Health Security Plan Design Research, Year 1:
Federal Legal Landscape and Waivers

Why the Federal Legal Landscape Is a Priority Research Issue

The Health Security Plan will provide automatic comprehensive coverage for as many New Mexico residents as possible. How many New Mexicans will be included? Clearly the number of people covered will impact costs, so this potential enrollment information is critical.

More than half of New Mexicans currently receive health coverage through *federal* programs; 955,000 receive coverage through Medicaid; 441,000 receive coverage through Medicare; and 45,000 purchase private insurance through the Affordable Care Act's Health Insurance Exchange (BeWell New Mexico), which provides federal subsidies to eligible purchasers. There are other federal programs as well. Waivers or agreements are required to include any groups covered through federal programs in the Health Security Plan.

The 2019 Health Security Act raises important guardrails when seeking federal waivers. The goal is to not lose any federal funding (to maximize federal dollars) and to protect the benefits and the entitlements of New Mexicans who have health insurance coverage through these programs. The Act specifies that military members and their families, along with federal retirees, will retain their coverage, so no waivers would be requested for these populations. The Act further states that any waivers sought for tribal enrollment – with the agreement of the tribes – must not impact treaty obligations.

The report discussed here provides an in-depth analysis of various waiver possibilities and restrictions when considering whether Medicaid beneficiaries, Medicare beneficiaries, and ACA subsidy recipients could be included in the Health Security Plan. But like a jigsaw puzzle, the different pieces of our health care system are interconnected. Since the Health Security Act envisions changes in many areas – – additional waivers and negotiations with federal agencies may be required for other aspects of the Plan. For instance, New Mexico could create and seek federal multi-year funding from the Center for Medicare and Medicaid Innovation for global budgets for health facilities. There are also waivers for innovative payment systems that may reduce the administrative complexity of provider payment systems, which has led to frustration and burnout. These two important areas are covered in other consultants' reports and would result in a more streamlined and cost-effective system that would benefit all New Mexicans.

The Consultants

In 2021, the Superintendent of Insurance contracted with a group of expert legal consultants from George Washington University (along with some outside attorneys) to focus on various waiver possibilities for Medicaid and Medicare beneficiaries, as well as individuals who purchase insurance through the federally authorized BeWell New Mexico program.

Their report, which was released in early 2022, describes the legal requirements of five waiver options in applicable laws. The report also covers two federal laws that would have an impact on Plan enrollment: the Employee Retirement Income Security Act (ERISA) and the Dormant Commerce Clause, which deals with interstate commerce.

Key Consultant Points

Seven key points that apply to each of the five waivers described in the report:

• Waiver requests cannot transfer federal legal authority of these programs to a state. (In other words, recipients cannot lose their federal entitlements.) This is also a requirement under the 2019 Health Security Act.

• Waiver requests will have to explain how the proposed program deals with eligibility, enrollment, coverage, cost-sharing, and provider/health facility payment systems.

• Waiver requests must demonstrate that they are "budget neutral" (no added cost to the federal government). How this is calculated is critical. For example, does the calculation exclude those who could potentially enroll in Medicaid or factor them in? Does the calculation take into consideration projected current program expenditures due to growth?

• Each waiver has rules that allow for "innovative" programs, which are defined by statute or by rule.

• While each program has its own waiver approval system, it is possible to coordinate the application process.

> Recognizing that states may have as their goal broader health reform initiatives, § 1332 [Affordable Care Act Waiver for State Innovation] and its implementing regulations explicitly recognize that states may wish to coordinate their § 1332 waiver requests with other waiver processes, including § 402 (Medicare), § 1115A (Center for Medicare and Medicaid Innovation (CMMI)), and § 1115 (Medicaid), into a single application to the Department of Health and Human Services (HHS) and/or the Department of Treasury. (pp. 12–13. See also p. 20)

• There are opportunities for New Mexico to receive needed waivers so these recipients can be included in the Health Security Plan and not lose any entitlements. One option for Medicaid recipients might be for the Health Security Plan to be considered a publicly managed Medicaid managed care plan. (Connecticut is mentioned as an example.) To include Medicare recipients, the Health Security Plan might be deemed a Medicare Advantage Plan.

• How various waivers could work to the benefit of recipients, providers, the state, and the federal government needs to be fleshed out in consultation with appropriate state and federal agency staff. The report continually points out that discussions with the appropriate agencies are essential to be able to figure out how waivers could support the proposed systemwide, administratively streamlined approach required under the Health Security Act.

Waivers Described in the Report

1. Section 1115 of the Social Security Act – Medicaid

Section 1115 authorizes the Health and Human Services Secretary to enable a state "to test new approaches to eligibility, enrollment, and coverage" in accordance with the objectives of Medicaid (p. 15). Medicaid can be modified, but no state can replace it (p. 18).

In seeking such a waiver, each Medicaid-eligible group that the Health Security Plan seeks to move into the Plan would have to be identified, and their coverage and cost-sharing requirements under Medicaid would need to be compared to those of the Health Security Plan (p. 17).

2. Section 1115A(b)(2)(C) of the Social Security Act – Medicaid and Medicare

Established under the Affordable Care Act, the Center for Medicare and Medicaid Innovation is authorized "to test innovative payment and service delivery models to reduce program expenditures" (p. 22). These include "all-payer payment reforms" (standardized payment systems for all providers/health facilities). An all-payer payment system would help to control costs and achieve administrative simplicity across the board and would benefit all New Mexicans, whether or not they are covered by the Health Security Plan.

