July 2, 2018

VIA ELECTRONIC SUBMISSION

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9936-NC2
P.O. Box 8010
Baltimore, MD 21244-1810

RE: CMS-9936-NC2; Request for Information Regarding State Relief and Empowerment Waivers

Dear Administrator Verma:

As organizations dedicated to promoting the health of our nation's children and pregnant women, we write to offer comments on the Request for Information (RFI) from the Centers for Medicare & Medicaid Services (CMS), the Department of Health and Human Services (HHS), and the Department of the Treasury (DOTR) related to Section 1332 of the Affordable Care Act (ACA). As we outlined in our previous comment letter on the new flexibilities given to states under the Oct. 22, 2018 guidance,[1] our organizations believe that revised guidance is inconsistent with the statutory requirements of Section 1332 and could have far-reaching negative effects on children, pregnant women, and families. Furthermore, we believe that any additional flexibilities for states, as envisioned in the RFI, will undermine, rather than advance, the value and affordability of medical and dental care for children, pregnant women and families.

Therefore, we reiterate our call for the Departments to rescind the newly released guidance and retain the previous 2015 guidance consistent with statutory requirements. Commercial coverage for children must ensure access to timely, affordable, high-quality and age-appropriate health care (including dental, vision and hearing services) that meets their unique needs. Plans must also promote the health of women before, during and between pregnancies.

We share the Departments' goals of expanding the value and affordability of health coverage and would welcome the opportunity to work together to advance solutions that can improve both affordability and access to care for children, pregnant women and their families. Our specific comments are below:

Reinterpretation of Statutory Guardrails Puts Children and Families at Risk

The statutory guardrails outlined in Section 1332 of the ACA are vitally important protections for children with serious, chronic or complex health conditions, pregnant women and their families. However, the 2018 guidance weakens those protections for vulnerable groups, including children and pregnant women, resulting in less affordable and comprehensive coverage.

According to the guidance, HHS could approve a waiver that dramatically reduces the number of children and families enrolled in affordable, comprehensive plans if those families had the option, on paper, to enroll in such plans, whether or not they actually do so. Additionally, the guidance allows waivers that make coverage much more affordable for some (e.g. healthy) children and families, even if coverage is costlier for a larger

[1] https://downloads.aap.org/DOFA/FINAL--SKG1332.pdf

number, including vulnerable populations. As a result, families could be left with exorbitant out-of-pocket costs and unmet health care needs.

Furthermore, the guidance notes that the Secretaries will "consider favorably" section 1332 waivers that foster health coverage through private coverage, including Association Health Plans (AHP) and Short-Term Limited-Duration Insurance (STLDI) plans, over public programs. As we noted in our prior comment letters opposing the expansion of AHPs[2] and STLDI plans,[3] families who purchase these plans could be subject to pre-existing condition exclusions, annual or lifetime limits, limited benefits with no guaranteed coverage of essential health benefits (EHBs) such as prescription drug coverage and pediatric and maternity benefits, rating restrictions based on health status, and no guaranteed renewability without medical underwriting. Consequently, children may not have access to a full range of in-network pediatric providers to ensure they receive all necessary pediatric care, given the lack of network adequacy requirements for these plans. Many women may also enroll in these plans without expecting to need maternity care during the plan year and would then be left without coverage for that care if they became pregnant. Moreover, healthier individuals could be attracted to these less expensive plans and leave vulnerable populations, such as children and pregnant women, who require more comprehensive coverage, with even more expensive plans.

We are also concerned about the implications of the new federal approach to EHB benchmark selections and design for Section 1332 waivers. Specifically, the 2018 guidance reiterates that the changes made by the 2019 Notice of Benefit and Payment Parameters (NBPP), which allow states to weaken their EHB benchmarks by substituting benefits and/or using another state's less comprehensive benefit package as a benchmark, apply to Section 1332 waivers. As outlined in our comments on the changes to the 2019 NBPP,[4] without stronger parameters for states that design their own EHB package from scratch, or choose a full benchmark or parts of a benchmark from another state, it is very possible that a state could limit or drop certain benefits for children in the interest of lowering premiums. Revisions to the EHB benchmark process could also leave children, particularly those with serious, chronic or complex conditions, worse off and their families with higher out-of-pocket costs. Because of their continuous growth and development, gaps in benefits for children can result in life-long health consequences that generate extensive and yet avoidable costs.

