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Jeanne Klinefelter Wilson  
Deputy Assistant Secretary  
Employee Benefits Security Administration  
Office of Regulation and Interpretations, Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: RIN 1210-AB85 – Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans**

*(Submitted electronically via www.regulations.gov)*

Dear Deputy Assistant Secretary Wilson:

On behalf of more than 8,800 pediatric nurse practitioners (PNPs) and fellow pediatric-focused advanced practice registered nurses (APRNs) committed to providing optimal health care to children, the National Association of Pediatric Nurse Practitioners (NAPNAP) appreciates the opportunity to provide its comments on the Employee Benefits Security Administration’s January 5, 2018, propose rule, *Definition of “Employer” Under Section 3(5) of ERISA – Association Health Plans* (RIN 1210–AB85). While we applaud the Administration’s goal of increasing access to affordable health care coverage in the commercial market through Association Health Plans (AHPs) under the Employee Retirement Income Security Act (ERISA) of 1974, we are deeply concerned that the proposed rule could leave children, particularly those with serious, chronic, or complex medical needs, with less comprehensive coverage, higher out-of-pocket costs, the possibility of unpaid health care bills, and limited access to appropriate providers. We respectfully urge the Administration to consider the implications of the rule for the health of our nation’s children before proceeding with its proposed policies.

As you may know, APRNs who concentrate on children’s care, including PNPs, have attained enhanced education in pediatric nursing and health care using evidence based practice guidelines. Committed to improving children's health, they practice in primary care, specialty, and acute care. Pediatric-focused APRNs have provided high quality health care to children and families for more than 40 years in an extensive range of practice settings such as pediatric offices, clinics, schools, and hospitals – reaching millions of patients across the country each year. Many of them are primary care providers for the more than 50 percent of all children covered through commercial health plans.

NAPNAP members understand how important it is for commercial coverage for children to provide a range of age-appropriate primary, acute and specialized care that meets their developmental needs. We are eager to work with you to implement policies that strike a balance between affordability and comprehensiveness of coverage for infants and children and pregnant women, and we offer the following specific comments on provisions of the proposed rule.

**Definition of Employer (§2510.3-5)**

NAPNAP believes that a basic framework of consumer protections for children, pregnant women, and families must be part of any expansion of ERISA to increase the availability of AHPs. However, we are concerned that the proposed change in the definition of “employer” under ERISA will weaken the safeguards that have been provided in previous Department of Labor guidance and create an unclear role for state regulators in overseeing AHPs.

There are inherent financial incentives for plans to not cover seriously ill infants and children and other vulnerable populations or to limit that coverage by restricting benefit packages or provider networks. A clear framework for benefit design, cost sharing, consumer protections and provider network standards can provide financial protection for plans as well as families, and help infants and children with special health care needs or serious or chronic conditions get the care they need. The Labor Department's current guidance provides such a framework for most types of AHPs and defines the role of states in overseeing plan compliance with requirements such as essential health benefits (EHBs), caps on out-of-pocket expenses, actuarial value (AV) requirements, prohibition of annual and lifetime limits, and basic network adequacy requirements. This guidance assures families that they and their children have access to needed providers and to regular preventive and primary care for healthy children, and will be protected from financially devastating cost-sharing if a child experiences a serious illness.

NAPNAP urges you to consider the following proposals to help ensure that children and families enrolled in AHPs will have basic protections regarding plan benefits, out-of-pocket expenses, and provider networks:

**Benefits:** The Department of Labor must collaborate with state regulators to conduct strong oversight of AHP benefit packages, given the potential weakening of health benefit design standards if the proposed ERISA expansion is adopted. As NAPNAP and other pediatric providers has often said, children are not "little adults" – the care and services they require are specific to their distinct developmental and medical needs. Under the proposed rule, however, children enrolled in an AHP may have no assurance that important benefits such as vaccines, prescription drugs, mental health services, dental or vision services, or habilitative services would be adequately covered. Gaps in these core benefits can result in life-long health consequences that are costly – and avoidable – for both families and society.

**Cost-sharing protections:** Affordable coverage must include protecting families from bankrupting out-of-pocket costs, yet the proposal would allow AHPs to offer coverage not subject to cost sharing limits, specific actuarial value standards, or prohibiting annual and lifetime limits on the cost of benefits. Without those protections, a family with a child who requires extensive health care services or medications could be financially overwhelmed. Families confronted with additional financial burdens may delay needed care, which can increase inappropriate utilization of emergency rooms and affect a child's long-term health outcomes and future productivity.

**Adequate provider networks:** We believe the Labor Department must work with state regulators to ensure that states have both the capability and the authority to conduct stringent oversight of AHP provider network design. The composition and oversight of these networks is critically important for children who need pediatric specialty and subspecialty services – adult providers are simply not equipped to care for these children's distinct health and development needs. Restricted, inadequate provider networks that fail to include a range of appropriately trained pediatric primary care providers, specialists and subspecialists, and pediatric APRNs can result in unnecessary delays in needed care, leading to poor medical outcomes that ultimately cost insurers and consumers more – and can severely harm children's long-term health.

We also continue to be concerned that 42 U.S.C. 300gg–5 has never been fully implemented. This statute prohibits plans from using practices that would restrict access to services and treatments by discriminating against any health care provider who is acting within the scope of their license. The statute reads:

“(a) PROVIDERS. – A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures.”

