

August 3, 2010

Amy Turner
Beth Baum
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Room N-5653
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Interim Final Regulations for Dependent Coverage of Children to Age 26
[RIN 1210-AB41]

Dear Ms. Turner and Ms. Baum:

As leading youth, public health, grassroots, patient, and consumer rights advocates, we appreciate the opportunity to comment on the interim final regulations for the extension of dependent coverage included in health care reform. Overall, we are very supportive of the Departments' application of the law. Young adults are the least likely to be insured of any age group and therefore stand to benefit substantially from the ability to join their parents' insurance. The regulations make that a real possibility for over a million young Americans.

The broad definition of dependent will allow young adults to join their parents' plan¹ without regard to residency, financial dependence, or student status. This definition furthers the clear intention of the Affordable Care Act (ACA) to dramatically increase coverage by ensuring that a large number of previously uninsured young adults will obtain insurance. Moreover, the prohibition on varying dependents' premiums will guarantee that families pay a fair rate for every child and will help keep premiums for adult dependents affordable. Finally, the requirement that insurers issue notice to enrollees will help to ensure that families do not miss out on this important benefit.

Even with these strong points, there are a few areas in which the dependent coverage regulations can be both strengthened and clarified to provide young adults with the maximum benefit from this provision. We have identified three main ways to improve these regulations:

1. Include stepchildren and adopted children in the definition of child;
2. Clarify the situations where grandfathered plans can remove young adults who are eligible for employer-sponsored insurance; and
3. Strengthen the notice requirement.

The following sections explain our recommendations in greater detail.

¹ The interim final regulations use the word "plans" to identify group health plans, and the word "policies" to identify individual health plans. For our purposes, "plan" or "policy" refers to a health insurance plan in either the individual or group market unless otherwise noted.

1. Include Stepchildren and Adopted Children in the Definition of Child

The regulations provide plans significant leeway to define dependent, and do not specifically require coverage for stepchildren or adopted children. Instead, the Departments opt for the following guidance: “With respect to a child who has not attained age 26, a plan or issuer may not define dependent for the purposes of eligibility for dependent coverage other than in terms of a relationship between a child and the participant.”² In its discussion of regulatory alternatives, the Departments explain that they “carefully considered limiting the flexibility of plans to define who is a child. However, [they] concluded, as they have in other regulatory contexts, that plan sponsors and issuers should be free to determine whether to cover children or which children should be covered. . . .”³

Such expansive flexibility is at odds with the basic purpose of the dependent coverage expansion: to cover as many children as possible up to age 26. By allowing plans to have sole control over defining who is a child, the Departments have left open the very real possibility that plans could deny coverage to large numbers of individuals commonly thought of as dependent children, such as adopted children and stepchildren. In 2004, an estimated 5.5 million children lived with a stepparent, and 1.5 million children lived with an adoptive parent.⁴ Giving plans the option of denying coverage to these children would undermine the purpose of this provision in a fundamental way.

Further, expressly covering adopted children and stepchildren is consistent with federal policy. Section 152 of the Tax Code defines “child” to include both stepchildren and adopted children, giving them identical tax benefits as biological children regarding medical expenses.⁵ The ACA incorporated this definition of child when extending favorable tax treatment for medical care reimbursement to adult dependents.⁶ The Employee Retirement Income Security Act (ERISA) also prohibits discrimination against dependent coverage for adopted children for all group plans under its jurisdiction.⁷ The regulations should extend the logic of these rules so that stepchildren and adopted children (regardless of whether their legal parent has an ERISA regulated plan) can benefit from the dependent coverage extension.

We strongly urge the Departments to reconsider granting such expansive flexibility to plans and, instead, issue revised guidance that establishes a basic definition for dependent children that would clearly include stepchildren and adopted children. This is consistent

² Interim Final Rule for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care, 75 Fed. Reg. 27121, 27138 (May 13, 2010) (to be codified at 29 C.F.R. pt. 2590).

³ *Id.* at 27131.

⁴ UNITED STATES DEPARTMENT OF COMMERCE, US CENSUS BUREAU. LIVING ARRANGEMENTS OF CHILDREN: 2004 (2008). Retrieved from: <http://www.census.gov/prod/2008pubs/p70-114.pdf>. Numbers based on children under the age of 18.

⁵ 26 U.S.C. § 152(f)(1); 26 U.S.C. § 105(b).

