

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Susan Neese, M.D and **James Hurly,**
M.D., on behalf of themselves and
others similarly situated,

Plaintiffs,

v.

Xavier Becerra, in his official capacity as
Secretary of Health and Human Services;
United States of America,

Defendants.

Case No. 2:21-cv-00163-Z

BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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Plaintiffs Susan Neese and James Hurly respectfully move to certify a class of all health-care providers subject to section 1557 of the Affordable Care Act.

The common characteristics of these class members are that they are all health-care providers, and they are all subject to section 1557 of the Affordable Care Act because they receive federal funds. *See* Local Rule 23.2(b)(3). The distinguishing characteristics are that the class members hold different jobs in the health-care profession, practice different areas of medicine, and hold differing views on the appropriate and ethical responses to patients suffering from gender dysphoria. *See id.*

I. THE COURT SHOULD CERTIFY THE PROPOSED CLASS UNDER RULE 23(b)(2)

A party that moves for class certification must satisfy each requirement of Rule 23(a) and at least one subdivision in Rule 23(b). The proposed class meets each of these requirements.

A. The Proposed Class Is So Numerous That Joinder Of All Members Is Impractical

The number of health-care providers subject to section 1557 easily exceeds the numerosity threshold. *See In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016) (“[N]umerosity is generally satisfied if there are more than 40 class members.”). Any health-care provider that participates in a federally funded health-care program such as Medicare, Medicaid, or CHIP is covered by section 1557’s anti-discrimination provisions. According to the March 2022 version of the Centers for Medicare & Medicaid Services Fast Facts, which is available for download from CMS’s website,¹ there are more than 1.4 providers in Medicare alone. *See* Exhibit 1, at p. 15.

1. *See* <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Fast-Facts> (last visited on August 5, 2022).

The local rules of this Court require us to provide the “approximate number of class members.” Local Rule 23.2(b)(1). Based on the data discussed above, the plaintiffs estimate that the proposed class of health-care providers subject to section 1557 easily exceeds 1 million.

B. There Are Questions of Law or Fact Common to The Members of The Class

The plaintiffs are litigating at least two questions of law common to all members of the class. The first is whether Secretary Becerra’s interpretation of section 1557 is consistent with the statutory definition of “sex” discrimination, as construed by the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). The second is the extent to which section 1557’s prohibition on “sex” discrimination compels health-care providers to provide “gender-affirming care” to patients suffering from gender dysphoria.

These questions affect all class members because Secretary Becerra has announced that every health-care provider subject to section 1557 must refrain from “discrimination on the basis of gender identity.” Yet his notification of May 10, 2021, refuses to specify or explain the extent to which health-care providers must accommodate the requests of patients with gender dysphoria. This leaves all class members in a state of uncertainty over their legal obligations under section 1557, and the plaintiffs seek declaratory relief to clarify how the statutory prohibition on “sex” discrimination applies to the treatment of transgender patients. Each class member is “suffer[ing] the same injury” from the legal uncertainty created by Secretary Becerra’s notification of May 10, 2021, and that is all that needed to satisfy Rule 23(a)(2)’s commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)); *see also Wal-Mart*, 564 U.S. at 360 (“[E]ven a single [common] question will do.” (citation and internal quotation marks omitted)); *In re Deepwater Horizon*, 739 F.3d 790, 812

(5th Cir. 2014) (same). And a ruling on these issues “will resolve an issue that is central to the validity of each one of the claims in one stroke,”² as the requested declaratory relief will provide the clarity that each class member needs to determine how they must respond to transgender patients in a manner consistent with federal law.

C. The Plaintiffs’ Claims Are Typical of The Claims of The Class

The plaintiffs’ claims are more than typical: they are precisely the same as those of all members of the proposed class. The plaintiffs are requesting a declaratory judgment that defines the scope of the class members’ legal obligations under section 1557’s prohibition on “sex” discrimination, as well as a ruling that “sets aside” Secretary Becerra’s notification of May 10, 2021, under section 706 of the APA. *See James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (“[T]he test for typicality is not demanding. It focuses on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.” (citations and quotation marks omitted)); *id.* (“[T]he critical inquiry is whether the class representative’s claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.” (citations and quotation marks omitted)); *see also Wal-Mart*, 564 U.S. at 350 n.5 (“[T]he commonality and typicality requirements of Rule 23(a) tend to merge.” (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157–58 n.13 (1982))).

