



Texas Association of Health Plans
1001 Congress Ave., Suite 300
Austin, Texas 78701
P: 512.476.2091
www.tahp.org

August 6, 2020

The Honorable Greg Abbott
Office of the Governor
P.O. Box 12428
Austin, TX 78711

RE: FSER Request for License Expansion

Dear Governor Greg Abbott:

The Texas Association of Health Plans (TAHP) is the statewide trade association representing health insurers, health maintenance organizations, and other related health care entities operating in Texas. The COVID-19 pandemic poses unprecedented challenges to Texas and our nation, touching every facet of American life. In the face of these challenges, Texas health plans are committed to curbing the virus and helping Texans receive the testing and care they need to stay healthy—including eliminating out-of-pocket costs for Texans by covering COVID treatment and testing at no cost. The health and well-being of millions of Texans is our highest priority.

We are writing to express our concern and opposition to expanding the licensure for Texas freestanding emergency rooms/centers (FSER). This industry has a long history of misleading, price gouging, and surprise billing Texas patients. **Now, many FSERs are using COVID-19 testing as the latest excuse to do what they have always done: price gouge Texas patients.** Expanding their licensure would only put more Texas patients at risk of being victimized by FSERs' predatory behavior. Instead of expanding their scope of practice, Texas should investigate FSERs' anti-consumer activities. Texas should also take proactive steps to make COVID-19 testing more affordable by prohibiting facility fees and observation fees for all drive-thru and asymptomatic testing. Surprise billing should also be prohibited for all COVID-19 related treatment and care.

In Texas, health plans are seeing a dangerous new trend of FSERs billing outrageous amounts for COVID-19 testing. While most providers charge about \$100 - \$250 per test, some providers—primarily FSERs—are price gouging Texans for tests with charges of over \$1,000. Many FSERs also regularly pile on thousands of dollars more in physician, facility, observation, or other fees and unnecessary tests associated with the visit. These combined charges are often more than 2,000% of what Medicare pays. In many of these cases, Texas patients received drive-thru testing, where no real medical care was delivered other than the COVID-19 test.



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Total claims for COVID-19 testing can be over \$3,000 for a single drive-through test, easily meeting Texas’ new FSER price gouging threshold. These exorbitant prices for COVID-related care are just the latest in a long line of examples demonstrating the need for stronger protections against price gouging and unfair billing practices for health care services in Texas.

Texas FSERs also have a long history of misleading patients about their prices and network status. According to a 2018 AARP investigation, 77% of Texas independent FSERs used confusing language—such as stating they “take” or “accept” insurance—when they were not in network with any major health plan, and 30% of FSER websites did not comply with applicable state network transparency laws.¹

The COVID crisis has only exacerbated the predatory actions of many independent FSERs. We strongly recommend that state regulators enforce current laws rather than provide FSERs with additional opportunities to mislead Texas consumers.

The FSER Industry is Under Congressional Investigation

The U.S. House Committee on Energy and Commerce recently requested information from the FSER industry about its practices and prices for COVID-19 testing. The request comes after the committee conducted an initial examination that yielded disturbing information about the price of COVID-19 tests and providers’ compliance with the requirements of the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act).²

In a letter to 10 health care providers and the National Association of Freestanding Emergency Centers, Energy and Commerce Committee Chair Frank Pallone, Jr., wrote, “These examples we have received, if accurate, are unconscionable and clearly excessive. Meanwhile, based on the committee’s review, it appears that your company has failed to list the cash price for the COVID-19 diagnostic test on a public website, which is in violation of the CARES Act.”³

The Committee’s letter to the Austin-based National Association of Freestanding Emergency Centers expresses concern regarding FSERs’ compliance with these federal laws and reports that

¹<https://states.aarp.org/texas/survey-finds-consumers-misled-by-freestanding-er-language>

²<https://energycommerce.house.gov/newsroom/press-releases/pallone-requests-information-from-companies-on-potential-covid-19-test-price>

³https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/NationalAssocFreestandingMedicalCenters.2020.7.1.%20Letter%20re%20COVID-19%20Test%20Price-Gouging.HE_.pdf



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patients are receiving surprise bills for hundreds, or even thousands, of dollars for out-of-network laboratory charges for COVID-19 testing.

The Committee requested additional information from the FSER industry about its billing practices for benefit plans and uninsured consumers for COVID-19 diagnostic tests, serological tests, and related items and services. The Committee is also concerned by reports of consumers receiving large balance bills for COVID-19 testing and related services, citing as an example the recent New York Times article about two friends going to the same emergency clinic in Austin for COVID-19 tests.⁴ One paid the cash price of \$199; the other, who used his insurance, was charged \$6,408.

