

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### HEALTH CARE REFORM REVIEW COMMITTEE

Wednesday, April 11, 2012  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative George J. Keiser, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives George J. Keiser, Donald L. Clark, Robert Frantsvog, Eliot Glasheim, Nancy Johnson, Jim Kasper, Gary Kreidt, Lisa Meier, Ralph Metcalf, Marvin E. Nelson, Karen M. Rohr, Robin Weisz, Lonny B. Winrich; Senators Dick Dever, Jerry Klein, Judy Lee, Tim Mathern

**Members absent:** Representative Lee Kaldor; Senator Spencer D. Berry

**Others present:** See [Appendix A](#)

**It was moved by Senator Dever, seconded by Representative Frantsvog, and carried on a voice vote that the minutes of the February 2, 2012, meeting be approved as distributed.**

#### CHAIRMAN'S COMMENTS

Chairman Keiser recognized that on March 26-28, 2012, the United States Supreme Court heard arguments on two of the cases in opposition to the federal Affordable Care Act (ACA), and it is likely the court will not issue its decision on these cases until the end of June 2012. However, he said, regardless of the outcome of these cases, the committee is charged with studying the feasibility and desirability of developing a state plan that provides North Dakota citizens with access to and coverage for health care which is affordable for all North Dakota citizens.

#### HEALTH CARE DELIVERY

Chairman Keiser called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for comments regarding the feasibility of enrolling the state's uninsured in the public employee health plans. Mr. Collins distributed written material ([Appendix B](#)) that summarized the number of Public Employees Retirement System (PERS) health contracts and the amount of premium and a copy of the October 25, 2010, review of a bill draft that was introduced as 2011 Senate Bill No. 2358.

In response to a question from Representative Johnson, Mr. Collins said the primary PERS health plan has a grandfathered status under the ACA; therefore, there are limitations to the types of adjustments that can be made to the plan while maintaining this grandfathered status. He said he would need to review the law that provides a coverage mandate for the temporomandibular joint disorder--North Dakota Century Code Sections 26.1-36-09.3

and 54-52.1-04.6--to determine whether a statutory increase in the minimum dollar coverage would jeopardize the health plan's grandfathered status.

In response to a question from Senator Mathern, Mr. Collins said PERS has more than one health plan--a grandfathered plan, a nongrandfathered plan, and a high-deductible plan.

In response to a question from Representative Keiser, Mr. Collins said if a PERS health plan was expanded to include a buyin program, there may be adverse selection concerns that would need to be addressed.

Chairman Keiser called on Ms. Maggie Anderson, Director, Medical Services, Department of Human Services, for comments ([Appendix C](#)) regarding the feasibility of enrolling the state's uninsured in the public employee health plans.

In response to a question from Representative Keiser, Ms. Anderson said although she does not have precise data on the number of Medicaid-eligible individuals who do not apply for coverage, based on the federal data available at the Kaiser Family website, approximately 27,000 additional individuals in North Dakota may be Medicaid-eligible but have not applied. She said the expectation is that the individual mandate provision of the ACA will help to address the provision of medical coverage for these individuals.

Representative Keiser said through the implementation of the Ronald McDonald Care Mobile, which provides dental services to children, he is surprised at the number of kids who do not have any medical coverage but who would qualify for Medicaid.

In response to a question from Representative Kasper, Ms. Anderson said she can provide additional data regarding who makes up the health care uninsured in North Dakota.

In response to a question from Representative Glasheim, Ms. Anderson said the biennial budget for the state's Medicaid program is approximately \$1.4 billion, of which approximately \$600 million is state funds.

In response to a question from Representative Keiser, Ms. Anderson said if the ACA was found to be unconstitutional, it is her understanding the state's Medicaid program would continue to operate at today's levels.

