



To: NJ For Health Care  
From: Renée Steinhagen, Esq.  
Date: February 3, 2012

Re: Comparison of S. 2597 (2010) and S. 1319 (2012) in context of NJ For Health Care  
Coalition Exchange Principles

This memo is written to assist people in understanding Senator Gill's new bill, which I understand will be introduced by Assemblyman Conaway and heard in committee on Monday. I am examining the bill through the lens of our exchange principles, and will note principles that are not addressed. I will also note areas where the Coalition has suggested language so organizations may decide to advocate for our recommended language or may want to develop additional language if a principle is not addressed.

#### Public Interest Mission

The statutory declarations in S.2597 and S.1319 are identical and satisfy our principle that the exchange be established for the benefit of the people and businesses who obtain health insurance coverage for themselves, their families and their employers. However, both do not mention "empowering" consumers, and instead, note the intent to create a "transparent marketplace" where plans "compete" on "price, quality and service and not risk selection." I do not think this is significant. Despite the identical language, the new bill establishes the "American Health Benefit Exchange in New Jersey" in contrast to the "Health Insurance Exchange in New Jersey." This name difference may be to emphasize that subsidies are secured through the exchange, not just insurance products, and the reference to "American" may be to tie this to the federal government, though the definition of "Exchange" drops the American and inserts New Jersey. This misnomer may thus be a drafting error.

#### Independent Public Exchange

S.1319 in contrast to the earlier bill establishes the exchange "within the Department of Banking and Insurance" for purposes of satisfying the constitution, but makes clear that the exchange is "independent of any supervision or control by the department or by any board or officer thereof." S.2597 created the exchange as a nonprofit under New Jersey's Nonprofit Corporations Act. S.1319 defines the exchange as "an instrumentality of the State exercising public and essential government functions" and thus is subject to OPRA. See Sec. 10 (S.1319)

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S.1319 explicitly places all employees of the exchange, except the executive director, under the protections of Civil Service, and subjects all board meetings to the OPMA. “[M]atters relating to litigation, personnel, contracting, and payment rates,” however, may be discussed in closed session. We should get clarification as to whether the Exchange will deem this provision to declare such matters, in particular contracting and payment rates, confidential for purposes of OPRA. S.1319 does say that contracts for professional services should be awarded through a process “that, to the maximum extent practicable, meets the procedural requirements as those set forth in N.J. S.A. 52:34-9.1 (State Policy regarding Professional Service Contracts) so there will be some oversight. However, S.1319 contains a new section that explicitly puts “negotiations with carriers contracting or seeking to contract with the exchange” off limits from any OPRA request. See Section 10 (S. 1319). This demand is consistent with the demand of the industry with respect to Medicaid ACOs. Unlike that situation, however, I think that the rates themselves will still be open for public review; just the negotiations remain confidential.

Also, both bills make clear that the Exchange is subject to Administrative Procedure Act (APA) for purposes of rulemaking. See Section 13(S. 1319), and Sec. 11(S.2597). We may consider changing the language to require that rules and regulations be promulgated. Now, the language is “shall each adopt such rules and regulations as may be necessary to effectuate the purposes of the act.” Also, despite the fact that the Exchange is responsible for selecting, certifying and re-certifying qualified health plans and processing subsidies, such quasi-judicial decisions are not subject to review explicitly under the APA. This issue is less one of independence than accountability, however, Coalition members may want to ensure that the public has standing to challenge the certification or decertification of an insurance plan. Accordingly, we should request that judicial review be made explicit under the APA and consumer groups have standing to challenge selection, certification and de-certification decisions in addition to the plans themselves.

#### Qualified, Pro-Consumer Governing Board

Our principles state that we want (i) a majority of the board to represent consumers, (ii) board members to have certain expertise, and (iii) no board member is “affiliated” with the healthcare industry. It appears that both Senator Gill’s bills satisfy our principles. The bill creates a 7 member Board with Commissioners of DOBI and DHS given a position *ex officio*. The Coalition has expressed a preference that the two Commissioners should not only be appointed in their *ex-officio* capacities but should also be non-voting members. We have also expressed an interest in having the Commissioner of Health and Senior Services on the Board. If non-voting, the addition of another Commissioner would be fine. However, if the Commissioners vote that the addition of one more would turn a 7 member Board into an 8 member, and one more person would be required to ensure a tie breaker.

Among the five public members of the board, all of whom are appointed by the Governor with the consent of the Senate (and two of whom are recommended by the Speaker and two recommended by the Majority Leader), one must be an actuary and the others must hold expertise in certain areas including consumer health care advocacy. There is strong language preventing any board member or employee of the Exchange from being affiliated with the health care industry during service and two years thereafter, though there is nothing prohibiting a

person currently affiliated with the industry from being appointed or hired as an employee. The revolving door may be hard to prevent, if someone is willing to serve on the board and leave their paid employment for that period of time and two years thereafter only to return on day 1 of year 3.