Texas FSERs Attract Media Attention for Unfair Billing Practices

Congress is not the only entity investigating FSERs—a number of national, state, and local media outlets have also looked into these instances of bad behavior in Texas. On Aug. 1, national investigative journalism organization ProPublica published the story of a Houston woman who was charged nearly \$2,500 for her son’s drive-thru COVID-19 test.⁵

In the article, Health Care Cost Institute president and CEO Niall Brennan calls charging \$2,479 for a drive-thru COVID-19 test a “nauseating” example of profiteering during a pandemic. AARP Texas associate state director Blake Hutson told ProPublica that some FSERs appear to be drawing in patients with COVID-19 testing to charge their insurance plans for additional services. “It’s not a surprise they would be racking up the charges and adding on everything they can and billing the health plan,” Hutson said.

In June, The New York Times published a story on “a small number of medical labs, hospitals and emergency rooms taking advantage of the way Congress has designed compensation for coronavirus tests and treatment.”⁶ The article notes that “multiple insurers identified Texas as the state where they’ve received the highest proportion of expensive tests,” and that “patients will eventually bear the costs of these expensive tests in the form of higher insurance premiums.”

⁴<https://www.nytimes.com/2020/06/29/upshot/coronavirus-tests-unpredictable-prices.html>

⁵<https://www.propublica.org/article/how-a-covid-19-test-led-to-charges>

⁶<https://www.nytimes.com/2020/06/16/upshot/coronavirus-test-cost-varies-widely.html?action=click&module=RelatedLinks&p:pgtype=Article>



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These actions are consistent with bad-acting FSERs' track records of luring patients into their facilities with misleading advertising and then charging them for a myriad of unnecessary and expensive tests that often lead to exorbitant bills.

TAFEC Letter Includes Significant Inaccuracies

In its recent letter to HHSC Executive Commissioner Cecile Young, the Texas Association of Freestanding Emergency Centers (TAFEC) wrote, "state regulations require anyone receiving treatment at a FEMC to be processed as an emergent patient," indicating that state law provides a basis for price gouging drive-thru COVID-testing patients with excessive assessment, facility, and observation fees when patients receive no treatment and never saw a physician.

This is simply not true. FSERs are not legally required to charge these fees, and they are certainly not required to price gouge patients for COVID-19 tests or any other care. Many FSERs are actively choosing to charge prices that are exorbitantly higher than the actual cost of providing COVID testing. In fact, FSERs that treat all COVID tests as emergencies are potentially violating their licensing laws as the vast majority of COVID tests, particularly drive-thru tests, are not provided in true emergency situations.

TAFEC also writes that if FSERs are allowed to provide outpatient services, "any reimbursement disputes will already be subject to new SB 1264 and subsequent Texas Department of Insurance rules." This is also inaccurate. First, SB 1264 does not apply to enrollees of self-funded ERISA plans, which includes the majority of Texans with private coverage, so FSERs would be able to balance bill those enrollees for even more services. Second, it would not apply to FSER outpatient claims, including those covered under fully-insured benefit plans. SB 1264 generally applies to patients who receive out-of-network emergency services, out-of-network services within a network facility, or out-of-network lab or imaging services related to in-network services. FSER outpatient (non-emergency) services do not fit in any of these three categories and would not be subject to SB 1264. Because SB 1264's prohibition on balance billing would not apply to FSER outpatient services, **the licensure expansion TAFEC is requesting from HHSC would allow FSERs to balance bill patients outside of the patient protections provided to emergency patients by one of the nation's strongest surprise billing laws.**



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FSERs That Want to Treat Non-Emergency Patients Have Other Options

If FSERs truly want to provide affordable testing and non-emergency care, more efficient and effective options are already available to them. Some FSERs operate as part of a “dual door” facility/clinic where consumers have a choice of receiving emergency care from a licensed FSER or receiving urgent care from—or under the direction of—a licensed physician without being charged ER rates that include expensive “facility fees.” All FSERs have the option to change their business models to this type of practice. Expansion of their licensure is not an effective or appropriate solution to address any alleged access to care issues.

Many FSERs are Not Complying With Current Law

It is also critical to note that many independent FSERs are still not in compliance with the notice and other consumer protection requirements adopted by the Texas Legislature or the federal CARES Act. Expanding their allowed services would only increase consumer confusion about appropriate care, health plan networks, and balance billing. It would allow FSERs to expand their price gouging to even more Texans.