In response to a question from Senator Mathern, Ms. Anderson said in order to amend the state's Medicaid program to comply with the ACA, she is not certain whether a stand-alone bill would be introduced

or whether the necessary changes would be included in the department's appropriation bill. She said not all the program's changes would require legislation, but the changes would need to be reflected in the department's budget.

In response to a question from Senator Mathern, Ms. Anderson said if the individual mandate provision of the ACA were found unconstitutional, there would be additional analysis required to determine how that might impact the Medicaid expansion provisions of the ACA. She said under the ACA, Medicaid eligibility is based on gross income, whereas the state's current eligibility criteria are based on net income. She said standardizing income determinations and eliminating Medicaid categories may have some benefits in simplifying upfront enrollment issues.

Senator Lee said she would request that the committee resist investing too much time into researching the issue of expanding the PERS or Medicaid programs while there is still so much unknown related to the ACA. She said hopefully the state can deal with the Medicaid systems replacement project and get it functional and deal with the requirements of the ACA before going any further.

Representative Keiser said the committee is charged with looking at options on how to best deal with the state's uninsured. He said he appreciates that the Human Services Committees have wrestled with these issues for years; but the current system is not working, and he recognizes there is value to having these discussions.

Chairman Keiser called on Mr. Mark Hardy, Assistant Director, State Board of Pharmacy, for comments regarding the state's prescription drug monitoring program (PDMP). Mr. Hardy distributed written testimony and data ([Appendix D](#)) regarding the PDMP.

In response to a question from Representative Keiser regarding whether Workforce Safety and Insurance (WSI) has access to the PDMP, Mr. Hardy said the program does not prohibit WSI from accessing this data. Ms. Kathy Zahn, State Board of Pharmacy, said currently only one person at WSI is authorized to access the PDMP.

In response to a question from Representative Keiser, Mr. Hardy said approximately 25 percent of the state's prescribers are using the PDMP. He said this figure does not reflect that the prescriber consistently uses the PDMP but indicates the prescriber has used the PDMP at some point.

In response to a question from Representative Frantsvog, Mr. Hardy said in the case of a direct access account, a prescriber can get real-time data, and in the case of a fax, there is typically a 24-hour turnaround.

In response to a question from Representative Nelson, Mr. Hardy said in the case of heavy drug use, the PDMP generates a report and the patient is flagged.

The following panel discussed the PDMP and issues related to prescription of controlled substances:

- Mr. Hardy;
- Mr. Duane Houdek, State Board of Medical Examiners;
- Dr. Brendan Joyce, Department of Human Services;
- Ms. Courtney Koebele, North Dakota Medical Association;
- Mr. Ben Leingang, Bureau of Criminal Investigation;
- Mr. Rod St. Aubyn, Blue Cross Blue Shield of North Dakota; and
- Mr. Timothy Wahlin, Workforce Safety and Insurance.

Mr. Houdek distributed written testimony ([Appendix E](#)).

Ms. Koebele said at the North Dakota Medical Association's annual meeting, affirmative acts will be taken to enroll doctors for the PDMP. She said although the state's pain doctors are already utilizing the PDMP, she is aware of the issues related to pain medication and is looking forward to working with the state to address these issues.

Dr. Joyce distributed written testimony ([Appendix F](#)). He said the state's Medicaid program has been participating in the PDMP since its inception. He said he is the only person at Medical Assistance who uses the PDMP, and although he finds he uses it sparingly, the system has worked well to identify fraud.

Mr. Leingang said the PDMP has been beneficial to the Bureau of Criminal Investigation. He said the profit potential is great for opioids on the street. In addition to overdose issues, he said, there has been an increasing trend of opioid availability on the street.

Mr. Wahlin distributed written testimony ([Appendix G](#)). He said the nature of workers' compensation is that WSI has a high incidence of injured employees who have acute injuries. He said the most recent WSI performance evaluation considered the issue of the increasing trend in opioid use.

In response to a question from Representative Rohr, Mr. Wahlin said in 2011 WSI spent almost \$3 million on opioids.