There is nothing in the bill that requires the governing board to establish advisory councils that would include specific stakeholders nor is their language prohibiting such activity. However, the board is given the authority to adopt by-laws for the regulation of its affairs, and the convening of an advisory council could fall within that authority. Also, under both Gill bills, the board is given the authority to establish “a mechanism for ensuring consultation by the exchange with relevant stakeholders. (Sec. 6(d)(9)) and the executive director is given the authority to “undertake any other activities necessary to accomplish the purposes of the exchange (5(g)(2)(e)). Although a reasonable interpretation of such provisions grants the exchange the authority to create an advisory council, we might want to request that such authority be made explicit, if that is still a priority of the Coalition.

### Negotiate on Behalf of Consumers

Our principles contain a clear preference that the Exchange use selective contracting and active purchasing to utilize the bargaining power of this new insurance pool to negotiate affordable premiums for consumers. A close look at S.1319 indicates that the Exchange is granted explicit authority to undertake certain activities that are consistent with being an “active purchaser.” Section 6 and Section 7 of S.1319 contain language supporting this conclusion:

--- Section 6(d)(2) and (3), previously included in Gill’s former bill, require the Exchange to establish “procedures and minimum requirements for the selection, certification, and recertification of qualified health benefits plans to be offered through the exchange,” and “criteria for determining that certain health benefits plans will be no longer be made available through the exchange and a procedure to decertify these plans;”

--- with respect to State Business Health Options program, S.1319 adds language that agreements between the exchange and employers will “require the exchange to provide premium aggregation and other related services in order to minimize the administrative burden on the employer.” Sec. 6 (b)(iii);

--- a new section 7(a)(1) sets forth that the exchange shall only certify plans that “it determines provide good value and offer high quality coverage to enrollees, so as to provide an appropriate range of health care coverage choices within the exchange;” and

--- section 7(c)(4) authorizes the board to consider any premium increase in a qualified health benefits plan “in determining whether to make the health benefits plan available through the exchange.”

Although there is no provision explicitly requiring the exchange to negotiate premiums and benefit packages with insurers, their power to select, certify and de-certify clearly give them leverage to demand “quality, responsiveness to consumer concerns, reasonable rates, efficient

plan designs, robust provider networks, and comprehensive benefits” as our principles state. Furthermore, the language that the Coalition recommended to Senator Vitale is not stronger than the language included in the current bill.<sup>1</sup>

### Full Integration with Medicaid and NJ Family Care

The Coalition’s principles demand seamlessness in the application process and continuity in coverage to permit persons going to and from the Exchange to Medicaid and Family Care, as well as a desire to see Medicaid and Family Care plans offered on the Exchange. S.1319 has significantly augmented Section 8(a) of the bill to satisfy the first prong of our principle. In particular, Section 8(a)(5) requires the board to “utilize any other measures that the board deems necessary . . . to ensure the most efficient, cost-effective, and comprehensive health care coverage possible and continuity of coverage and care when an enrollee transitions . . .” between the Exchange and Medicaid. The bill, like Vitale’s bill, does not offer Medicaid and NJ Family care Plans on the exchange (though we did not suggest any language to do so). It is my impression that someone who knows the Medicaid process has put their fingers on this legislation.

### Consumer Friendly

The Coalition has advocated for an exchange that is easily accessible to all consumers and small businesses, uses plain, easy-to-understand language and is culturally and linguistically sensitive. Both of Senator Gill’s bills require the establishment of a customer service center, which operates a toll-free telephone service and provides oral and written information in a manner that is culturally and linguistically appropriate and must provide employers with information about cafeteria and gym plans that may be tax deductible. Section 6(d)(6). The exchange must maintain a web site that provides standardized comparative information about plans, and it must provide “clear and comprehensible information” to applicants that “fully explains the application process” including information about tax credits and subsidies. Sec. 8 (a)(3).

In addition, in our comments to Senator Vitale, the Coalition suggested language regarding data collection, and requested that such data be made available to the public. The exact list appears in Sec.7(c)(5). This time, someone who is familiar with the California bill amended Senator Gill’s bill.

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<sup>1</sup> We suggested the following: The Board “shall determine the minimum requirements a carrier must meet to be considered for participation in the Exchange, and the standards and criteria for selecting qualified health plans to be offered through the Exchange that are in the best interests of qualified individuals and qualified small employers. The board shall consistently and uniformly apply these requirements, standards and criteria to all carriers. In the course of selectively contracting for health coverage offered to qualified individuals and small employers through the Exchange, the board shall seek to contract with carriers so as to provide health care coverage choices that offer optimal combination of choice, value, quality and service.”

