

Notes from Exchange Advisory Coalition meeting, Friday, March 4, 2011, 8:00 a.m. CST

Participants: Robin and Sita Diehl, NAMI; Pat Post, LWV; Tony Garr, Lisa Primm, Beth Uselton, Chris Coleman, TJC; Tom Starling; Karen Franklin, NASW, Betsy Dooley

[N.B.: Jack Stewart is new Executive Director of NAMI-TN.]

HHS is looking for non-anecdotal evidence of people moving to TN for TennCare coverage (e.g., Patti Killingsworth – previously assistant commissioner, Bureau of TennCare — did this to obtain care for her child with developmental disabilities).

AGENDA

1. Update on repeal and national happenings for the Affordable Care Act (ACA) – *Chris Coleman, Tennessee Justice Center*

There are a multitude of lawsuits against ACA; most are unsubstantial, dismissed on procedural grounds. Five cases actually address the constitutionality of ACA. Three judges have ruled in favor, two against constitutionality of the individual mandate to purchase health insurance. Judge Hudson's opinion in VA found the individual mandate unconstitutional but severable from the rest of the Act. Judge Benson in FL issued a declaratory judgment that the entire ACA is unconstitutional; the individual mandate is *not* severable from the rest of the Act; but he did not issue an injunction. This means the defendant (US Govt) needed to request clarification of judicial intent. The Judge stayed the order for 7 days and granted expedited appeal within 7 days. The US Govt is now seeking expedited appeal of Judge Benson's order. Other cases supportive of ACA may be decided before the Supreme Court considers this issue.

Q: What is timeline for a decision? Initial expectation was next year's term. Judge Benson wants to expedite this. Still, the case probably won't get to the Supreme Court this term. Will the Court make a decision before the May/June 2012 deadline for State exchange plans? **A:** Probably not. Not expected until October 2010, earliest. The Eleventh Circuit Court of Appeals won't delay hearing this appeal. When State Legislature adjourns in 2012, it is unlikely that they will have a Supreme Ct. decision to help them make the decision about establishing a state Exchange.

Q: What is the prudent thing to say to the Legislature at this point? **A:** There is nothing legally controversial about this law. Arguments against its constitutionality have been "invented" by Judges Benson and Hudson. The issue is between activity and non-activity (purchasing or not purchasing health insurance).

"How is this different from auto insurance?" Nobody who doesn't have a car is required to buy auto insurance; auto insurance is controlled at state level, not the federal level. "Can the federal gov't require us to buy broccoli?" Bad analogy. Real problem has to do with what Congress can do under the *Commerce Clause*. The health insurance market affects all states. Thus Congress has the authority to regulate health insurance. *Necessary and Proper Clause*: Congress can do anything that is necessary and proper to accomplish that regulation. (cf., Scalia, marijuana case in CA). The argument is that there is a limit to substantive rights. The defendant must convince the Court that there is an unenumerated constitutional right to be uninsured. "Is paying taxes a better analogy?" There is a separate opinion by Judge Benson: If don't buy insurance, have to pay a penalty (tax). Specification of different tax rates is permissible as a separate, enumerated taxation power of

Congress. A connection can be made between the individual mandate to purchase health insurance and the existing mandate to provide emergency care to anyone injured in the US (rationale often used by advocates). Another strategy of ACA opponents to get around this argument: Get rid of IMPALA, which requires that any hospital receiving federal funds treat anyone who comes to their emergency department.

2. Update on state legislation concerning [Interstate] Health Care Compact and Health Freedom Act.

These are really 2012 election campaign issues. The *Health Freedom Act* will be decided once the Supreme Court decides whether or not health insurance can be mandated by the federal govt. It concerns a health payment tax. The *Health Care Compact* refers to a collaboration among states with no obligation to the federal govt. A compact has to be passed by Congress but does not need to be signed by the President. This is unlikely to be approved by Congress before 2012. Both acts have been introduced in the House of Representatives and may be discussed on the House floor next week. There is no way to stop these bills from passing; advocates should focus on talking about the advantages of ACA. Analogy: water compact among Western states. Not the same as a regional exchange; this is an attempt to block the requirement for states to adhere to the ACA. To date, compacts have not been used to opt out of federal law. This is a different use of the term 'compact'. Lots of hurdles are required for states interested in doing this.

3. State legislation on "enabling legislation to establish a health insurance exchange."

Beth Uselton and Tony Garr did legislative visits last week. They heard from Rep. Charles Sargent (R-61) that state legislators are going to wait until very early next year (2012) to start talking about the Exchange in hearings. This leaves very little planning time. The State of TN has obtained a Planning Grant – which was released to the Senate and the House along with several other ACA grants last week. The State needs to start building the technological means of achieving insurance enrollment (including bridging between the Exchange and TennCare/Medicaid). The Legislature could give responsibility for running the Exchange entirely to the administrative branch, or could create a quasi-governmental entity to handle some of the Exchange. Timing is key: We need a workable plan in place by the end of 2012 to preclude the federal govt. from starting a federal exchange in TN. Brian Haile, et al, say they prefer a state exchange. Beth said advocates have been stressing the timeline with legislators, and the necessity to begin planning earlier that they are now contemplating.