Mr. St. Aubyn distributed written testimony ([Appendix H](#)).

Representative Keiser said he is very concerned that with the high number of prescriptions for pain medication, only 25 percent of the state's prescribers are accessing the PDMP.

Mr. Houdek said when the State Board of Medical Examiners is considering whether a doctor has exercised an appropriate standard of care, one of the considerations is whether the doctor used the PDMP in prescribing. He said in considering how best to use the PDMP, it is important to keep in mind that if doctors are faced with too many barriers when prescribing opioids, the doctors may decide to stop prescribing them entirely and this is problematic. He said patients are already forced to travel for pain

management care, resulting in the unintended consequence of the doctor being unfamiliar with the patients.

Mr. Houdek said legislators need to be careful not to tie the hands of the medical providers and negatively impact their ability to manage pain. However, he said, he recognizes it is also important to make sure doctors are acting responsibly and are held accountable.

The following panel discussed health care delivery issues related to the development of the oilfield:

- Mr. Daniel Kelly, McKenzie County Healthcare Systems;
- Ms. Koebele;
- Mr. Ron Ness, North Dakota Petroleum Council;
- Ms. Shelly Peterson, North Dakota Long Term Care Association;
- Mr. Kurt Stoner, Bethel Lutheran Nursing and Rehabilitation Center; and
- Mr. Wahlin.

Mr. Ness said Blue Cross Blue Shield of North Dakota coordinated a survey that went out to its membership and also went out to the hospitals. He said the issues being faced by the medical providers are very real and brings to question how best to manage this growth.

Ms. Peterson distributed written testimony ([Appendix I](#)).

Mr. Kelly provided written testimony and material ([Appendix J](#)). He said he supports the growth in the oilfield; however, it is important to also recognize the needs and issues that accompany this growth. He said the communities have been trying to deal with this growth on their own, as they do not want to come to the legislators if unnecessary.

Mr. Kelly said one of the issues the medical community is facing is workforce recruitment and retention and housing shortages for the workforce. He said in addition to facing the naturally occurring aging of the workforce, the medical community in the oilfield also has to deal with the next generation not filling these opening positions, in part due to higher wages available in the community.

Mr. Kelly said another issue the medical community is facing is the self-limiting nature of the current clinic space. He said the clinics are maxed out and are unable to increase patient services because there is physically no more space. Unfortunately, he said, one consequence of the full clinics is the increased use of emergency rooms and the associated higher costs of emergency room visits. He said additional issues the medical community is facing include increases in communicable diseases, increases in bad debt, and unmet day care needs for the workforce.

In response to a question from Senator Mathern, Mr. Kelly said the local economic development agencies are pursuing making requests for assistance directly to the oil industry. He said before they ask the oil industry for help, they first consider whether the

unmet needs would cashflow on their own, and if the answer is no, then it may be appropriate to contact the oil industry for assistance.

Senator Lee said she is a big proponent of public health and hopes the necessary partnerships grow to address these challenges. Additionally, she said, she would like to see the hospitals and clinics forge partnerships to help address these issues.

Mr. Jerry Jurena, North Dakota Hospital Association, said his organization has taken on this issue of helping the hospitals form partnerships. He said he recognizes it is more than just a hospital issue; therefore, the initiative has expanded its participants and has expanded beyond western North Dakota. He said the health care communities in Bismarck and Minot are also being impacted by the oilfield development.

Representative Keiser said he appreciates how the medical community is trying to address and solve these issues on its own as that is the "North Dakota way"; however, with the limited profit margin in health care, he questions whether these issues will be able to make it until the 2013 regular legislative session.

Mr. Kelly said two-thirds of the critical access hospitals in North Dakota lose money. He said if this trend continues, the hospitals may not be viable in the long term. As an optimist, he said, he hopes that as the new residents become more permanent, these issues may resolve themselves.