In keeping with the goal of improving access to high-quality care, establishing strong provider nondiscrimination protections in regulation and health plan provider agreements will help to ensure that participation in provider networks is appropriately based on the health care professional's ability to deliver quality care that improves health outcomes. This policy is consistent with the Institute of Medicine's 2010 report, *"The Future of Nursing: Leading Change, Advancing Health."* The report's first recommendation calls for registered nurses (RNs) and APRNs to practice to the fullest scope of their education and clinical preparation. NAPNAP believes that requiring and enforcing the elimination of these practice barriers is a crucial imperative in federal, state, and private sector health policy.

Unfortunately, this statutory requirement has never been fully implemented. The Departments of Labor, Health and Human Services, and Treasury continue to follow a policy under which they will take no action against health plans "as long as the plan or issues is using a good faith, reasonable interpretation of the statutory provision..." In spite of their advanced education and clinical preparation to provide care that meets the special needs of children, adolescents, and their families, PNPs often encounter barriers imposed by health plans that prevent them from practicing to the full extent of their education and training.

In addition, because of the regional nature of pediatric specialty care, children often travel across state lines to get needed care from a pediatric provider with the requisite training and expertise. However, the proposed rule would allow employers to form AHPs within a common city, county, or metropolitan area, which could result in provider networks with widely different geographic boundaries. Without clear, specific standards to ensure a full range of in-network pediatric providers, families may not have access to appropriately trained in-network providers because of those geographic limits.

These issues call for a provider network adequacy review and oversight framework that allows for at least the same level of scrutiny that states currently apply to the individual and small group markets. NAPNAP urges the Department of Labor to work with states to implement a set of minimum quantitative and other standards for AHP networks comparable to those articulated in the National Association of Insurance Commissioners (NAIC) Health Benefit Plan Network Access and Adequacy Model Act No. 74. The Model Act is designed to give states options that fit the needs of their particular state, with a minimum framework for a degree of quantitative network adequacy standards and reporting that addresses access to care for vulnerable children and adults.

### **Nondiscrimination (§ 2510.3-5(d))**

NAPNAP supports the Administration's attempt to prevent discrimination based on health status, but we encourage you to strengthen the nondiscrimination provisions in the rule to ensure that children, pregnant women, and their families are protected against adverse risk selection and "cherry-picking." Specifically, we believe it is necessary to prohibit AHPs from discrimination that can occur due to limited benefit designs, limited drug formularies, and narrow provider networks. We are concerned that the proposed rule may open the door to health plan designs that could intentionally discourage individuals with significant health conditions to enroll in them. For example, issuers could exclude some pediatric specialty providers from their networks to discourage parents of a child with special health care needs from signing up for their plan. This discriminatory strategy would allow the issuer to avoid risk and lower premium costs – but mean fewer choices for families that may be left with only high-cost options to meet their child's health care needs.

We also are troubled by the likely impact of AHPs with limited benefit packages and networks on children and families who seek coverage through health plans inside or outside of insurance marketplaces that comply with Affordable Care Act (ACA) requirements. As the proposed rule's regulatory impact analysis acknowledges, the expansion of lower-cost, less-comprehensive AHP coverage would be most attractive to healthier individuals, drawing them out of the traditional market. A segmented market means higher premiums for more comprehensive non-AHP, ACA-compliant plans that cover more of the services and include the providers that children and need. The nondiscrimination provisions of the proposed rule offer no protection from these discriminatory practices for children and families.

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## State and Federal Oversight of AHPs

If the Administration moves ahead with the proposed AHP expansion, NAPNAP believes it is crucial that you maintain states' regulatory authority over AHPs, and this authority must be clearly articulated in the final rule. Ambiguity regarding the roles of federal and state authorities governing AHPs has resulted in fraud and insolvency in the past, leaving children and their families with unpaid benefits and large financial obligations. We are very concerned that the proposed rule will result in a return to that confusing patchwork of state and federal AHP requirements and oversight responsibilities.

We believe the final rule must specifically affirm the state's role in regulating fully insured AHPs. For example, states should continue to be allowed to require AHPs to comply with state mandated benefits, network adequacy requirements, rate review standards, and other consumer protections. We support the continuation of state regulatory authority over the solvency of self-funded AHPs, as well as other state regulatory responsibilities to prevent inconsistencies between fully and self-insured plans regarding these important core protections. We also urge the Administration to work with states and the NAIC to collect the data that will enable regulators and stakeholders to assess whether and how children and families are being served by AHPs. The data transparency requirements under Section 2715A of the Affordable Care Act should serve as a model for data transparency requirements for AHPs.

In summary, while we share the Administration's to address the need for more affordable health care, NAPNAP is deeply concerned that the proposed expansion of AHPs without basic protections and strong oversight falls far short of achieving a reasonable balance between affordability and access to quality care, failing our children, infants and their families. We respectfully encourage you to work collaboratively with us to identify delivery system reforms and other quality improvement initiatives that will reduce health care costs, drive down premiums, and improve care. We are grateful for the opportunity to provide these comments and hope you will contact NAPNAP for assistance on any issues or policies related to children's health and nutrition. We have a wide range of experts eager to assist you in framing a healthier future for our children.

Sincerely,



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President