D. The Plaintiffs Will Fairly and Adequately Protect the Interests of The Class

The plaintiffs will fairly and adequately represent the interests of their fellow class members, and there are no conflicts of interest between the plaintiffs and the other members of this class. No member of the class can be harmed or made worse off by a

2. *Wal-Mart*, 564 U.S. at 350; *see also M.D. v. Perry*, 675 F.3d 832, 840 (5th Cir. 2012).

ruling that gives them the *option* to treat transgender patients or patients with gender dysphoria in manner consistent with their ethical beliefs. That remains the case even though there are class members who support Secretary Becerra’s notification and disagree with Dr. Neese and Dr. Hurly on the proper response to patients with gender dysphoria. The relief requested will preserve the rights of those health-providers to continue following Secretary Becerra’s interpretations of section 1557 if they choose to do so, even if the Court “sets aside” the Secretary’s guidance documents. And a health-care provider has no legally cognizable interest in seeing another provider punished with loss of federal funds for failing to comply with Secretary Becerra’s edicts. *See Allen v. Wright*, 468 U.S. 737 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

The situation is no different from the class certified in *J.D. v. Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019). The plaintiffs in *J.D.* had challenged a federal policy that denied abortion access to unaccompanied minors detained by the government, and sought to certify a class of *all* pregnant unaccompanied minors in federal custody. *Id.* at 1305. The district court certified the class, and the court of appeals affirmed—even though the class included minors who had no desire for an abortion, as well as minors who strongly opposed abortion for ideological, religious, or moral reasons. The Court explained that the class members suffered a common injury by being denied a *choice* in whether to have an abortion, even though many class members would never have exercised that choice had it been available:

The constitutional right asserted by the class is a woman’s “right to choose to terminate her pregnancy” before viability. The class members all assert a common entitlement to make that choice on their own, free from any veto power retained (unconstitutionally, the class says) by ORR. And on the plaintiffs’ theory, they are all denied the right to terminate their pregnancies by a veto power that effectively supersedes it. The class representatives are suited to press that interest on the class’s

behalf, even if various class members might make varying ultimate decisions about how to exercise their choice.

Id. at 1313 (citation omitted). So too here. The plaintiffs are asserting the right of every health-care provider to choose whether to follow Secretary Becerra’s purported interpretations of section 1557, and the class members are suffering the “same injury” because they are being denied that choice.

E. The Plaintiffs’ Proposed Class Satisfy Rule 23(b)(2)

The final criterion for class certification under Rule 23(b)(2) is that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). The Supreme Court has held that this requirement is satisfied “when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart*, 564 U.S. at 360; *see also id.* at 361–62 (“[T]he relief sought must perforce affect the entire class at once . . .”). That is precisely what the plaintiffs are requesting: a single declaratory judgment that section 1557 does not prohibit discrimination on account of sexual orientation and gender identity, as Secretary Becerra asserts, but that it prohibits only “sex” discrimination, which means that the provider would have acted differently toward an identically situated member of the opposite biological sex. *See* First Amended Complaint, ECF No. ¶¶ 48, 50(d). No one is seeking individualized relief for any class member or for any subset of the class. *Compare with M.D.*, 675 F.3d at 845 (disapproving class certification under Rule 23(b)(2) when individualized relief was sought).

In addition, the defendant agencies are “act[ing] . . . on grounds that apply generally to the class,” because section 1557 and Secretary Becerra’s notification of May 10, 2021, apply to each of the class members.

II. REMAINING ISSUES

The parties have already conducted class discovery and Dr. Neese and Dr. Hurly have each sat for depositions. *See* Local Rule 23.2(f). The plaintiff's attorneys are self-financing this litigation. *See* Local Rule 23.2(g). The remaining information required by Local Rule 23.2 is inapplicable because certification is sought solely under Rule 23(b)(2) and the plaintiffs are not seeking damages or monetary relief, so notice need not be given to absent class members. *See* Local Rule 23.2(e). In addition, this is not a diversity action, so there is no need to determine a jurisdictional amount. *See* Local Rule 23.2(d).

CONCLUSION

The motion for class certification should be granted.

Respectfully submitted.