Mr. Stoner said he echoes Mr. Kelly's statements. He said in the last eight months, his facility's losses far exceed the losses of the entire last year. He said although he runs a good long-term care facility, he has very little control over these new circumstances.

Mr. Stoner said affordable housing has become a huge issue for his facility. Although there are tax credit programs that help some of the low-income residents of the community, these programs do not necessarily help his employees. Additionally, he said, senior housing is also a growing unmet need in the community.

Mr. Stoner said that as an employer he recognizes that his employees are experiencing increased stresses and they cannot help but bring this stress to work. As a result, he said, he has experienced a high employee turnover.

In response to a question from Senator Mathern, Mr. Stoner said he has been lucky that the foundation for his facility has been very supportive and has increased financial support; however, it is not very realistic to use foundation aid to buy housing at the market's increased costs.

## **AFFORDABLE CARE ACT**

Chairman Keiser called on Ms. Lisa Feldner, Chief Information Officer, Information Technology Department, for comments regarding the status of the department's preparations for federal administration of the state's federally administered health benefit

exchange. Ms. Feldner provided written testimony ([Appendix K](#)).

In response to a question from Representative Keiser, Ms. Feldner said regardless of the outcome of the ACA lawsuit, she is focusing on the Medicaid eligibility rewrite, which needs to be completed regardless of the constitutionality of the ACA.

Chairman Keiser called on Mr. Adam W. Hamm, Insurance Commissioner, Insurance Department, to provide an update of the status of the state's implementation of the ACA, including updates on:

- The health benefit exchange requirements of the ACA;
- The essential health benefits requirements under the ACA; and
- The consequences under the ACA of increasing current health insurance mandates or enacting new health insurance mandates.

Mr. Hamm provided written testimony ([Appendix L](#)).

In response to a question from Representative Keiser regarding the commissioner's preferred benchmark plan, Mr. Hamm said he would like to continue analyzing the options before making a recommendation and then the Insurance Commissioner and the Governor can convey this recommendation to the federal government. He said in evaluating the various benchmark plans, the rubber meets the road in considering the costs of the various benchmark plans. He said he has an actuarial consultant who can do an analysis of the different benchmark plans; however, this analysis may take a few months to complete.

In response to a question from Representative Glasheim, Mr. Hamm said in selecting one of the benchmark plans, a state essentially has to accept the plan "as is." He said if a state chooses to add coverage to one of the benchmark plans, the state will incur the expenses of those additional benefits.

In response to a question from Representative Keiser, Mr. Hamm said a timeline has not yet been released for the states that choose to participate in a partnership model for the health benefit exchange. Additionally, he said, the federal government has not yet released how it plans to fund the federally administered health benefit exchanges.

The following panel discussed the implementation of the ACA, including the health benefit exchange and essential health benefits, and the possible outcomes of the federal lawsuit in opposition to the implementation of the ACA:

- Ms. Anderson;
- Ms. Lisa Carlson, Sanford Health;
- Mr. Jurena;
- Ms. Koebele;
- Mr. Jack McDonald, America's Health Insurance Plans (AHIP); and
- Mr. St. Aubyn.

Mr. St. Aubyn distributed written testimony ([Appendix M](#)).

Mr. McDonald said his largest concern with the lawsuit relates to the individual mandate and the consequences of it being found unconstitutional. He said if the individual mandate is struck down, there may be increased premium, fewer employers will offer coverage for employees, and fewer individuals will have uninterrupted coverage.

Ms. Carlson said she echoes Mr. St. Aubyn's and Mr. McDonald's comments. She said in order to work, the system needs to balance risk. Additionally, she said, the essential health benefits raise concerns. She said the selection of the essential health benefits should plan for a variety of scenarios, needs to be based on cost, and requires public deliberation. As an example of the issues that may arise when considering what should be included as an essential health benefit, she discussed contraceptive coverage.