Proposed "Waiver Concepts" Will Not Guarantee Access to Care

The Departments note that this RFI is intended to solicit public comment on waiver ideas for states to consider that will "strengthen their health insurance markets, expand choices of coverage, target public resources to those most in need, and meet the unique circumstances of each state." The RFI was released a few months after CMS issued a discussion paper entitled "Section 1332 State Relief and Empowerment Waiver Concepts," which illustrates policy changes states may consider to their individual marketplaces under the 2018 guidance.[5]

We are concerned that the promulgation of these waiver concepts, combined with the departments' decision to evaluate a Section 1332 waiver based only on *access to* affordable and comprehensive coverage, will have a spillover effect on a state's compliance with the coverage guardrail outlined in the statute.

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[2] https://downloads.aap.org/DOFA/SKGAHP.pdf
[3] https://downloads.aap.org/DOFA/SKGSTLDI.pdf
[4] https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/Jointcomments2019NBPP.pdf
[5] https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.PDF

As an example, and as envisioned in CMS' November 29 waiver concept fact sheet, a state could advance a proposal with a state-specific premium assistance program to direct families toward STLDI coverage.[6] As we note above, and in our comments on the STLDI proposed rule,[7] these alternative, non ACA-compliant plans may not provide access to pediatric specialists and subspecialists needed by children with special health care needs or medical complexity. We are equally concerned that STLDI coverage could also reduce access to the pre and post-natal care and services needed by women. While ACA-compliant plans might remain available in the state that offer access to needed care for these populations, the market segmentation caused by the state's proposal would likely cause compliant plans to become prohibitively expensive for both families whose children have special health care needs and expectant mothers who face serious medical challenges. They would ostensibly have *access to* such coverage with the benefits and services they need, but that coverage may simply be too unaffordable to obtain.

By changing the evaluation framework of the coverage guardrail to focus only on the aggregate effects of the waiver and to allow non-ACA compliant plans to be counted, vulnerable families are put at greater risk. Despite the creation of a waiver principle that claims the Departments will "support and empower those in need," the erosion of the 2015 evaluation framework that explicitly accounted for those with low incomes and serious health issues could lead to significant coverage losses and exorbitantly high out-of-pocket costs for those same vulnerable children and their families, including children with special health care needs.

Alignment with Section 1115 Waivers

The Departments are also soliciting public comments regarding how states might align Section 1332 waivers with 1115 Medicaid waivers. The 2015 guidance included safeguards to ensure that the Medicaid-eligible population would not be harmed in a coordinated Medicaid 1115 waiver and private insurance 1332 waiver. Specifically, it required states to consider whether there might be changes in Medicaid enrollment or in the number of low-income people enrolled in Medicaid and the Children's Health Insurance Program (CHIP) as a result of the waiver. The 2018 guidance does not provide the same unequivocal safeguards.

While a 1332 waiver cannot alter provisions of a state's Medicaid program, our organizations are concerned that allowing for the easier coordination of 1332 and 1115 waiver requests without strong coverage protections could put children and families at risk. We urge the Departments to continue to evaluate each waiver separately to ensure that it meets the criteria for its waiver program, and to ensure states' waiver requests result in no decrease in the number children, pregnant women, or families that have coverage for the full set of services covered under the state's Medicaid and/or CHIP programs.

In conclusion, our organizations appreciate this opportunity to submit comments on this RFI. We reiterate our call to the Departments to rescind the 2018 guidance and, instead, retain the 2015 guidance that aligns with federal law. It is imperative that the affordability and coverage protections envisioned by Congress when it enacted Section 1332 are implemented in ways consistent with statutory requirements. The guardrails should be maintained and strengthened, rather than eroded. We look forward to working with you to advance more appropriate delivery system reforms and health care quality improvement initiatives that will reduce consumer costs and improve care for children, pregnant women and their families. If you have any questions, please do not hesitate to contact Nick Wallace at the American Academy of Pediatrics, at 202-347-8600 or nwallace@aap.org.

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[6] https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Fact-Sheet.pdf

[7] https://downloads.aap.org/DOFA/SKGSTLDI.pdf

Sincerely,

American Academy of Pediatrics
Children's Defense Fund
Children's Dental Health Project
Children's Hospital Association
Family Voices
First Focus on Children
Georgetown Center for Children and Families
March of Dimes
National Association of Pediatric Nurse Practitioners