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Dated: August 5, 2022

*Counsel for Plaintiffs and
the Proposed Class*

CERTIFICATE OF SERVICE

I certify that on August 5, 2022, I served this document through CM/ECF upon:

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Civil Division, Federal Programs Branch
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Counsel for Defendants

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
*Counsel for Plaintiffs and
the Proposed Class*

CMS Program Data - Populations¹

Medicare (avg monthly)	CY 2019	CY 2020	CY 2021 ²
Parts A and/or B	61.5	62.8	63.8
Aged	53.0	54.5	55.8
Disabled	8.5	8.3	8.0
Original Medicare Enrollment	38.6	37.8	36.3
MA & Other Health Plan Enrollment	22.9	25.1	27.5
MA Enrollment	22.2	24.4	26.9
Part D (MAPD+PDP)	45.8	47.4	48.7

Medicaid (avg monthly) ³	FY 2019	FY 2020	FY 2021
Total	73.9	75.3	83.5
Aged	6.1	6.3	6.5
Blind/Disabled	10.2	10.1	10.2
Children	28.9	29.1	33.5
Adults	15.2	15.4	17.0
Expansion Adult	12.1	12.8	15.0

CHIP (avg monthly) ³	7.2	7.1	7.1
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¹ Populations are in millions and may not add due to rounding

² Preliminary and subject to change

³ Projected estimates

MA - Medicare Advantage
 MA PD - Medicare Advantage Prescription Drug Plan
 PDP - Prescription Drug Plan
 CHIP - Children's Health Insurance Program

SOURCES: CMS/Office of Enterprise Data & Analytics/Office of the Actuary

Medicare Deductibles, Coinsurance, Premiums

	CY 2021	CY 2022
Part A		
Inpatient Hospital		
Deductible	\$1,484.00	\$1,556.00
Coinsurance/Day	\$371.00	\$389.00
Coinsurance/LTR Day	\$742.00	\$778.00
Coinsurance/SNF Day	\$185.50	\$194.50
Part B		
Deductible	\$203.00	\$233.00
Part D		
Maximum Deductible	\$445.00	\$480.00
Initial Coverage Limit	\$4,130.00	\$4,430.00
Out-of-Pocket Threshold	\$6,550.00	\$7,050.00
Premiums		
Part A	\$471.00	\$499.00
Part B	\$148.50-\$504.90	\$170.10-\$578.30

NOTE: The inpatient hospital deductible applies per benefit period.

LTR - Life Time Reserve
SNF - Skilled Nursing Facility

SOURCE: CMS/Office of the Actuary

**Original Medicare Persons Served and Payments by Type of Service
 Calendar Year 2020**

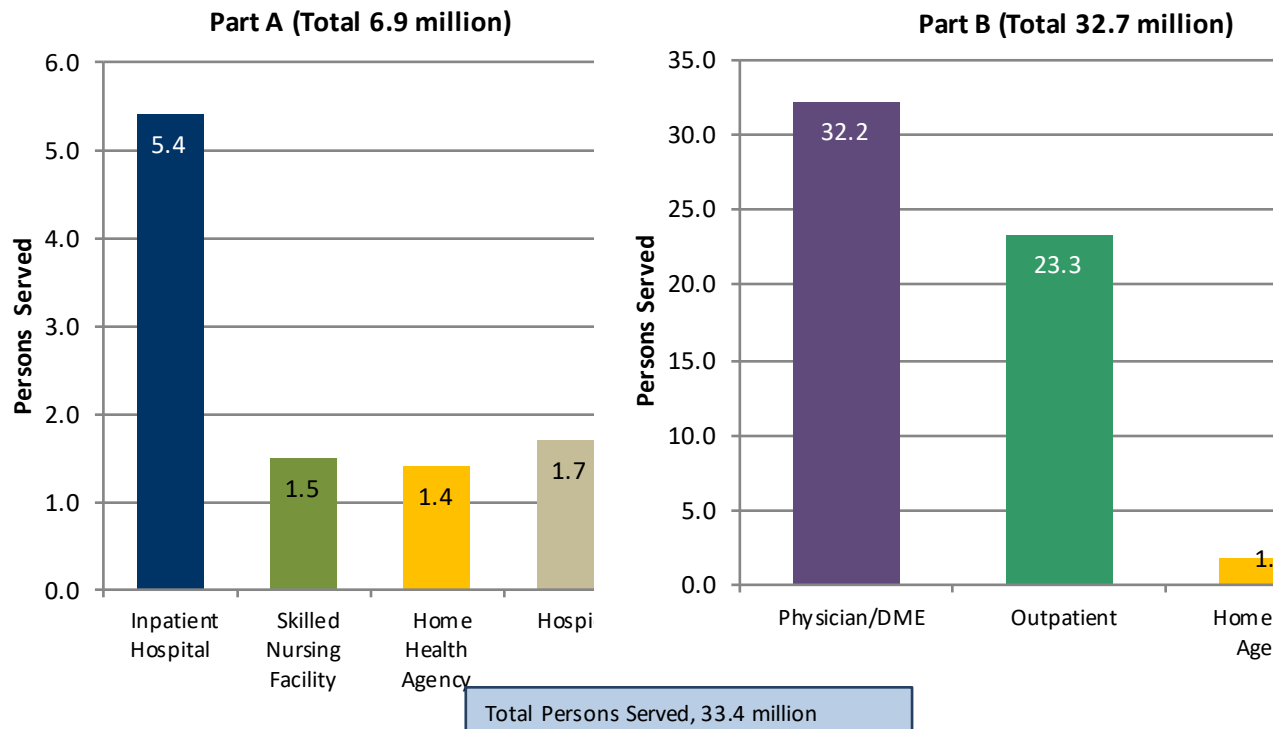
	Persons Served (in millions)	Program Payments (in billions)
Total	33.4	\$379.6
Part A	6.9	\$187.4
Inpatient Hospital	5.4	\$130.2
Skilled Nursing Facility	1.5	\$28.6
Home Health Agency	1.4	\$6.3
Hospice	1.7	\$22.4
Part B	32.7	\$192.2
Physician/DME	32.2	\$106.5
Outpatient	23.3	\$74.8
Home Health Agency	1.8	\$10.8

