

January 14, 2022

VIA E-MAIL (medicaidrulescomments@dhhs.nc.gov)

Ms. Shazia Keller
Rulemaking Coordinator
NCDHHS Division of Health Benefits
2501 Mail Service Center
Raleigh, N.C. 27699

RE: Comments to Proposed Repeal of “Caretaker Relative” Definition

Dear Ms. Keller:

Our firm assists in connection with the pursuit of Medicaid benefits by many thousands of individuals annually. We write to offer comment in opposition to deletion of the caretaker relative definition from the Administrative Code as proposed in the notification memorandum issued by the Division of Health Benefits (“DHB”) on November 15, 2021.

The concern is twofold. First, the proposed deletion will violate state and federal law and potentially cost the state of North Carolina hundreds of millions of dollars. Second, the proposed deletion will lead to ambiguity concerning who falls under the definition. We address each of these concerns in turn below.

I. THE FEDERAL REGULATION AND NORTH CAROLINA’S ADOPTION OF A MORE INCLUSIVE DEFINITION

Federal regulations promulgated by the Centers for Medicare and Medicaid Services define the term “caretaker relative” as

a relative of a dependent child by blood, adoption, or marriage with whom the child is living, who assumes primary responsibility for the child’s care (as may, but is not required to, be indicated by claiming the child as a tax dependent for Federal income tax purposes), and who is one of the following—

- (1) The child’s father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece.
- (2) The spouse of such parent or relative, even after the marriage is terminated by death or divorce.
- (3) At State option, another relative of the child based on blood (including those of half-blood), adoption, or marriage; the domestic partner of the parent or other caretaker relative; or an adult with whom the child is living and who assumes primary responsibility for the dependent child’s care.

42 C.F.R. § 435.4 (the “**Federal Definition**”). This regulation allows states to choose whether to offer Medicaid coverage to caretaker relatives whose blood relationship to the minor child is more distant than those specified in paragraphs (1) and (2).

North Carolina has exercised the option described in paragraph (3) of the Federal Definition such that the Administrative Code currently defines caretaker relative as follows:

- (a) any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;
- (b) stepfather, stepmother, stepbrother, and stepsister;
- (c) persons who legally adopt a child, their parents as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;
- (d) spouses of any persons named in the groups in Subitem (19)(a)–(c) of this Rule even after the marriage is terminated by death or divorce.

10A N.C.A.C. 23A.0102(19) (the “**State Definition**”). If the State Definition were to be repealed, paragraphs (1) and (2) of the Federal Definition would define caretaker relatives for the purpose of Medicaid administration in North Carolina. Moving forward with such a change would violate requirements imposed by federal and state law and would produce ambiguous standards for the administration of North Carolina’s Medicaid program.

II. REPEALING THE DEFINITION WOULD VIOLATE CONDITIONS FOR FEDERAL FUNDING AND VIOLATE STATE LAW

The proposed change would violate federal law by creating more restrictive eligibility standards. Section 6008 of the Families First Coronavirus Relief Act (the “**FFCRA**”) provides extra federal funds to states for their Medicaid programs for the duration of the COVID-19 Public Health Emergency. However, to receive these funds, a recipient state must meet certain requirements. In particular, states must ensure that their Medicaid program “eligibility standards, methodologies, or procedures” are no more restrictive than they were on January 1, 2020. As of December 31, 2020, North Carolina had accepted over 195 million dollars in federal funds pursuant to this section.¹ As of the date of this letter, the Public Health Emergency is still in effect. Therefore, as long as North Carolina continues to accept these federal funds, it cannot enact more restrictive eligibility standards than what were in effect on January 1, 2020.

