

TESTIMONY
Senate Banking & Insurance Committee Hearing
Patient Protection Affordable Care Act Navigators
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Thank you for affording the Pennsylvania Association of Health Underwriters (PAHU) the opportunity to testify at this hearing.

As you know, Pennsylvania Association of Health Underwriters (PAHU) is an association comprised of insurance producers who specialize in meeting business and individual needs for health insurance and employee benefits. They are on the front lines of this debate. Insurance agents and brokers take pride in their consumer advocacy by helping consumers in understanding choices and in navigating a confusing system to help get legitimate claims paid. They are regulated by the Insurance Department to ensure that proper marketing and service practices take place.

Unfortunately, the role of the insurance agent is often obscured given media and Federal Government promotion of the exchanges through navigators, “assisters”, certified application counselors, community health centers, libraries and the like. In this testimony, I will refer to all of the above as ‘navigators’ or ‘navigators et al.’.

First, Pennsylvania state law restricts what navigators may do by themselves. Act 147 of 2002 specifies that only licensed agents may sell, solicit or negotiate contracts of insurance. The word ‘negotiate’ is legally defined as **“To confer directly with or to offer advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning the substantive benefits, terms, or conditions of the contract, providing that the person engaged in that act either sells insurance or obtains insurance from insurers for purchase”** Navigators et al do not sell insurance but they are a conduit in that they obtain insurance for purchasers. Navigators et al also appear to meet the definition of solicit, **“to attempt to sell insurance OR ask or urge a person to apply for a particular kind of insurance from a particular insurance entity.”** Again, navigators et al do not sell but in the process of educating the consumer and by comparing plans, the question that may be posed is ‘which qualified health plan is best for me?’ What that means is that navigators et al run the risk of crossing that line as they help people to enroll and as such must be regulated by the state.

Navigators et al are meant to be an outreach function to reach those who may not be within the insurance mainstream because of economic, linguistic or cultural challenges. Their job is NOT to steer a person towards a specific qualified health plan even though Federal rules permit them to compare plans. Understand that the murkiness of just exactly what “advice” means gives bona fide insurance brokers heartburn since that is an easy line to cross. When helping someone to fill out the application or to wrestle with healthcare.gov, will the navigator, assistor, certified application counselor or champion complete the enrollment process and answer the question ‘Which plan should I pick?’ Registering these individuals with the Insurance Department at least gives state regulators a greater ability to respond more quickly if it appears that the navigator et al has overstepped his/her bounds. Describing different plans is permissible. Providing specific recommendations is not.

I have seen nothing in the Navigator training manual or in webinar training for navigators et al that tells them to stop! at the point of giving a specific recommendation. What I see is that the navigator et al leads a person through the enrollment process from start to finish.

Another reason is adequate knowledge about health insurance. In order for someone to be enrolled, the consumer must make a choice but does the average consumer understand the difference between coverages or networks, co-pays or deductibles? The answer sadly is probably not. Certified application counselors are only required to complete five hours and only reach a certain minimal level of ability in answering insurance questions. Health insurance is complicated. There is no way around that even if one considers the standardization of coverage options attempted by PPACA. Navigators and certified application counselors need to work with licensed brokers to ensure that proper information is given in helping consumers better understand what choices they have. Insurance brokers are required to take 24 hours of continuing education every two years to keep their knowledge up to date. Brokers cannot receive a license without going through 24 hours of training and a criminal background check.

Navigators, certified application counselors and all others performing navigator functions in Pennsylvania should register with the PA Insurance Department. This would give the Department access to activities so as to be able to respond quickly if there is a case of a well-intentioned navigator doing only what licensed agents and brokers may do, sell, solicit, or negotiate insurance contracts.

Who are the Navigators et al.? Why is this important?

The bottom line is that the universe of navigators et al is larger than many perceive it as being and it involves a greater number of people than many know. In addition, it is much better funded than it would appear at first glance.