Total = Parts A and/or B

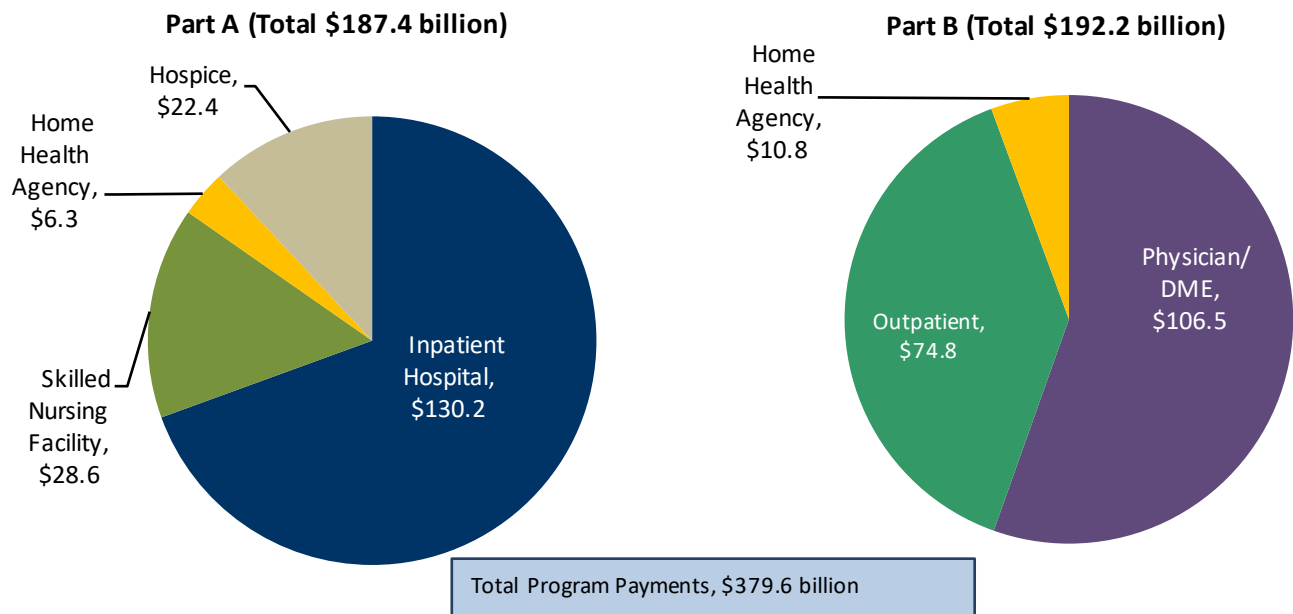
DME - Durable Medical Equipment

SOURCE: CMS/Office of Enterprise Data & Analytics

Original Medicare Persons Served (in Millions) by Type of Service
Calendar Year 2020