⁶ INTERNAL REVENUE SERVICE, NOTICE 2010-38: TAX TREATMENT OF HEALTH CARE BENEFITS PROVIDED WITH RESPECT TO CHILDREN UNDER AGE 27 (2010).

⁷ Specifically, ERISA states that “in any case in which a group health plan provides coverage for dependent children of participants or beneficiaries, such plan shall provide benefits to dependent children placed with participants or beneficiaries for adoption under the same terms and conditions as apply in the case of dependent children who are natural children of participants or beneficiaries under the plan, irrespective of whether the adoption has become final.” 29 U.S.C. § 1169(C)(1).

with the intent of the ACA dependent coverage extension and ensures that children are not unjustly discriminated against and excluded from coverage solely on the basis of adoptive or stepchild status.

2. Clarify the Exemption for Young Adults with Employer-Sponsored Insurance Until 2014

The ACA permits one major exception to the mandate that dependent coverage be available to a wide range of young adults: until 2014, grandfathered plans may choose not to cover adult dependents who are “eligible to enroll” in their own employer sponsored insurance.⁸ After that date, employers must extend dependent coverage to every qualified dependent up to age 26.⁹ **We urge the Departments to clarify (1): which types of plans are considered employer-sponsored plans; (2) when a young adult would be considered eligible for such a plan; and (3) what can plans require young adults and their parents to do to prove that a dependent does not have such coverage.**

a) Clarify Which Types of Plans are Considered Employer-Sponsored Plans

The regulations do not state which types of coverage available to a dependent will allow a parent’s plan to refuse coverage for that dependent. ACA Section 5000A(f)(2) defines an eligible employer-sponsored plan as “a group health plan or group health insurance coverage offered by an employer to the employee which is ... a governmental plan ... [or any] other plan or coverage offered in the small or large group market within a State... .”¹⁰

We are concerned that young people offered employer-sponsored coverage that is insurance in name only (e.g. an accident-only or “mini-med” plan) will not be able to remain on a parent’s plan. Congress intended for young adults - who have an uninsurance rate that is nearly twice that of non-elderly adults ages 27-64 - to have access to affordable and adequate health coverage by allowing them to stay on a parent’s policy until they reach age 26. Therefore, to the extent permitted under the law, we encourage the Departments to allow young people offered inadequate employer-sponsored plans the option of remaining on a parent’s policy until age 26.

Specifically, the regulations should make clear that, for the purposes of the dependent coverage extension, the exempted benefit plans described in section 5000A(f)(3) are not considered eligible employer-sponsored insurance. Those exempted benefits include plans that only provide coverage for specific illnesses or for injuries from automobile accidents, among others.¹¹ While the definition in 5000A(f)(2) generally incorporates the exclusions from 5000A(f)(3), the regulations should ensure that those exclusions also apply to the dependent coverage provision.

Further, the Patient Bill of Rights regulations allow the Secretary to waive annual cap restrictions for certain plans, including mini-med plans, if doing so is required to avoid a major reduction in benefits or increase in premiums.¹² The dependent coverage regulations should clarify that a

⁸ Health Care and Education Affordability Reconciliation Act of 2010 § 2301(a)(4)(B)(ii).

⁹ *Id.*

¹⁰ ACA § 1501(b) (inserting § 5000A into the Internal Revenue Code of 1986).

¹¹ *See also* 45 C.F.R. § 148.220 (expressly clarifying that similar exclusions apply to the definition of a group health plan).

¹² 26 C.F.R. § 54.9815-2711T(d)(3).

health plan receiving such a waiver is not eligible employer sponsored insurance. A young adult with such a plan should still be allowed to join a parent's grandfathered plan.

Finally, the Departments have yet to decide how to regulate college-sponsored student health plans under the ACA. Some have speculated that the rules governing group health plans will apply to student health plans. However, that scenario would not automatically qualify student plans as employer sponsored insurance – nor should it. Typically, student plans offer less generous benefits and lower annual and lifetime caps compared to a parent's plan. Accordingly, the regulations should clarify that a young adult may join a parent's grandfathered plan as a dependent regardless of whether that young adult has access to a student health plan through a college or university.¹³

b) Ensure That Young Adults Can Stay on Their Parents Plan Until They Receive Full Coverage From an Employer

Even after a young adult has a qualifying offer of employer-sponsored insurance, the dependent may not have access to care immediately. Regulations should make clear that young adults may stay on their parents' grandfathered plan until fully covered by their own employer plan.