In response to a question from Representative Keiser, Ms. Carlson said she is not certain how the essential health benefits will deal with inclusion of infertility services and the existing caps contained under most policies. Mr. St. Aubyn said his research indicates the ACA will not allow a lifetime cap for an essential health benefit, such as infertility treatment. However, he said, the federal government may allow the plan to be revised to be actuarially equivalent.

Mr. Jurena said the North Dakota Hospital Association is concerned about what would happen if the entire ACA was struck down, and as a result, the frontier amendment went away. He said the frontier amendment translates to \$68 million per year for six North Dakota hospitals.

In response to a question from Senator Lee, Ms. Carlson said it appears that health care providers overall are supportive of the ACA because it is expected the ACA will increase private coverage.

Ms. Koebele said the first priority of North Dakota doctors is the health and treatment of North Dakotans. She said the North Dakota Medical Association supports the frontier amendment, which is a part of the ACA.

Ms. Anderson said if the ACA is struck down, the Department of Human Services would stop going forward on Medicaid expansion but would continue going forward on developing the eligibility system.

Representative Kreidt said he does not think the federal government will be able to afford to pay the cost of the Medicaid expansion.

Chairman Keiser called on Mr. Wayne Stenehjem, Attorney General, for comments regarding the status and possible implications of the federal lawsuit in opposition to the ACA. Mr. Stenehjem reviewed a flowchart ([Appendix N](#)) summarizing the lawsuit. He said he personally attended the Supreme Court arguments, which covered an unprecedented six hours over three days. On the first day, he said, the court considered the application of the federal Anti-Injunction Act, on the second day the court considered the issue of the individual mandate and severability, and on the third day the court considered the expansion of the Medicaid program.

In response to a question from Representative Kreidt, Mr. Stenehjem said if the court rules that Congress has the authority to implement an individual mandate, the supremacy clause rules, and the states are required to follow this law.

In response to a question from Senator Mathern, Mr. Stenehjem said in North Dakota it takes four of the five Supreme Court justices to find a law unconstitutional; however, at the federal level it takes a simple majority. He said although the courts give deference to the law, the justices are also charged to uphold the constitution.

Chairman Keiser called on Mr. Hamm to provide comments regarding how the state's Comprehensive Health Association of North Dakota (CHAND) program may be impacted by the implementation of the ACA. Mr. Hamm's written testimony ([Appendix L](#)) addressed this issue. He said his recommendation is that the legislature wait for the Supreme Court decision, the fall elections, and the 2014 implementation of the ACA and then evaluate CHAND enrollment to determine what changes may be appropriate.

### COMMITTEE DISCUSSION

Senator Mathern requested that the committee consider 2009 Engrossed Senate Bill No. 2362 ([Appendix O](#)), which would have provided for a children's health insurance program (CHIP) buyin program to be established by the Department of Human Services and 2011 Senate Bill No. 2221 ([Appendix P](#)), which would have provided for Medicaid coverage through private health insurance providers.

Representative Glassheim requested that at a future meeting the committee receive data regarding uncompensated care at hospitals and clinics. Representative Keiser said last interim the committee collected information regarding uncompensated and uncollected care as well as regarding charity care.

Chairman Keiser said if the committee seeks to make a recommendation, the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management* require that the committee consult the Legislative Management for prior approval.

Representative Keiser said a macro-analysis of the state's health care system shows that we have a disjointed system. He said the providers are not available, and the people cannot afford the access. In summary, he said, the current health care system is not working. He said the small employers are not able to absorb the inflationary cycle, and soon they will not be able to afford to offer health insurance for employees. Therefore, he said, regardless of the federal laws, this committee needs to consider what the state can do to address affordability and access. He said the next five years will bring tough decisions, which may include limiting what is covered by health insurance.

No further business appearing, Chairman Keiser adjourned the meeting at 4:00 p.m.

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Jennifer S. N. Clark  
Committee Counsel

ATTACH:16