in the State that is described in a dis-  
20 proportionate share hospital tier (as defined in  
21 paragraph (2)); and

22 “(C) in making payments to dispropor-  
23 tionate share hospitals, the methodology meets  
24 the requirements of paragraph (3).

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

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

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

9           “(ii) one or more of the following cri-  
10 teria:

11           “(I) The hospital has a Medicaid  
12 inpatient utilization rate (as defined  
13 in subsection (b)(2)) that is not less  
14 than 2 standard deviations above the  
15 mean Medicaid inpatient utilization  
16 rate for hospitals receiving Medicaid  
17 payments in the State.

18           “(II) The hospital has a low-in-  
19 come utilization rate (as defined in  
20 subsection (b)(3)) of not less than 40  
21 percent.

22           “(III) More than 70 percent of  
23 the inpatient days for which payments  
24 are received by the hospital are paid  
25 for under the Medicare program

1 under title XVIII, the Medicaid pro-  
2 gram under this title, or the Chil-  
3 dren’s Health Insurance Program  
4 under title XXI.

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

8 “(i) is not described in the previous  
9 subparagraph; and

10 “(ii) satisfies one or more of the fol-  
11 lowing criteria:

12 “(I) The hospital has a Medicaid  
13 inpatient utilization rate (as defined  
14 in subsection (b)(2)) that is not less  
15 than 1.5 standard deviations above  
16 the mean Medicaid inpatient utiliza-  
17 tion rate for hospitals receiving Med-  
18 icaid payments in the State.

19 “(II) The hospital has a low-in-  
20 come utilization rate (as defined in  
21 subsection (b)(3)) of not less than 35  
22 percent.

23 “(III) The hospital has the larg-  
24 est number of inpatient days attrib-  
25 utable to individuals entitled to bene-

1 fits under the State plan of any hos-  
2 pital in such State for the previous  
3 State fiscal year.

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

7 “(i) is not described in a previous sub-  
8 paragraph; and

9 “(ii) satisfies one or more of the fol-  
10 lowing criteria:

11 “(I) The hospital has a Medicaid  
12 inpatient utilization rate (as defined  
13 in subsection (b)(2)) that is not less  
14 than the mean Medicaid inpatient uti-  
15 lization rate for hospitals receiving  
16 Medicaid payments in the State.

17 “(II) The hospital has a low-in-  
18 come utilization rate (as defined in  
19 subsection (b)(3)) of not less than 25  
20 percent.

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

24 “(i) is not described in a previous sub-  
25 paragraph; and



1                   “(ii) satisfies the requirement de-  
2                   scribed in subsection (d)(3).

3                   “(3) PAYMENT METHODOLOGY REQUIRE-  
4                   MENTS.—

5                   “(A) PRIORITIZATION OF HOSPITALS.—In  
6                   making disproportionate share hospital pay-  
7                   ments, a State methodology shall prioritize hos-  
8                   pitals in the following order:

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

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

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

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

17                  “(B) FACTORS.—The methodology speci-  
18                  fies the factors that will be considered in deter-  
19                  mining the amount of a disproportionate share  
20                  hospital payment to be made to a hospital,  
21                  which may include—

22                  “(i) the hospital’s net operating mar-  
23                  gins (including past net operating mar-  
24                  gins);

1           “(ii) past disproportionate share hos-  
2           pital payments to the hospital;

3           “(iii) whether the hospital was af-  
4           fected by a major disaster (as declared by  
5           the President under section 401 of the  
6           Robert T. Stafford Disaster Relief and  
7           Emergency Assistance Act) in the 12  
8           months prior to the payment; and

9           “(iv) other relevant factors, as deter-  
10          mined by the State (subject to the ap-  
11          proval of the Secretary).

12          “(C) CONSIDERATION OF FINANCIAL CIR-  
13          CUMSTANCES OF HIGH TIER HOSPITALS.—

14                 “(i) IN GENERAL.—The State shall  
15                 certify that the State methodology ade-  
16                 quately considers the unique financial cir-  
17                 cumstances of tier 1 hospitals and tier 2  
18                 hospitals, and takes necessary steps to  
19                 mitigate net operating losses by such hos-  
20                 pitals.

21                 “(ii) GUIDANCE.—

22                         “(I) IN GENERAL.—Not later  
23                         than 18 months after the date of en-  
24                         actment of the SAFE Hospitals Act  
25                         of 2019, the Secretary shall issue

1 guidance to States outlining methods  
2 that States may use to satisfy the re-  
3 quirement of this subparagraph.

4 “(II) STATE ALTERNATIVES.—  
5 Subject to the approval of the Sec-  
6 retary, a State may develop an alter-  
7 native method for satisfying the re-  
8 quirement of this subparagraph.

9 “(D) TREATMENT OF IMDS AND CAHS.—  
10 The State shall specify how the methodology  
11 prioritizes institutions for mental diseases and  
12 critical access hospitals (as defined in section  
13 1861(mm)(1)), but in no case shall institutions  
14 for mental diseases or critical access hospitals  
15 receive a higher priority than tier 1 hospitals.

16 “(E) STATE AUTHORITY TO RECLASSIFY  
17 HOSPITALS.—Subject to the approval of the  
18 Secretary, for purposes of prioritizing dis-  
19 proportionate share payments under a State  
20 methodology under this subsection, a State may  
21 treat up to 15 percent of all disproportionate  
22 share hospitals in the State, excluding institu-  
23 tions for mental diseases, as belonging to a dif-  
24 ferent disproportionate share hospital tier than

1 the tier in which the hospitals are described  
2 under paragraph (2).

3 “(F) RULE OF CONSTRUCTION.—Nothing  
4 in this subsection shall be construed as requir-  
5 ing a State to apply a uniform payment meth-  
6 odology to all hospitals within a dispropor-  
7 tionate share hospital tier.

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

10 “(A) IN GENERAL.—In the case of a State  
11 that has fewer than 15 disproportionate share  
12 hospitals, the State shall use the methodology  
13 for identifying and making payments to dis-  
14 proportionate share hospitals that is developed  
15 by the Secretary under subparagraph (B).

16 “(B) DEVELOPMENT OF METHODOLOGY.—  
17 Not later than 18 months after the date of en-  
18 actment of the SAFE Hospitals Act of 2019,  
19 the Secretary shall develop a methodology for  
20 identifying and making payments to dispropor-  
21 tionate share hospitals for States that have  
22 fewer than 15 disproportionate share hospitals  
23 that prioritizes DSH payments to hospitals with  
24 disproportionately high volumes of Medicaid pa-  
25 tients and low-income patients.

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

8           (b) MODIFICATION OF CAP ON INDIVIDUAL DSH  
9           PAYMENTS.—Section 1923(g)(1)(A) of the Social Security  
10          Act (42 U.S.C. 1396r-4(g)(1)(A)) is amended, in the first  
11          sentence, by inserting “, including any costs incurred by  
12          the hospital during the year that are associated with sub-  
13          sidizing a physician or a clinic or other health center that  
14          is owned and operated by, controlled by, or in common  
15          control with the hospital for the purpose of providing care  
16          to indigent patients” before the period.

17          (c) MODIFICATION OF DSH QUALIFICATION RE-  
18          QUIREMENTS.—

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

24                         “(A) has a Medicaid inpatient utilization  
25                         rate (as defined in subsection (b)(2)) that is not

1 more than 1 standard deviation below the mean  
2 Medicaid inpatient utilization rate for hospitals  
3 receiving Medicaid payments in the State;

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

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

9 (2) EFFECTIVE DATE.—The amendments made  
10 by this subsection shall take effect on October 1,  
11 2021.

○