i. *Young Adults Facing an Employer Waiting Period Should be able to Remain on Their Parents' Plan*

Employers sometimes require new employees to wait a specified number of weeks or months before they can join the company's insurance. Although the ACA limits these waiting periods to a maximum of 90 days,¹⁴ many young adults beginning jobs will not receive health benefits immediately. The relevant statutory and regulatory text appears to permit an adult child to stay on his or her parent's insurance until the first day of coverage, stating that a grandfathered plan may only exclude adult dependents who are "eligible to enroll" in an employer-sponsored plan.¹⁵ In the context of HIPAA rules governing pre-existing condition exclusions, an employer waiting period means the time that "must pass before coverage for an employee or dependent who is otherwise eligible to enroll under the terms of a group health plan can become effective."¹⁶ The definition suggests that a person waiting for insurance is not fully "eligible" for coverage. Thus, a young adult could remain on her parent's insurance while waiting to join her employer's plan.

However, some insurers may attempt to consider a young adult eligible from the day he or she applies for insurance. This would result in a premature loss of coverage. HIPAA regulations may also provide guidance here by defining an enrollment date as "the first day of coverage ... or, if there is a waiting period, the first day of the waiting period."¹⁷ Consequently, some grandfathered insurers may consider young adults "eligible to enroll" on their employers' plan at

¹³ Though some students work for their universities (e.g. as teacher's assistant), and have the option to join the school's student plan, they should be able to remain on their parents' coverage. Working students have access to student plans in their capacity of students - not as employees. To avoid confusion, the regulations should state that grandfathered plans cannot count student plans as employer sponsored insurance event though a student may work for a college or university.

¹⁴ ACA § 2708.

¹⁵ *Id.* See also See 45 C.F.R. § 147.120.

¹⁶ 29 C.F.R. § 2590.701-3(a)(3)(iii).

¹⁷ *Id.* at (a)(3).

the beginning of the waiting period rather than on the first day of coverage. Insurers could then drop adult dependents or refuse to cover claims before the young adults actually join an employer's plan. The situation would result in needless gaps in coverage for young people, in conflict with the clear intent of Congress to increase insured rates among young Americans.

Finally, simple confusion over the rule could prevent a dependent from maintaining coverage. For example, an insurer could ask a plan holder whether her dependent works for a company that provides health insurance to employees. A "yes" answer from the beneficiary would end coverage for her dependent, even if the child had to wait before joining an employer's plan.

To avoid the problems surrounding waiting periods the regulations should state clearly that grandfathered plans can exclude adult dependents only when the dependent can receive full coverage under an employer-sponsored plan. The text should include an example where an adult dependent covered by a grandfathered plan finds a job but must wait to obtain employer-sponsored insurance. The conclusion should affirm that grandfathered plans can not drop dependents while they wait for coverage from an employer.

ii. Pre-existing Condition Exclusions

A corollary to the waiting period issue is the need to address exclusionary periods for pre-existing conditions under HIPAA. Until 2014, group plans may continue to exclude coverage of preexisting conditions for up to a year after an individual enrolls.¹⁸ If an adult dependent begins working for an employer and the child has not earned sufficient creditable coverage, the child could face an exclusionary period for certain benefits under the employer plan. Unlike a blanket waiting period, the child would be excluded from coverage directly related to the medical care serving the specific condition. A young adult facing a pre-existing condition exclusion would have employer-sponsored insurance, but would lack the benefits he or she needs.

This problem would arise for a small but vulnerable population. Young adults with health issues who have the option of joining their parents' insurance will likely do so. The time spent on a parent's plan will accrue days of creditable coverage prior to joining an employer's policy. Under HIPAA, every day a person spends on a qualifying health plan before joining a different plan reduces the amount of time an insurer can exclude for a pre-existing condition by an equal amount of days. Thus, young adults already on their parents insurance are unlikely to face a pre-existing exclusion from a new employer. On the other hand, adult dependents without creditable coverage will likely face an exclusionary period before joining both their parents' plan or a new employer. The upshot is that few young adults will lose their parents insurance by gaining an offer of ESI with a pre-existing condition exclusion.

Nevertheless, some adult dependents with pre-existing conditions would be dropped from their parents' plan and forced to join a plan that fails to pay for vital care. For example, dependents on their parents' policy who have not had full coverage for at least a year, and receive an offer of insurance from an employer, could face a pre-existing condition exclusion. The result runs contrary to the intent of the law. The fact that grandfathered plans can only exclude adult dependents with their own offer of insurance demonstrates a clear will to ensure young

¹⁸ See 29 U.S.C. § 1181; see also ACA § 2704.