We prefer to see enforcement of current state and federal FSER consumer protection laws, including the CARES Act requirement that all providers offering COVID testing must publicly post their full cash prices for the tests. We would like to see HHSC enforce the laws that were passed in the last few legislative sessions in an effort to ensure that FSERs are providing true price and network transparency and not misleading patients.

Last session, the Texas Legislature specifically rejected HB 1278, a proposal similar to TAFEC’s current lobbying effort, to expand FSER licensure to include outpatient services. Instead, the Legislature recognized the need for additional consumer protections and adopted three separate bills further regulating FSERs. We would like to see HHSC enforce these laws that were passed in an effort to ensure FSERs are providing true price transparency and not misleading patients.

HB 2041 protects Texas consumers and helps lower health care costs by requiring Texas FSERs to be transparent about their prices and network status.⁷ The law now requires these facilities to provide their prices to patients in a written disclosure at the time of service or on their website. The written disclosure must notify patients that the FSER charges facility and observation fees

⁷<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=HB2041>



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for medical treatment and must also include the facility’s median facility and observation fees, a range of possible facility and observation fees, and the facility and observation fees for each level of care the FSER provides. It also protects consumers from FSERs’ use of confusing language and deceptive advertising by prohibiting FSERs from using phrases like “we take” or “accept” all insurance and displaying a health plan’s name or logo unless they are in network with the health plan mentioned.

Based on a demonstrated pattern by some independent FSERs of withholding important information from patients regarding their network status and the exorbitant fees they charge—including one case in which a patient received an astronomical \$71,000 total bill for eight stitches—the Legislature also adopted HB 1941 last session to protect Texans against this type of price gouging in emergency care situations.⁸ The law grants the Texas Attorney General (AG) power to take action against FSERs that charge consumers more than 200% of average charges for emergency care in the area, similar to the AG’s authority to protect Texans from price gouging during a natural disaster. This law protects all Texans—even those who are uninsured—from price gouging at FSERs.

TAHP Recommendations

FSER licensure should not be expanded to allow non-emergency outpatient services, including testing for COVID-19. Instead of giving FSERs authority to provide more services, which could subject millions of Texans to excessive charges and increase the cost of health care in Texas, TAHP recommends HHSC and the Governor's office prohibit facility fees and observation fees for COVID-19 testing that does not involve any treatment. We also recommend against the requested blanket waiver of requirements that apply when FSERs hold patients for more than 23 hours. A waiver of these requirements would create a risk for abuse of any extended privileges. Many FSERs have a history of providing unnecessary care and charging exorbitant rates, including for “observation fees.” We urge state leaders not to expand opportunities for FSERs to provide inappropriate care and bill excessive charges.

We also recommend a prohibition on surprise balance billing for any COVID-19 testing or treatment. State leadership should enforce current laws regulating FSERs to avoid inappropriate care, excessive charges, and surprise balance billing, and the AG’s office should use its authority

⁸<https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=HB1941>



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under HB1941 to go after these bad acting providers that are pricing gouging Texas patients at prices well above three times the amounts regularly charged in the market.

Facilities providing COVID tests to people who have no symptoms should be prohibited from charging “facility fees” in connection with those tests. Providing a COVID test to a person with no symptoms at all is clearly not an “emergency” and does not even require a “facility.” In fact, some FSERs are charging facility fees for non-emergency drive-thru testing performed in the facility’s parking lot.

In short, the proposed FSER licensure expansion is an obvious attempt to leverage a crisis in order to make a profit. Their proposed expansion is a misallocation of resources and would put Texas patients and employers at financial risk of price gouging and balance billing. No Texan should ever be price, gouged—especially not during a global pandemic.

Please let me know if you have any questions or would like to discuss. We appreciate your attention to these important issues.

Sincerely,

A handwritten signature in black ink that reads "Jamie Dudensing". The signature is written in a cursive, flowing style.

Jamie Dudensing, RN
CEO
Texas Association of Health Plans

cc: The Honorable Ken Paxton
Attorney General

The Honorable Kelly Hancock
Chair, Senate Business & Commerce Committee

The Honorable Lois Kolhorst
Chair, Senate Health & Human Services Committee



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The Honorable Senfronia Thompson
Chair, House Public Health Committee

The Honorable Eddie Lucio III
Chair, House Insurance Committee

Cecile Young
Executive Commissioner, Health and Human Services Commission

Phil Wilson
Acting Executive Commissioner, Health and Human Services Commission