Original Medicare Program Payments (in Billions) by Type of Service
Calendar Year 2020

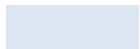


Total = Parts A and/or B

SOURCE: CMS/Office of Enterprise Data & Analytics

.8 _____

: Health
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Medicare Part D Utilization and Expenditures
Calendar Year 2020

Utilizing Beneficiaries, in millions	46.2
Prescription Drug Events, in billions	1.5
<hr/>	
Total Part D Expenditures, in billions	\$105.8
Part D Benefit Payments	\$104.6
Part D Administrative Expenses	\$0.4

SOURCES: CMS/Office of Enterprise Data & Analytics/Office of the Actuary

Medicaid Beneficiaries and Payments by Selected Type of Service
Fiscal Year 2014

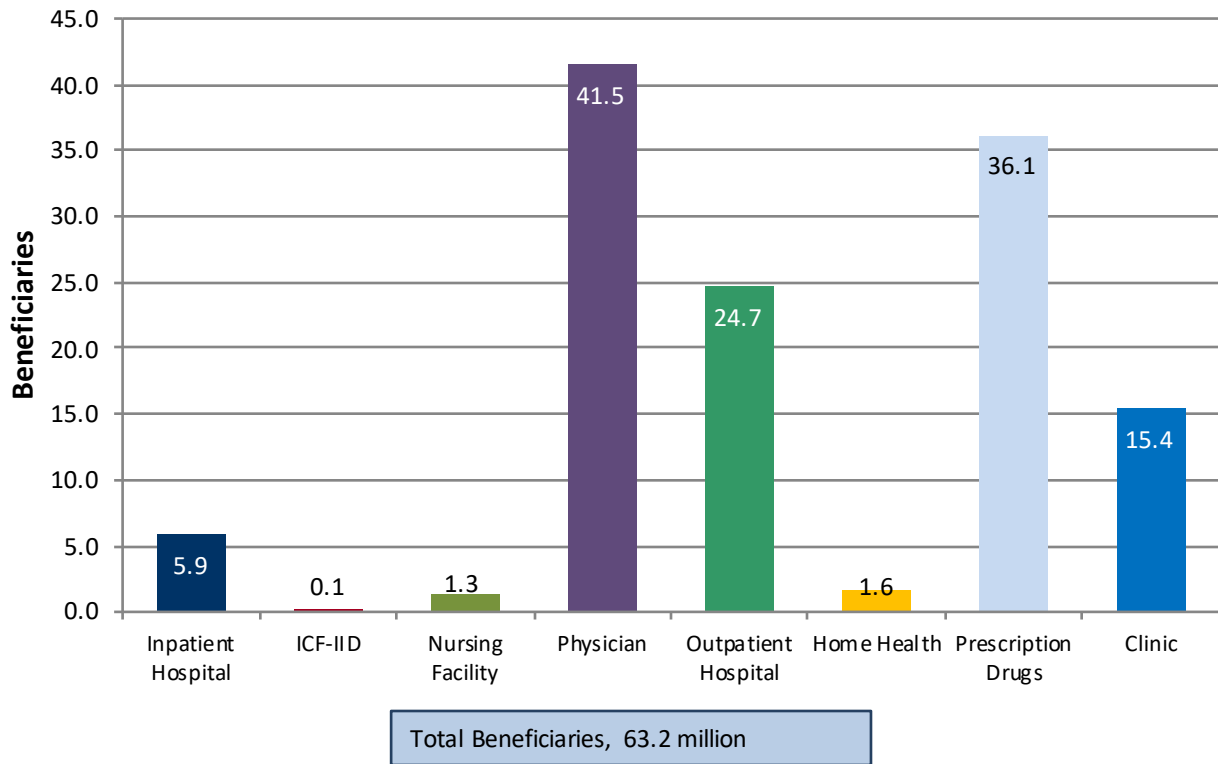
	Beneficiaries (in millions)	Payments (in billions)
All Services	63.2	\$314.5
Inpatient Hospital	5.9	\$22.6
ICF-IID	0.1	\$7.9
Nursing Facility	1.3	\$37.0
Physician	41.5	\$6.9
Outpatient Hospital	24.7	\$9.3
Home Health	1.6	\$4.8
Prescription Drugs	36.1	\$14.9
Capitation	--	\$138.7
Clinic	15.4	\$11.0
Personal Care	1.1	\$9.9
Other Services	--	\$51.6

