

Summary of the Proposed Cerebral Palsy Care Act

The following is a brief summary of the proposed Act, meant to describe its overall purpose, structure and legal effect. It does not include the operational and legal details contained in the text of the Act itself. Questions and comments about the proposed Act may be addressed to Dianna Mellott-Yost at dianna_mellott-yost@cms.org or 720.858.6321 who will share them with the authors.

Objectives and Overview

The proposed Act will create a renewable five-year demonstration project with two major objectives:

- (1) To provide care coordination and resource coordination, as well as material resources presently not always available to families of children with birth-related cerebral palsy; and
- (2) To demonstrate that such programs can be more effective, financially more efficient, and more conducive to the improvement of medical care than the existing negligence-based legal process of medical liability.

Children and their families who meet the Act's eligibility criteria will receive benefits without having to establish either provider fault or causation between their child's condition and the medical care they received before and during birth. Benefits available under the Act will in turn be the beneficiaries' exclusive legal remedy for the covered conditions.

The Act's scope – which is limited to birth-related cerebral palsy (CP) – is appropriate to a demonstration project. In addition, families affected by birth-related CP have extraordinary needs not presently satisfied by private or public resources. And the cases covered by the Act are among those for which the existing medical liability system is most inefficient and ineffective, yet inflicts substantial private and public costs.

Eligible Beneficiaries

The Act will cover all children born within the State of Colorado, to parents who have lived in Colorado at least 90 days prior to the birth, who meet three criteria:

- (1) A birth weight of 2500 grams or more.
- (2) A contemporaneous medical record evidencing within seven days after birth the essential indicators of neonatal encephalopathy (NNE) as published by the American College of Obstetrics and Gynecology and the American Academy of Pediatrics (ACOG-AAP).
- (3) A diagnosis of CP within eight years after birth.

Children and families of children who do not meet these criteria may not receive the major benefits available under the Act, and do retain their right to bring lawsuits for their injuries.

The 2500 gram birth weight is an objective, easily-established, standard which excludes low birth weight babies and effectively excludes babies born prematurely. The ACOG-AAP markers are widely-accepted indicators of the precursors of CP. Only the “essential” markers (presently four) must be in evidence. The seven-day limit is a surrogate for causation, focusing the program on birth-related CP rather than CP attributable to other childhood causes. The eight year limitation tracks the present statute of limitations for birth-related injury claims.

Benefits

Benefits available to children and their families are of two general kinds: assistance with care and resource coordination; and material benefits designed to meet the family’s medical and personal needs. Care and resource coordination are available to those who meet the first two of the three criteria, *viz.* a birth weight of at least 2500 grams and a contemporaneous medical record of the essential ACOG-AAP markers of NNE.

The major benefits – including otherwise unfunded but necessary medical care and family and personal resources such as respite care, home and van modifications, and educational support services – are available to families and children who meet all three criteria, *i.e.* who in addition to the birth weight and NNE marker requirements have also received a diagnosis of CP.

All benefits will be “second” to the family’s existing public and private insurance and entitlements. The program will assist families to garner those benefits and entitlements, and in appropriate instances may adopt the family’s rights in order to attain them.

Administration

The program will be implemented and managed by a not-for-profit, quasi-governmental organization, with overall responsibility in a Board appointed in part by the Governor, within stated classifications. It will not be regulated by any agency of the State except that its financial operations and its solvency may be reviewed by the Commissioner of Insurance who will have the statutory right to terminate the program. The state Attorney General will have the authority to enforce the provisions of the Act.

Benefits will be designed and administered by a Benefits Committee appointed by the Board. Disputes about benefits will be resolved by an independent negotiation and arbitration process, at nominal cost to the beneficiaries and with a one-sided binding effect (*i.e.* an arbitrator’s decision will be binding on the program but not on the beneficiary.)

Medical review of all included births will be conducted by a Medical Review Committee, appointed by the Board within stated membership classifications, as described in the following section.

Patient Safety: The Medical Review

A major objective of the Act is to further healthcare quality improvement and patient safety, with a focus on birth-related cerebral palsy. To achieve that objective the following provisions of the Act are essential:

1. Every birth meeting the birth weight and NNE marker criteria will be analyzed by the Medical Review Committee. Members of the Committee include the attending physicians, representatives of the hospital or other entity in which the birth took place, the family of the affected child at its option, persons with recognized expertise in NNE and CP, and others designated by the Act.
2. Participants in the medical review will be covered by immunities equal to those available in statutory peer review; and the information developed for and by the review process will be confidential and privileged as peer review information.
3. The medical review will be conducted as a learning opportunity, not as a forum for finding fault. The Committee will have no disciplinary authority and will make no determination of individual or institutional providers' having met or failing to meet any legal standard of care.
4. Aggregated and de-identified information of use to the healthcare community will be published as the Medical Review Committee deems appropriate, directed solely to the improvement of healthcare as it may be related to NNE and CP.
5. A confidential and privileged report of the Committee's analysis and findings will be transmitted to the hospital or other peer-review-qualified institution in or by which the prenatal and perinatal medical care was provided. The institution may deal with the report as it deems appropriate. Under no circumstance will the Medical Committee's analysis preclude or replace the institution's own quality assurance, incident reporting, or peer review procedures.
6. The Medical Review Committee may report its analysis to a regulatory authority, with respect to a provider or regulated entity, only if it finds an immediate threat to public safety.

Funding

The program's funding will come principally from those insurers and self-insurance funds which now bear the burden of liability and liability defense for claims alleging birth-related CP. The program will be qualified as a tax-exempt organization under the federal Internal Revenue Code and thus eligible to receive grants and contracts from public and private entities. However, its obligations to its present and future beneficiaries will not be dependent upon any future grants or contracts. Benefit commitments will be assured through reinsurance with independent and qualified carriers.

Limitation of Liability

The Cerebral Palsy Care Act (CPCA) program will be funded by a dedication to it of the moneys now spent, most often uselessly, by insurers and providers defending legal claims. Legally, the replacement of rights to bring lawsuits in the torts system for an exclusive right to receive benefits without regard to fault or legal causation is, in the parlance of state constitutional law, a “quid pro quo.” Every aspect of the CPCA is designed to make both its individual and its social benefits greater than any benefits that may be produced by the negligence-based liability system it will replace.

To preclude the adverse selection that would make the program economically infeasible, the benefits and the elimination of medical liability apply to all covered births. It is neither an opt-in nor an opt-out program.

The liability bar applies only to those children and their families whose circumstances meet all three of the eligibility criteria. In many cases a diagnosis of cerebral palsy is not made until a child is some years older. Children who meet the birth weight and NNE marker criteria, but who have not been diagnosed with CP, may receive the care and resource coordination benefits but are *not* barred from suit prior to the time a CP diagnosis is made. For such cases, in which a family does bring a legal claim after the birth but before the diagnosis, the Act adopts a pre-existing judicial procedure by which a defending provider or healthcare entity may have an independent pediatric neurologist examine the child and, if medically proper, make a diagnosis. That diagnosis will satisfy the third criterion of the statute.

Termination

Unless re-enacted the CPCA program will end after five years. Children and families who meet the program criteria during that time will nevertheless be afforded the program’s benefits for the child’s lifetime. The program may also be terminated by its Board or by the Commissioner of Insurance, at any time, if either the Board or the Commissioner finds that the program’s assets are not sufficient to meet all of its present and future commitments. If the program terminates in that way, the eligible beneficiaries will be reinstated to their right to bring legal claims subject to setoff of any damage award by the value of benefits theretofore received, and the statute of limitations will be tolled for the time the program was in effect.