The Federal Government was frankly unprepared by the numbers of states that chose not to establish a state-based exchange. 27, like Pennsylvania, opted for the federally-facilitated exchange (marketplace). HHS' response was to expand the definition of navigator to include other types of assistors including certified application counselors since the original budget would be insufficient for their expanded task of funding for exchange outreach.

So, who is who in the navigator et al world?

First, there are four official navigators. They have an unknown number of employees or volunteers helping them achieve their mission. PA Association of Community Health Centers March 2013 PA Directory lists more than 200 community health centers in 48 of PA's 67 counties. Resources for Human Development Pennsylvania lists 138 locations in all areas of provided services and eleven specific to family and health counseling. Mental Health America and PA Mental Health Consumers Association appear to share the navigator function in three regional servicing offices. HHS says that PA Association of Community Health Centers has several sub-grantees/partner organizations: Health Federation of PA, PA Health Law Project, PA Office of Rural Health and 41 federally qualified health centers.

Grant monies received according to HHS in September 2013 were Resources for Human Development \$997,801.00, PA Association of Community Health Centers \$739,005.00, PA Mental Health Consumers Association \$424,625.00, and Mental Health America - Pennsylvania \$547,754.00

Second, there are 316 certified application counselor entities listed on the Find Local Help section of healthcare.gov. (NOTE: This list may also include some navigators.)

Third, there are champions, 900 nationally and 80 in PA ranging from Salvation Army to Reading Hospital to Montgomery County WIB (Workforce Investment Board) to two state representatives' offices. Their mandate according to HHS Secretary Sibelius August 22, 2013 is to provide "A network of volunteers on the ground in every state can spread the word and encourage their neighbors to get enrolled. Champions for Coverage are local businesses and organizations -bloggers, community health centers, hospitals, communities of faith and civic organizations.

Although not receiving federal funds directly for this purpose and requiring no training for volunteers or staff engaging in exchange outreach activities, champions work towards the same purpose of enrollment. I am sure that most would not presume to exceed their mandate as cheerleader but consider that many receive federal funding which could permit some staff to be diverted to actual outreach and enrollment. Possible beneficiaries could be any one of the list of PA champions in the appendix. Again, let me stress that I am not saying that they are using federal funds to pursue navigator-type efforts. I am saying that the Insurance Department will not know unless there is a registration provision in PA law that requires each organization doing navigator work to register with the Department.

Not passing this legislation means that you have a small army of well-intentioned people advising consumers without a license. The lack of a handle by the Insurance Department to track activities and people also means that some may not be so well-intentioned and would enjoy seeing personal information such as Social Security numbers for their own purposes. After all, there this no criminal background check for individuals doing navigator et al work.

How much money is being spent on navigator et al activities?

In addition to the original navigator grants with approximately \$2.7 million to PA navigators, there has been ample federal money being used to fund exchange outreach and enrollment with the HHS' Health Resources and Services Administration (HRSA) being the prime resource:

- On May 9, 2013, HHS Health Center Outreach and Enrollment Assistance in Fiscal Year 2013 announced that 40 PA health centers would receive ACA Marketplace outreach and enrollment grants.
- \$150 million was awarded to health centers July 10, 2013 to “complement and align with other federal efforts such as the CMS-funded Navigator program” Included were 38 PA centers.
- \$2.5 million on September 20, 2013 went to educate and enroll uninsured individuals and families living in rural America in new health coverage options offered by the Affordable Care Act. Two in PA (Armstrong-Indiana Drug & Alcohol Commission and Clearfield-Jefferson Community Health Center) each received \$25,000.
- September 13, 2013 announced \$67 million additional to establish new health delivery sites, “instrumental to the successful implementation of ACA not only as providers of care but also in linking individuals to coverage through outreach and enrollment in the Health Insurance Marketplace.” Primary Health Network in Sharon received \$358,333.
- \$150 million in awards announced November 7, 2013 for community health centers “on the front line of helping uninsured residents enroll in new health insurance options available in the Health Insurance Marketplaces (exchanges).”