NOTES: Beneficiaries represent unique individuals on whose behalf Medicaid payments for the indicated services were made during the fiscal year (FY). Excludes enrollees in separate Title XXI Children's Health Insurance Programs. Excludes data for Alaska, Colorado, Florida, Kansas, North Carolina, and Rhode Island and contains partial data for District of Columbia, Delaware, Illinois, Kentucky, Maryland, Maine, Montana, North Dakota, New Hampshire, Nebraska, New Mexico, Nevada, South Carolina, Texas, Virginia, and Wisconsin. These statistics are lower for FY 2014 than those previously reported for FY 2013 and are primarily a result of incomplete data. MSIS data are incomplete for FY 2014, as noted above. The number of beneficiaries reported as receiving home health services was 1.6 million in FY 2014 compared to 17.3 million reported previously for FY 2013. The FY 2013 data were probably an anomaly based on coding problems in one or more states.

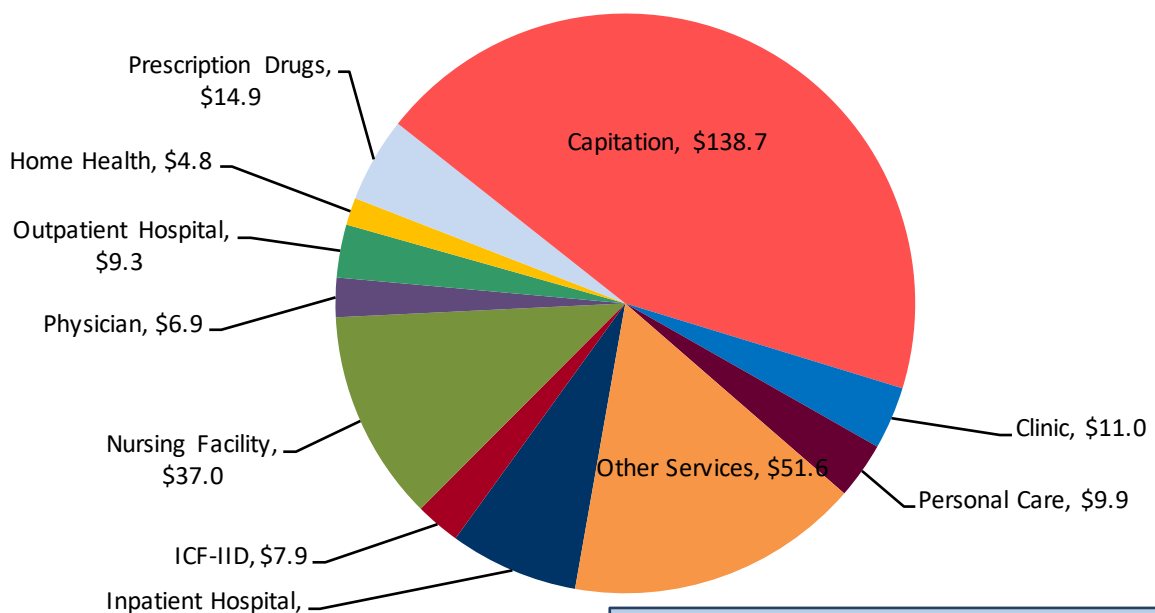
ICF-IID - Intermediate Care Facility for Individuals with Intellectual Disabilities.

SOURCE: CMS/Center for Medicaid and CHIP Services

Medicaid Beneficiaries (in Millions) by Type of Service
Fiscal Year 2014



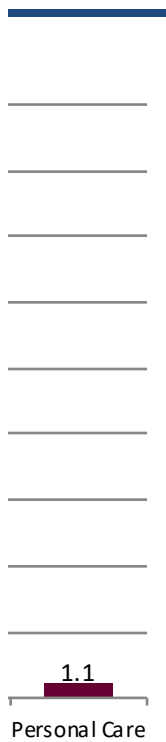
Medicaid Payments (in Billions) by Type of Service
Fiscal Year 2014



\$22.6

Total Medicaid Payments, \$314.5 billion

SOURCE: CMS/Center for Medicaid and CHIP Services



Medicare Institutional Providers Calendar Year 2020

Type of Provider	Count
Total Hospitals	6,214
Short Stay	3,481
Psychiatric	613
Rehabilitation	314
Children's	93
Long Term	347
Critical Access	1,351
Religious Non-Medical	15
Home Health Agencies	11,221
Skilled Nursing Facilities	15,015
Labs	284,414
Outpatient PT/Speech Pathology	2,044
Rural Health Clinics	4,736
Federally Qualified Health Centers	10,000
Ambulatory Surgical Centers	5,905
Comprehensive Outpatient Rehab Facilities	158
Hospices	5,260

