

ALSTON & BIRD

TO: Children's Hospital Association

FROM: Alston & Bird LLP

DATE: June 1, 2022

RE: ACE Kids Act Implementation Issues

Pursuant to your request, we address in this memorandum issues raised by the Centers for Medicare & Medicaid Services (CMS) concerning the implementation of the ACE Kids Act, as codified in section 1945A of the Social Security Act.¹ Specifically, we address questions that the agency raised concerning the definition of child with medically complex condition in section 1945A.

In section 1945A, one of the criteria for defining a “child with medically complex conditions” includes having at least “one or more chronic conditions that cumulatively affect three or more organ systems and severely reduces cognitive or physical functioning (such as the ability to eat, drink, or breathe independently) and that also requires the use of medication, durable medical equipment, therapy, surgery, or other treatments.”² The term, “chronic condition,” is defined as follows:

“(2) CHRONIC CONDITION.—The term “chronic condition” means a serious, long-term physical, mental, or developmental disability or disease, including the following:

- (A) Cerebral palsy.
- (B) Cystic fibrosis.
- (C) HIV/AIDS
- (D) Blood diseases, such as anemia or sickle cell disease.
- (E) Muscular dystrophy.
- (F) Spina bifida
- (G) Epilepsy
- (H) Severe autism spectrum disorder
- (I) Serious emotional disturbance or serious mental health illness.”³

¹ 42 U.S.C. 1396w-4a.

² 42 U.S.C. 1396w-4a(i)(1)(ii)(I).

³ 42 U.S.C. 1396w-4a(i)(2).

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During the agency's discussions with the Children's Hospital Association (CHA) concerning the implementation of the ACE Kids Act, the following issues have been raised:

1. Is the definition of "chronic condition" limited to the enumerated chronic conditions in paragraph 1945(i)(2)?
2. Is it the responsibility of the Secretary of Health and Human Services (HHS) to define child with medically complex conditions?
3. Should the definition of child with medically complex conditions be uniformly applied across all state Medicaid programs?

In this memorandum, we provide support for the positions that: (1) the definition of chronic condition is not limited to the enumerated chronic conditions in paragraph 1945(i)(2); (2) it is the responsibility of the HHS Secretary to define child with medically complex conditions; and (3) this definition must uniformly apply across all states.

The Definition of Chronic Condition Is Not Limited to the Medical Conditions Enumerated in Paragraph 1945A(i)(2)

It is our understanding that CMS asked whether the intent of the ACE Kids Act legislation was to limit the definition of chronic conditions to the medical conditions enumerated in paragraph 1945A(i)(2) and that CHA has responded that the list of medical conditions in paragraph 1945A(i)(2) refers back to the definition of a child with medically complex conditions and is not meant to serve as a comprehensive list of conditions that would be included in the definition. This interpretation is consistent with a plain reading of paragraph 1945A(i)(2).

First, in paragraph 1945(i)(2), the phrase, "including the following" precedes the enumerated medical conditions. The use of the term "includes" is not exclusive, and if the intent of the provision were to limit the definition of chronic condition to the enumerated medical conditions, then the term "means" would have been used instead. This interpretation of the use of "includes" versus "means" is consistent with congressional legislative drafting conventions. For example, according to guidance from the Office of the Legislative Counsel of the U.S. House of Representatives, "[t]he basic distinction between these two terms is that "means" is exclusive while "includes" is not."⁴

Second, the use of the phrase, "including the following" and not "includes, but is not limited to" does not result in an interpretation that the phrase is exclusive. According to the Office of the Legislative Counsel of the U.S. House of Representatives, "[i]f a definition says that "the term 'X' means A, B, and C", then X means *only* A, B, and C

⁴ Accessed at:

https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/intro_to_drafting.pdf.

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and cannot also mean D or E. If a definition says that “the term ‘X’ includes A, B, and C”, then X must include A, B, and C, but it may also include D or E, or both. Thus, the phrase “includes, but is not limited to” is redundant. In fact, using it in some places out of an abundance of caution could cause a limitation to be read into places where it is not used.”⁵

Finally, the enumerated medical conditions should be read in context with the rest of subsection 1945A(i). In subclause 1945A(i)(1)(A)(ii)(I), one of the requirements to meet the definition of child with medically complex conditions includes having “one or more chronic conditions that cumulatively affect three or more organ systems and severely reduces cognitive or physical functioning...”⁶ which is much broader than and encompasses conditions well beyond the enumerated medical conditions in paragraph 1945A(i)(2). Instead, when defining chronic condition, the focus should be on the definition of chronic condition in paragraph 1945A(i)(2), which means a “serious, long-term physical, mental, or development disability or disease...”⁷ Therefore, as discussed above, when defining chronic condition, the enumerated medical conditions are required to be included, but the ultimate definition is not to be limited to them.

It should be noted that while this definition is not exhaustive, it is not unlimited because merely having a chronic condition is not sufficient to qualify as a child with medically complex conditions. Instead, one or more of these chronic conditions must “cumulatively affect three or more organ systems and severely reduces cognitive or physical functioning (such as the ability to eat, drink, or breathe independently) and that also requires the use of medication, durable medical equipment, therapy, surgery, or other treatments.”⁸

The HHS Secretary Is Responsible for Defining Child with Medically Complex Conditions Under Paragraph 1945A(i)(2)

During the legislative process, consideration initially was given to allowing each state to craft its own definition; however, the law’s drafters concluded that the HHS Secretary should have this responsibility in order to ensure consistent implementation of the program across all state. While the statute is not explicit on whether the HHS Secretary or the state is responsible for defining child with medically complex conditions, it is at least implied that this responsibility should be with the HHS Secretary. In section 1945A, both the HHS Secretary and states are subject to different and distinct requirements. For example, the HHS Secretary is required to create health home

⁵ *Id.*

⁶ 42 U.S.C. 1396w-4a(i)(1)(A)(ii)(I).

⁷ 42 U.S.C. 1396w-4a(i)(2).

⁸ *Id.*

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qualification standards⁹, award planning grants¹⁰ and provide guidance on coordinating care from out-of-state providers.¹¹ These requirements, especially the creation of health home qualification standards, would require defining what constitutes a child with medically complex conditions so it is reasonable to conclude that the Secretary is responsible for carrying out this requirement.

Moreover, subparagraph 1945A(i)(1)(B) includes a rule of construction that “[n]othing in this paragraph shall prevent the Secretary from establishing higher levels as to the number or severity of chronic, life threatening illnesses, disabilities, rare diseases or mental health conditions for purposes of determining eligibility for receipt of health home services under this section.”¹² This rule of construction applies to the HHS Secretary instead of the states and therefore provides support to the position that the Secretary is responsible for defining child with medically complex conditions.

The Definition of Child with Medically Complex Conditions Should be Uniformly Applied Across All States

Uniformly applying the definition of child with medical complex conditions would promote consistent implementation of this health home approach across all states and ensure accountability so that the federal enhanced Medicaid matching funds are targeted appropriately to the children intended to benefit from the approach. A plain reading of paragraph 1945A(i)(1) supports that this definition should be uniformly applied across states because there is a lack of any language that allows for different definitions to be applied.¹³ Instead, the provision calls for one definition of child with medically complex conditions.

⁹ 42 U.S.C. 1396w-4a(b).

¹⁰ 42 U.S.C. 1396w-4a(c)(3).

¹¹ 42 U.S.C. 1396w-4a(e).

¹² 42 U.S.C. 1396w-4a(i)(1)(B) (emphasis added).

¹³ 42 U.S.C. 1396w-4a(i)(1).