Two PA centers in Philadelphia received \$1,505,483. Neither Philadelphia Fight nor Project H.O.M.E. could be found in the HHS data base of certified application counselors.

- December 11, 2013 HHS announced awards of \$58 million in exchange outreach grants to 1,157 health centers including 38 in PA
- \$38 million announced on January 16, 2014 went to 1,157 health centers “expanding the hours of existing outreach and enrollment assistance workers and hiring new or temporary outreach and enrollment assistance workers, an unknown amount going to PA recipients.
- In all, PA health centers have received at least \$6.4 million in exchange outreach grants.

Other Federal Navigator et al Resources

- In addition, the US Department of Agriculture (USDA) September 20, 2013 provided \$1.250 million to set up a network of **Cooperative Extension Service** educators in 12 federally-facilitated marketplaces (exchanges) to help the uninsured make educated decisions about enrolling in the Marketplace. PAHU was not able to determine whether or not Pennsylvania was one of the states.
- Grant Outreach on the Marketplace Exchanges of the ACA was announced by USDA’s National Institute of Food and Agriculture June 26, 2013 totaling \$795,455.00 to land-grant institutions. PAHU was unable to determine whether or not Penn State was a recipient of this grant.

Libraries received assistance from the federally-funded Institute of Museum and Library Services announced by CMS Partnership Center Newsletter August 14, 2013 to “get librarians ready to help people in every State learn about the new Health insurance marketplace. CMS Administrator Marilyn Tavenner said “People will likely turn to libraries to learn about the Marketplace, and we want to make sure that library staff has access to the tools and information to respond to people who want to sign up and enroll for coverage.” As a recipient, the Free Library of Philadelphia’s library coordinator Nani Manion was quoted as saying “The trail to getting insurance is not a neatly designed trail, and so there is nothing better than a librarian to help navigate.” (Kaiserhealthnews.org February 14, 2014)

A document, *Rural Implications of the Affordable Care Act Outreach, Education and Enrollment Policy Brief* January 2014 (National Advisory Committee on Rural Health & Human Services) advised non-profit hospitals to examine IRS section 501(c) (3) and Form 990 Community Health Needs assessment which mandates providing and report benefit to the community, among which are “helping uninsured individuals and families learn about and enroll in sources of insurance including the Marketplace.” While not a grant, this article encourages hospitals to become actively involved in outreach and enrollment.

Implications for unlicensed activity

What this means is that the federal effort for enrollment is much wider than a narrow definition of the word ‘navigator’. Potentially thousands of unlicensed persons are out there having access to Social Security numbers (a potential identity theft threat since there is no criminal background check) and enrolling people -- crossing the line into what only licensed insurance agents and brokers are allowed to do. These vulnerabilities are addressed by Senate Bill 1268 and its House counterpart, House bill 1522.

State regulation of navigator et al activities

SB 1268 and HB 1522 clarify the proper role of navigators and give consumers greater assurances that their privacy will be protected. Other states have already enacted similar pieces of legislation according to the National Council of State Legislators (NCSL) May 31, 2013. These are Georgia (HB 198), Virginia (HB 2246 and SB 1261, Maryland (2012 (HB 443 and 2013 HB 361), Tennessee (SB 1145), New York (SB 2606), Montana (HB 250), and Maine. (2012 Public Law 631). The link to the original NCSL article follows: <http://www.ncsl.org/documents/health/ACANews56.pdf>

Others such as George Washington School of Public Health & Health Services (January 14, 2014) add Missouri, Florida, Indiana, Texas, Wisconsin to the list of so-called restrictive states. The pro-Affordable Care Act group Commonwealth Fund (July 1, 2013) puts the number of states which have enacted or are actively considering navigator regulation laws at fourteen -- Arkansas, Florida, Georgia, Indiana, Iowa, Louisiana, Maine, Montana, Nebraska, Ohio, Tennessee, Texas, Virginia, and Wisconsin.