PT - Physical Therapy

SOURCE: CMS/Office of Enterprise Data & Analytics

Medicare Non-Institutional Providers by Specialty⁴
Calendar Year 2020

Specialty Type	Count
Total Providers	1,403,879
Primary Care	223,298
Medical Specialties	176,699
Surgical Specialties	111,695
Emergency Medicine	50,357
Anesthesiology	43,339
Radiology	39,738
Obstetrics-Gynecology	35,278
Psychiatry	27,856
Pathology	12,572
Non-Physician Practitioners	515,001
Limited Licensed Practitioners	104,337
Ambulance Service Supplier	10,213
Opioid Treatment Programs	920
All Other Providers	76,821

⁴ Providers utilized by Original Medicare beneficiaries for all Part B non-institutional provider services. Providers may be counted in more than one specialty classification but are reported as a single provider in the "Total Providers" count.

SOURCE: CMS/Office of Enterprise Data & Analytics

**Medicare Durable Medical Equipment, Prosthetics, Orthotics
and Supplies (DMEPOS) Providers by Specialty
Calendar Year 2020⁵**

Specialty Type	Count
Total DMEPOS Providers	79,299
Pharmacy	47,017
Medical Supply Company	9,363
Podiatry	4,900
Optometry	4,228
Individual Certified Prosthetist/Orthotist	2,493
Orthopedic Surgery	2,019
General Practice	1,585
Optician	1,256
Ophthalmology	1,193
All Other DMEPOS Providers	5,500

⁵ Providers utilized by Original Medicare beneficiaries for all Part B non-institutional DMEPOS services. Providers may be counted in more than one specialty classification but are reported as a single provider in the "Total DMEPOS Providers" count.

SOURCE: CMS/Office of Enterprise Data & Analytics

Medicare Prepaid Contracts (01/2022)

	Count
Total Prepaid Plans (MA and others)	937
Total Prescription Drug Plans	62

SOURCE: CMS/Center for Medicare

National Health Expenditures Calendar Year 2020

Total	\$4,124.0
% of GDP	19.7%
Per Capita	\$12,530
Health Insurance	\$2,809.3
Private Health Insurance	\$1,151.4
Medicare	\$829.5
Medicaid (Title XIX)	\$671.2
CHIP (Title XIX & XXI)	\$21.3
Department of Defense	\$43.8
Department of Veterans Affairs	\$92.2

Dollars in billions except for Per Capita.

SOURCE: CMS/Office of the Actuary

CMS Financial Data Fiscal Year 2021

Total Federal Program Spending (\$ in billions)	\$1,463.4
Medicare Benefits ⁶	\$903.0
Total Medicaid ⁷	\$532.1
CHIP	\$16.1
Other Spending	\$12.1
Total Program Management (\$ in millions)	\$7,015.0
Total Appropriation	\$4,478.0
Other Sources	\$2,537.0
Total Health Care Fraud & Abuse Control Funding (\$ in millions)	\$2,222.4
FTE Employment	6,287

⁶ Medicare Benefits, including Health Information Technology Incentive Payments.

⁷ Amount reported as total gross outlays including the Vaccines for Children Program.

SOURCE: CMS/Office of Financial Management

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Susan Neese, M.D and **James Hurly, M.D.**, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Xavier Becerra, in his official capacity as Secretary of Health and Human Services; **United States of America**,

Defendants.

Case No. 2:21-cv-00163-Z

DECLARATION OF JONATHAN F. MITCHELL

I, Jonathan F. Mitchell, being duly sworn, states as follows:

1. My name is Jonathan F. Mitchell. I am over 18 years old and fully competent to make this declaration.

2. I have personal knowledge of the facts stated in this declaration, and all of these facts are true and correct.

3. I represent plaintiffs Susan Neese and James Hurly in this litigation.

4. The document attached as Exhibit 1 to this brief is an authentic copy of the March 2022 version of the Centers for Medicare & Medicaid Services Fast Facts, which I downloaded from the CMS website at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Fast-Facts>, on August 5, 2022.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this declaration are true and correct.

Jonathan F. Mitchell

JONATHAN F. MITCHELL

Dated: August 5, 2022