Americans have access to continuous coverage. Congress surely did not intend young adults with pre-existing conditions to lose their parents' insurance in favor of an employer plan that does not pay for the medical care a young person needs most. The regulations should make clear that a grandfathered plan may only remove a child with employer-sponsored insurance when the employer's plan provides full coverage. Already, many young adults will have to wait until 2014 before they can stop worrying about obtaining coverage for pre-existing conditions. The Departments should do their best to minimize the harm caused by exclusionary periods until then.

c) Provide Fair Guidelines for Employers to Ascertain Whether a Dependent has Access to Employer-Sponsored Insurance

In recent years, employers have become increasingly aggressive in ensuring that dependents enrolled in their health plans are eligible for coverage, often requiring onerous documentation.¹⁹ The new regulations will reverse this trend as they prohibit common eligibility restrictions on dependent coverage such as residency and financial dependency. In fact, the only major limitation available to employers between September 23, 2010 and January 1, 2014, is the ability to refuse coverage to dependents with their own employer-sponsored insurance offers. Employers will have a strong incentive to require dependents who work either full or part-time to prove that they do not have access to coverage.²⁰

Ensuring that employees are not fraudulently enrolling non-eligible dependents is a valid goal. However, we are concerned that the means created to “prove a negative” – that these dependents do *not* have access to their own employer-sponsored plan – may in practice be both overly intrusive and overbroad, resulting in the removal of legally eligible young adults. Therefore, we encourage the departments to issue guidelines for the documentation requirements used to prove that a young adult does not have an offer of employer-sponsored insurance.

3. Strengthen Notice Requirements

The Departments rightly mandated that beneficiaries receive “prominent notice” about the option to cover adult dependents. However, the regulations do not give specific enough guidance about what suffices for prominent notice, and would benefit from stronger requirements.

A key problem is the lack of a definition for “prominent.” Plan administrators can inform beneficiaries in a variety of ways under the new rules, and enrollees might miss a number of them in the yearly paperwork they receive about their health plans. **Prominent should mean a clear and conspicuous, stand-alone document highlighting the availability of the new coverage option and how to enroll.** The notice may also be included in the summary plan document.

¹⁹ See Lesley Alderman, *Companies Crack Down on Defining Dependents in Benefit Plans*, THE NEW YORK TIMES, June 5, 2010, at A5, available at <http://www.nytimes.com/2010/06/05/health/05patient.html>; see also Keith Epstein & Jena McGregor, *You've Got Dependents? Prove It*, BUSINESS WEEK, Nov. 26, 2007, available at http://www.businessweek.com/magazine/content/07_48/b4060082.htm.

²⁰ See e.g. MICHAEL G. BROWNING, CHAPMAN KELLY INC., DEPENDENT ELIGIBILITY UNDER HEALTH CARE REFORM: COST-CONTAINMENT STRATEGIES EMPLOYERS SHOULD TAKE FROM THE SIGNING OF THE BILL TO BEYOND 2014 (2010).

The regulations should further mandate that notice of extended dependent coverage include basic information and responsibilities of qualified beneficiaries that all enrollees and their adult dependents should know prior to the enrollment period. This would ensure that families receive the information they need and companies have a clear standard to meet when informing enrollees about the dependent coverage extension.

Apart from strengthening the notice's content, the Departments should also require that plan administrators inform enrolled adult dependents that they may stay on their parent's plan. Currently, notice need only go to the plan-holder. Under this scheme, young adults will not know their full range of health coverage options and may miss out on the opportunity to obtain insurance. COBRA offers a better model where all qualified beneficiaries, including spouses and children of the employee, must be notified of their eligibility to enroll.²¹ The task is easier under COBRA where insurers naturally have information about all eligible dependents through their participation in the plan. In the context of dependent coverage, insurers will often not know whether plan holders have eligible dependents.

Nevertheless, plan administrators should be required to notify dependents who are already enrolled. Plan administrators will have contact information for these young adults and ought to inform them that they can remain on their parent's insurance. Providing information to as many eligible participants as feasible will help to ensure that families can make fully informed decisions about their health coverage.