The bill also includes a prohibition against fees or other monetary penalties for the termination of coverage if a person enrolls in another type of essential coverage because the person has become newly eligible for that coverage which is clearly a consumer friendly policy. See Sec. 7(a)(3).

### Effective Outreach and Assistance

Although S.1319 explicitly requires the board to develop “a strategy for publicizing the services, eligibility requirements, and enrollment procedures of the exchange,” Sec. 6(d)(8), and to “undertake outreach and enrollment activities that seek to assist enrollees and potential enrollees. . .in the least burdensome manner” Sec. 8(b), there is no requirement that the exchange enter into partnership with independent organizations that will help consumers and small groups “navigate” the plans, as our Coalition has requested. Silence on the issue is telling. I think the language is broad enough to allow the Exchange to enter into partnerships with independent organizations, such as consumer groups; however, the bill would also permit the Exchange to enter into relationships with broker groups (especially pursuant to the professional service contract language of the bill). This issue perhaps should wait to be played out when regulations are promulgated rather than at the legislative stage, unless people think it is best to get resolved now.

### One Insurance Pool

The Coalition has always taken the position that the Exchange should explore how best to transition toward a unified insurance pool that combines both individual and small employer markets. Neither Gill bill addresses this issue. However, S.1319 does require the Commissioner of DOBI to report to the Governor and Legislature by January 2018 as to whether the State should phase out the New Jersey Individual Health Coverage Program and the New Jersey Small Employer Health benefits Program. Perhaps, the legislature anticipates that the federal government may permit undocumented folk to purchase insurance on the Exchange at some future date.

### Improve Health Care Quality & Promote Prevention

In our principles, the Coalition expresses our interest in seeing the Exchange require plans to prioritize prevention and work to reduce health disparities. We note that plans should offer dental and mental health services, and networks should include “essential community providers.” S.1319 requires a carrier, as a condition of participation in the exchange to “fairly and affirmatively offer, market and sell in the exchange at least one product within each of the categories of health benefits plans that the federal act requires to be offered through the exchange.” Sec. 7(c)(1). See also Sec. 7(a)(1)(“board shall certify only those plans that provide good value and offer high quality coverage to . . . achieve the purposes of the federal act”). The legislation appears to be deferring to the federal government with respect to required benefits and services. There is nothing in the legislation prohibiting the Exchange from prioritizing prevention, requiring mental health or dental services, or requiring certain providers to be “in-network” when establishing selection criteria during the rulemaking process; I do not know whether there are any risks with raising it now.

## Community Health

The Coalition has articulated the goal that the Exchange should promote community health by fostering collaborations between the Exchange insurers and community organizations, such as local public health departments, mental health associations, maternal and child health consortia and disease-specific nonprofits. Such collaborations are not mentioned in the legislation; however, the Board and executive director are given broad enough authority that undertaking efforts to foster such collaborations are within their authority.

## Ensure Exchange Stability

The Coalition clearly states that the State must guard against segregation of people by their health status, and must ensure that insurers do not steer people onto or off the exchange. S.1319 addresses this issue in two ways: products offered on the exchange must be sold off the exchange, Sec. 7(c)(2); and the board must establish procedures to avoid risk selection between plans offered through the exchange and those offered outside the exchange. Sec. 7(d). The latter provision is broad enough to give the board flexibility to respond to effects that appear as the exchange is implemented.

## Miscellaneous

Both bills exclude Medicare supplemental health insurance from the definition of “health benefits plan.” Both bills define “small employer” as a person, firm, corporation or partnership that is engaged in business, which “employed an average of at least two but not more than 50 employees on the first day of the current calendar year, and the majority of which employees are employed in New Jersey.” However, they both contemplate expansion to cover employers with more than 100 employees enabling such employers to purchase coverage through the exchange in January 2017.

Sustainability—Both Gill bills authorize the board to (1) apply for federal grants from the federal government to implement the exchange, (2) seek grant funding from private foundations to implement the exchange, and (3) apply a uniform surcharge to all qualified plans and a uniform assessment on carriers that do not contract with the exchange. All funds received pursuant to these three methods must be placed in a New Jersey Health Benefit Exchange Trust Fund within the Department of Treasury. Sec. 9 of S.1319. The funds received from the surcharge “may be used only to pay for administrative and operational expenses that the exchange incurs in order to carry out its functions.” Although funds received from the federal government or private resources are dedicated and not subject to the appropriations process, it is unclear whether funds received from the surcharge or assessment can be diverted. As we have seen with other so-called dedicated funds (i.e., real estate transfer tax dedicated to affordable housing, with poison pill in legislation diverted for general treasury purposes; consumer social benefits charge dedicated for alternative energy programs at the BPU appropriated for general treasury purposes), the legislature can authorize re-appropriation for other purposes during the budget process. We need to raise this issue, and figure out what to do. Poison pills can be amended (though as a constitutional matter not pursuant to an appropriation bill).