A Shelby County study sponsored by LeBonoir Hospital (co-authored by Dr. Mervis, also fellow in the Economic Center at UT-Knoxville) shows that the ACA would significantly increase the number of insureds, decrease unemployment, and decrease uncompensated care. Rep. Joe Armstrong is urging legislators to take this study seriously. Beth will send link to this 39-page report (one-page summary helpful). Economic impact studies were given to state legislators (the TN study as well as the Urban Institute study). Consider how to get funding for a statewide economic impact study (perhaps from large insurers) – thought to be preferable to an actuarial study, which looks just at the insurance market in TN. A statewide economic impact study would take into consideration the cost of premiums, and the impact on consumers and the state beyond insurance coverage. Planning data may require an actuarial study, however, said Karen Franklin. Gordon Bonnyman asked Dr. Mervis how to replicate study statewide; Mervis estimated the cost at \$100,000. Seek funding from BCBS, THA?

4. Thoughts on the Providers & Advocates Roundtable with the Brian Haile on Friday, March 4, 1 p.m., Tennessee Tower, Multi-media Room, 312 Rosa Parks Ave., Nashville: What are some questions that we should ask Haile?

- Why do you care about governance? About actuarial data? Ultimately, that's the product that people will be buying. Also important to focus on "the big picture". We do care about governance; want to be sure there is representation of consumers on the governing body – not just in planning process. Advocates need to pipe up and say that. (Uselton)
- Brian Haile is interested in forming an exchange that doesn't interfere with the private insurance market. But not much thought is being given to outreach to counties with disproportionate numbers of uninsureds, the role of public health departments and the TN Dept of Health.... Question: Has anyone looked at the health care infrastructure to support the exchange (e.g., hospitals, mental health system, primary care providers...)? How well is TN's health infrastructure developed from the perspective of planning an exchange? (2009 TSU study cited)
- If everyone got basic health insurance coverage and mental health coverage was part of that, would money currently appropriated for mental health coverage go away? What happens to jails? Cite cost of incarceration for a year to highlight mental health impact awareness. Coordination of all these elements in one study would be optimal (Garr).
- Dr. Mervis signed up for the Exchange Coalition; invite him to the next meeting. Get Craig Anne Heflinger in on call as well re: a discussion of quick, effective studies for mental health ("rubber-meets-the-road" approach to research).

5. Meeting on Options for State Exchange, Saturday, March 5, 8:30 a.m. to 3:30 p.m. at Calvary United Methodist Church, 3701 Hillsboro Pike, Nashville, TN:

http://www.thcc2.org/TakeAction/rtm_2011_spring/rtm2011spring.html

- Does delay of enabling legislation impede state access to more federal planning money (Tier 2)?
- Why haven't other Technical Assistance Groups (TAGs) been started yet (e.g., for consumers)? Are roundtable meetings taking the place of these TAGs? Will such meetings be continued?
- Encourage Brian Haile to participate in more educational meetings for the public on health insurance exchanges. (He gives a fairly "robotic" presentation, but it is still helpful.) Get a variety of people to ask questions from the audience (not just the "usual suspects").
- **Brokers:**
 - What do you see as role of the broker in doing outreach?
 - Do you anticipate funding grassroots outreach programs to promote the exchange?
 - How do you envision outreach to more vulnerable populations who do not have internet access?
 - How will brokers be compensated if plans are worried about medical loss ratios?
 - Do you envision Tennessee embracing a pass-through fee that Georgia is researching, effectively creating a direct fee for the brokers that won't come out of the plans premiums?

▪ **Health Plan Contacts:**

- How are Tennessee insurers readying themselves to embrace the larger Medicaid population? Our interests are as consumer advocates and we would appreciate being able to communicate the more vulnerable populations' interests to the health plans. Can you recommend contacts for BCBSTN and UnitedHealthcare, Humana and any other plans who are involved in actively readying themselves for 2014?
- **Technology**
- We understand that one of the members of your agent-broker tag is Mark Seghers, from Connecture Inc., a seller of Web-based health insurance sales and administration systems. Are you anticipating making the internet the first place for consumers to “shop” the exchange?
- **Applications/Renewals/**
- How do you anticipate simplifying and/or consolidating the application/renewal process for children whose eligibility and enrollment may switch between CoverKids, TennCare and plans on the Exchange?

Next meeting: April 1, 2011, 8:00 a.m. CST

Go to THCC's website for information on establishing an Exchange in Tennessee:

<http://www.thcc2.org/implementation/exchange.html>