The State Definition was in effect on January 1, 2020. This definition is more expansive than the Federal Definition because it specifically includes “any blood relative, including those of half-blood, and including . . . nephews, or nieces” and spouses of other enumerated caretaker relatives. 10A N.C.A.C. 23A.0102(19). Here is a simple example: a step-niece or nephew is currently considered a caretaker relative under the State Definition. The Federal Definition does not include these relatives; therefore, repealing the State Definition and leaving only the Federal Definition would cause fewer classes of North Carolinians to be eligible for Medicaid as caretaker relatives. DHB’s proposed change would thus result in more restrictive “eligibility standards, methodologies, or procedures,” which violates the conditions under which North Carolina receives additional federal funds pursuant to FFCRA.

¹ CSV Medicaid CMS-64 FFCRA Increased FMAP Expenditure, <https://tinyurl.com/y5qvlm6> Error! Hyperlink reference not valid.(last visited Jan. 12, 2022).

Even if one were to assume that the proposed change would not require forfeiture of federal dollars, the change is nevertheless outside of DHB's rulemaking domain. The General Assembly has expressly prohibited DHB from adjusting Medicaid eligibility categories. See N.C.G.S. § 108A-54(e)(4) (withholding the authority to adjust "eligibility categories, resource limits, and income thresholds"). Despite DHB's intentions, repealing the state's caretaker-relative definition would change eligibility categories by—as explained above—changing the categories of individuals who are considered caretaker relatives.

III. AMBIGUITY

In addition to restricting Medicaid eligibility, this proposed change will create ambiguity and confusion. DHB has said that current state definition is no longer necessary because (1) "[t]he term is no longer used in any other rule," and (2) the definition "conflicts with the definition in the North Carolina State Plan." We believe both of those assertions are incorrect.

First, while it may be true that the State Definition does not appear elsewhere in the Administrative Code, a similar definition is found among the guidance published in NCDHHS's Family and Children's Medicaid Manual (the "**Manual**"). The Manual says that

Parents/Caretaker Relatives, and the spouse of such parent or caretaker relative (even after marriage is terminated by death or divorce) may be eligible to receive Medicaid when:

- A. A child is under age 18, and
- B. Is related by blood, adoption, or marriage to the parent/caretaker; father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, and
- C. Living with the parent/caretaker relative

Manual § MA-3235.I. While this definition is similar, it is not the same as the State Definition. However, the Manual similarly includes some relatives that fall under the State Definition—and who do not fall under the Federal Definition—to be caretaker relatives: step-nieces and nephews, for example. Therefore, if the State Definition were repealed, there would be no regulatory support for the Manual's definition, resulting in ambiguity as to whether the Manual should be followed by local departments of social services interacting with Medicaid applicants and recipients. Accordingly, the State Definition should remain in place, as it offers clarity as to how to interpret and enforce the Manual provision on caretaker relatives.

DHB also claims that the State Definition conflicts the North Carolina State Plan. This is simply not true, as the State Plan does not contain a definition of caretaker relative at all. Instead, it merely states that the state has elected to offer coverage to caretaker relatives, as allowed under federal law. State Plan, Attach. 2.2-A at 14–14a, 26; *id.* Attach. 2.6-A at 1a. Federal law (including 42 C.F.R. § 435.110) allows optional Medicaid coverage for caretaker relatives as defined in 42 C.F.R. § 435.4. As explained above, this definition allows the states to adopt their own, more permissive, definitions. North Carolina has done this with the State Definition, choosing to define the term via state rules rather than in the State Plan. The State Plan only references the federal regulation—which expressly allows the state to include additional relatives as DHB has opted to do—and does not actually contain its own definition. As a result, there is no conflict between the State Plan and the State Definition.

Therefore, because the current State Definition is more permissive and provides clarity on the implementation of Medicaid coverage for caretaker relatives, we would ask that the State Definition remain undisturbed.

We appreciate your careful attention to these comments and look forward to discussing these concerns with you if you have questions or other insights. Thank you.

Sincerely,

OTT CONE & REDPATH, P.A.



Matthew B. Hoyt



Matthew Jordan Cochran