The Commonwealth Fund also adds five states which are considering pending legislation -- Pennsylvania, Illinois, Missouri, North Carolina, Since then, Missouri enacted its law.

Is Pennsylvania violating Federal rules on state regulation of navigators et al?

In March 2014, HHS issued a 279-page document that, among other things, provides more guidance on what states may or may not do when regulating navigators. “The proposed amendment to 155.225(d) would also clarify that (Navigators and) certified application counselors must meet any licensing, certification or other standards prescribed by the State so long as such standards do not prevent application of the provision of Title I of the Affordable Care Act. “ (Page 205) Language repeated in section 155.210 Navigator program standards (Page 243). Note that little of this is new, having been stated by HHS on April 13, 2013.

Following is a list from *RIN 0938-AS02 Patient Protection & Affordable Care Act: Exchange and Insurance Market Standards for 2015 and Beyond* . Note that Senate Bill 1268 and House Bill 1522 do not conflict with these. Also, please note that in an ideal world, navigators should be licensed insurance brokers but the Patient Protection Affordable Care Act does not see it that way. States may not:

- Require E&O insurance
- Require a producer license
- May not allow navigators et al to receive compensation directly or indirectly from a health insurance company
- Require referrals to another party
- Impose a requirement that prevent navigators et al from providing services to all persons to whom they are required to provide assistance

To put it another way: There is no Federal prohibition on requiring navigators et al to register with a state’s insurance department or to undergo a state criminal background check.

Conclusion

The National Association of Insurance Commissioners (NAIC) Health Insurance and Managed Care Committee on June 27, 2012 adopted a document that reads in part **“However, HHS regulations permit states to develop navigator-specific licensing or certification requirements...States will need to determine who will be responsible for monitoring navigator behavior and performance.”**

The National Council of Insurance Legislators (NCOIL), of which Senator Corman is a leader, also passed a resolution stressing the need for state oversight.

NCOIL RESOLUTION March 8, 2013

NOW, THEREFORE BE IT RESOLVED that the National Conference of Insurance Legislators urges states to enact a licensing framework and regulatory regime for navigators and similar assisters that:

- ***Defines the permitted scope of a navigator and assister’s activities and prohibits them from recommending particular health plans, offering advice about which health plan to choose, and engaging in similar activities;***
- ***Includes appropriate and meaningful training, continuing education, and examination requirements;***
- ***Ensures that navigators are subject to the jurisdiction of state officials and the state insurance code, including privacy, market conduct, and unfair trade practices acts;***
- ***Enables regulators to take enforcement action – such as assessing fines or suspending or revoking a license – when navigators engage in improper conduct, commit fraud, or violate state marketplace and consumer protection requirements;***
- ***Requires prospective navigators and similar assisters to undergo criminal and regulatory background screening;***
- ***Makes navigators and similar assisters responsible and legally liable for their actions and establishes financial responsibility requirements to ensure that consumers are made whole whenever wrongful or negligent acts are committed;***
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Establishes any other appropriate and relevant consumer protection and market conduct standards; and

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Ensures that navigators and similar assisters receive the due process protections afforded to other insurance licensees;

This is what Senate Bill 1268 and House Bill 1522 do. What this legislation does is to provide prudent and necessary regulatory oversight and reinforces the legitimate regulatory function of the PA Insurance Department. Navigators, certified application counselors, Champions of Coverage, and other “assisters” are all involved in the business of insurance because the outcome of what they do is enrollment into the exchange. Privacy of information used in an insurance transaction, a criminal background check as required for persons in the business of insurance (Violent Crimes Act, section 1033), and above all, registration are functions of a properly regulated insurance marketing environment.

PAHU would like to continue to be a resource for this committee in this and in other areas of Patient Protection Affordable Care Act implementation. Thank you again for allowing us to testify.