

Congress of the United States
Washington, DC 20515

May 19, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Secretary Becerra,

We write to express our deep disappointment with your testimony at the House Committee on Energy and Commerce Subcommittee on Health and House Committee on Ways and Means Fiscal Year 2023 budget hearings where you twice denied the existence of a rule to incentivize physician practices to implement so-called “anti-racism” plans. Rather than giving us answers about why your department is encouraging these prejudicial practices, you instead spread misinformation to the American people.

On November 19, 2021, the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) published its final rule for the CY 2022 Performance Period for the Merit-based Incentive Payment System (MIPS) under the Physician Fee Schedule. As a part of this final rule, CMS included a new measure, to be implemented in 2024, titled **“Create and Implement an Anti-Racism Plan”** (IA_AHE_8). This highly weighted measure calls for medical clinicians to craft “anti-racism plans” in their practice with subsequent quality assessment of services linked to the implementation of such plan. Furthermore, this new measure also called for the anti-racism plans to define race as “a political and social construct, not a physiological one.”¹

This measure would have a higher rating than the one given for crafting personalized mental health plans for patients, making timely cancer diagnoses, and even managing a patient’s medication so that they do not die on the surgical table during invasive surgery, just to name a few. Many Americans would be shocked to learn the priority you are placing on doctors adopting your political ideology.

In response, on February 18, 2022, led by Congressman Smith, several members of the House Committee on Ways and Means sent a letter to CMS Administrator Brooks-LaSure conveying concerns that the measure will not advance the worthy goal of addressing racial disparities in

¹ Pages 65969-65970 of the Federal Register, Volume 86, No. 221, published on Friday, November 19, 2021, under the rule entitled: Medicare Program; CY 2022 Payment Policies Under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; Provider Enrollment Regulation Updates; and Provider and Supplier Prepayment and Post-Payment Medical Review Requirements (CMS-1751-F), <https://www.govinfo.gov/content/pkg/FR-2021-11-19/pdf/2021-23972.pdf>.

health care and will undermine patient care.² To date, no members of Congress who signed that letter have received a response from you or your agency.

On April 27, 2022, at the Energy and Commerce Health Subcommittee hearing, in response to Congressman Palmer's question about the inclusion of a measure for anti-racism plans under this final rule, you claimed that HHS "does not have a policy as [he] described" and that "much of this is driven by mis- and disinformation." One day later, at the Ways and Means Committee hearing, in response to Congressman Smith's questions about this measure, you again denied existence of this measure in the CMS rule, which Congressman Smith then immediately entered into the public record.

In addition to the misguided priorities this rule creates, it also may violate the law. We have been made aware that on May 9, 2022, two doctors filed a federal civil rights lawsuit opposing this measure because enabling higher compensation for doctors adopting "anti-racism" plans violates the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA). Eight states have formally joined this lawsuit, including our home states of Missouri and Alabama. Your agency has implemented this measure despite opposition from doctors, contradictions it creates in state and federal law, and harms it will cause to care quality for patients.

Based on your on-the-record denials of this measure's existence, we are forced to conclude that you are either unaware of your own department's activity or intentionally obfuscating about this activity to hide a radical political agenda from the American people. Either action on your part is completely unacceptable.

Since your public testimony was clearly incorrect, we demand the following answers about this rule:

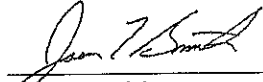
- 1) By adopting an anti-racism plan that denies physiological differences between different races, will physician practices be penalized if they screen for race in order to treat patients for diseases and disorders that are highly correlated with race?
- 2) How does your department justify implementing anti-racism plans to deliver better quality care in lieu of incorporating evidence-based medicine when treating patients of different races?
- 3) Does your department acknowledge how this measure forces physicians to knowingly violate existing state and federal law?
- 4) Has your department conducted an analysis of how many paperwork hours completing this measure would impose on participating practices?
- 5) Does your department plan to review the effectiveness of this measure with a meaningful outcomes-based study or merely reward physicians for hollowly participating?
- 6) How does your department plan to assess compliance with this measure? Will your department further promulgate how these anti-racism plans should be crafted? Will clinicians have to develop the plans themselves, detracting from time otherwise spent

² Smith Leads Fight Against Discriminatory Biden Health Care Rule, March 3, 2022, <https://jasonsmith.house.gov/newsroom/documentsingle.aspx?DocumentID=4178>

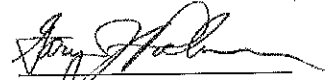
treating patients? Or will they be forced to rely on unproven "anti-racism" consultants to develop plans to be in compliance with this measure?

We trust that after multiple letters to your department, lines of questioning under oath – not to mention a lawsuit filed last week - you are now profoundly familiar with the existence of this measure. We request a thorough response to our questions within 14 days of receipt of this letter.

Sincerely,



Jason Smith
Member of Congress



Gary Palmer
Chairman, House Republican
Policy Committee

CC: The Honorable Chiquita Brooks-LaSure
Administrator
The Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244-1850