3. Section 402 of the Social Security Act – Medicare and Medicaid

Section 402 authorizes the Health and Human Services Secretary "to conduct significant demonstration projects relating to alternative methods for financing and delivering care to Medicare and Medicaid beneficiaries" (p. 18). Long-term demonstration projects may be considered (p. 19).

Medicaid and Medicare beneficiaries would continue to be legally covered by those programs. "At the same time, the Plan would take the place of the Medicaid managed care and the Medicare Advantage markets and would also be the means by which the traditional [fee for service] Medicare program operates" (p. 20). The report points out that Connecticut's Medicaid program operates as a public Medicaid managed care program. It also cites a Massachusetts Medicare program that is worth looking at.

Thus, under this section, the Health Security Plan could request a waiver to be designated as a Medicare Advantage Plan and a Medicaid managed care plan. The consultants suggest that "in combination with §1115, §402 might offer the state flexibility to implement the Health Security Act as a 'Health Security Plan' that effectuates coverage under both programs" (p. 20).

4. Section 402(a)(1)(C) of the Social Security Act – Medicare and Medicaid

Language quoted in this subsection of §402 seems to enable the Plan not only to request a waiver to develop payment or reimbursement systems for health care services but also to "cover and pay for different items and services than would ordinarily be covered by the

Medicare and Medicaid programs" (p. 21). The project would have to demonstrate that it would reduce program costs and not negatively impact quality of services.

5. Section 1332 of the Affordable Care Act

Section 1332, the waiver for state innovation [which was a result of the Health Security Campaign's advocacy work!] would enable a state to come up with alternatives to the Affordable Care Act's required health insurance exchange, which offers purchasers an array of health policy plans with different costs and provider networks. Those covered under BeWell New Mexico could be covered under the Health Security Plan. To be eligible for a waiver, the Plan would need to offer benefits at least as comprehensive as the exchange marketplace. (Because the Plan benefits are modeled after the benefits of the state employees plan, that would not be an issue.) If granted, the waiver would maintain all federal premium tax credits and cost-sharing reduction subsidies.

Other Legal Issues Described in the Report

1. Employer Coverage

While the majority of state residents are covered through public plans, there are New Mexicans who obtain health coverage through their employer and a smaller number who purchase individual plans in the private insurance market. This estimated coverage breakdown is important in determining how many New Mexicans would be covered under the Health Security Plan.

> **ERISA (Employee Retirement Income Security Act).** ERISA is a federal law that bars states from imposing any requirements on employers or plans that are *self-insured*. A self-insured company or plan (such as a union plan) collects the premiums, sets the parameters of the plan, and takes on all risk from the plan. Self-insured companies or plans usually hire what is known as a third-party payer (often an insurance company) to administer payment of the claims. While these companies and plans cannot be required to join the Plan, they could *voluntarily* decide that it is in their economic interest to have their employees or union members included in the Plan. State health plans (such as those covering state, local, or educational employees) are regulated by the state and not ERISA.
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> **The Employer Private Group Health Insurance Market.** There are employers who purchase group health insurance plans for their employees through the private market. In contrast to self-insured employers, these employers simply contract with an insurance company, and it is the insurance company that receives the premiums, decides what is eligible for payment, and pays the claims. While the number of people covered under this system amounts to a small percentage of New Mexicans, this group can be enrolled in the Health Security Plan; no waiver or change in federal law is required.

2. The Individual Market

The number of New Mexicans who purchase individual health coverage directly from the private market is small. (This is not the same group who buys insurance through BeWell New Mexico.) This group can be automatically included in the Health Security Plan without any need for a change in federal law or a waiver.

3. The Dormant Commerce Clause

The report describes the constitutionality of the Health Security Plan, which would not enable insurance carriers to offer products that would compete with the Plan. The "public option" approach that was discussed when Congress was considering the Affordable Care Act would have required that this option compete with private plans. (Insurance companies can offer supplemental policies, as is the case with traditional Medicare.)

The consultants do not think that this clause, which prohibits a state from protecting its own commercial products over others offered by companies located outside its borders, is a barrier to New Mexico creating its own health plan that automatically covers most residents.

> The purpose of the Health Security Act is not to give the edge to in-state commercial insurers; it is, instead, a classic exercise of a state's inherent powers to safeguard its residents' health through legislation designed to make it possible to achieve near-universal access to health care by means of a public insurance plan. To the extent that the legislation is grounded in the state's exercise of its inherent police powers to protect public health, the Health Security Act should withstand challenges to its displacement of the commercial insurance market in favor of a public approach that achieves greater efficiency and near-universality. (p. 12)

Conclusion

The question of whether Medicaid, Medicare, and other federal beneficiaries can be included in the Health Security Plan is not a simple one. While the federal legal landscape poses some challenges for our state, the opportunities for waivers and agreements with federal agencies are clearly there.

The report also makes it clear that systemic issues should be addressed when seeking waivers. There are many pieces to the health care puzzle, and each piece affects the others. This is why the Health Security Plan design process must link this issue – whether and how federal beneficiaries will be included – with issues such as global budgets, all payer payment systems, IT systems, and bulk purchasing of drugs. Developing a coordinated system that addresses costs and access problems will benefit all New Mexicans.