Finally, the regulations should also provide specific requirements governing the delivery of notice. In-hand furnishing of the notice to an employee at work is sufficient; however, it should not constitute delivery to the enrolled child. Adult dependents should receive notice by mail. The regulations should also consider a notice "furnished" by a plan administrator on the date of mailing, if mailed by first class mail, certified mail, or express mail; or on the date of electronic transmission, if transmitted electronically. Hand delivered notice should naturally count as "furnished" when the individual receives the notice in person.

Although the use of a generic notice is cost-effective for plan administrators, all current enrollees and their adult dependents should receive customized notices. Because beneficiaries may have questions about their eligibility and rights under their plan, the notice they receive should highlight how to find such information by listing relevant names, phone numbers, addresses, or websites. Delivering clear information about the dependent coverage extension is vital to its successful implementation. The Departments can ensure that young adults receive the benefits of the reform by modeling notice requirements on COBRA regulations. We have attached an example as an appendix to this letter as a suggested model that could be included in the regulations.

4. Conclusion

Although the interim final regulations for the dependent coverage extension will do a lot to expand coverage for young adults, there remains room for improvement. A specific definition of dependent including adopted children and stepchildren would ensure that deserving young

²¹ See 29 C.F.R. § 2590.606-1.

people do not go uninsured. For similar reasons, the Departments should clarify the exemption allowing grandfathered plans to drop adult dependents with an offer of employer-sponsored coverage. Lastly, stronger notice requirements would help families make health insurance decisions with full information. We ask the Departments to seriously consider incorporating these suggestions.

On a final note, we urge HHS to look closely at ways to ensure successful enforcement of the dependent coverage extension. Young adults planning to join their parents' insurance will rely on adequate implementation of these regulations by private insurers. The ACA uses the Public Health Service Act's current enforcement structure for many of the major reforms. That leaves implementation largely in the hands of states, though HHS may step in if a state substantially fails to enforce a provision.²² We hope that states will take the lead on dependent coverage and other areas of new laws and regulations, obviating the need for federal oversight. Nevertheless, HHS should closely monitor enforcement to ensure that young Americans and all Americans benefit from health reform.

Thank you for your attention to these important concerns. If you have any questions, please contact Jen Mishory, Deputy Director at Young Invincibles, at jen.mishory@younginvincibles.org or 202.339.9338.

Sincerely,

American Diabetes Association

National Multiple Sclerosis Society

American Heart Association

National Partnership for Women & Families

Community Catalyst

National Women's Law Center

Consumers Union

Pediatric Stroke Network, Inc.

Families USA

The National Alliance to Advance Adolescent Health

Health Care for America Now

U.S. PIRG

March of Dimes

Young Invincibles

Maryland Citizens' Health Initiative Education Fund, Inc.

²² 42 U.S.C. § 300gg-22(a).

Model Dependent Coverage Election Notice

[*Date of notice*]

Dear: [*Identify the qualified beneficiary(ies), by name or status*]

This notice contains important information about your right to:

- **Continue health care coverage of an adult child on the [*enter name of group health plan*] (the Plan);**
- **enroll in a plan with your newly eligible adult child; or**
- **change your plan selection.**

Please read this letter very carefully.

Under the Affordable Care Act (ACA), adult children can stay on their parents' health plan up to age 26. The requirement applies to all employers and insurers offering family coverage. By law, this eligibility for coverage of adult dependents starts on [*enter date*].

Effective [*enter date*], the Plan will allow you to enroll adult dependents until age 26, regardless of student status, residency, or financial dependency. Dependents who terminated coverage prior to [*enter date*] will be able to re-enroll, along with dependents already covered by the Plan. Dependents who were too old to qualify for coverage, prior to the change in the law, may also enroll in the Plan.

The Plan will provide a 30-day special enrollment opportunity for adult dependents beginning on [*enter date*]. To add an adult dependent to the Plan, follow the instructions on the next page to complete the enclosed Election Form and submit it to us. If elected, dependent coverage will begin on [*enter date*] and can last until [*enter date*].

Covering your adult dependent will cost: [*amount each qualified beneficiary will be required to pay for each option per month of coverage and any other permitted coverage periods.*]

This notice does not fully describe your right to cover an adult dependent under the Plan. More information about adult dependent coverage is available in your summary plan description or from the Plan Administrator.

If you have any questions concerning this notice, your rights to coverage, or if you want a copy of your summary plan description, you should contact [*enter name of party responsible for extension of dependent coverage for the Plan, with telephone number, address, and website if applicable*].

For more information about your rights under the ACA and other federal laws affecting group health plans, please go to www.healthcare.gov.