



**Health Benefit Exchange Authority
Draft Executive Board Meeting Minutes
Wednesday, July 9, 2014
5:38 PM**

Members present: Deborah Carroll, Kate Sullivan Hare, Dr. Leighton Ku, Diane Lewis, Kevin Lucia, Chester McPherson (by telephone)

Members absent: Dr. Henry Aaron, Dr. Joxel Garcia, Khalid Pitts, Wayne Turnage

I. Welcome, Opening Remarks and Roll Call, *Diane Lewis, Chair*

There was a roll call of members present to confirm that there was a quorum. A quorum was met with four voting members present (Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia).

II. Approval of Agenda, *Diane Lewis, Chair*

Ms. Lewis reported that the executive board meeting procedures have been updated. As a part of that, the agenda that is publicly posted will always be a DRAFT agenda. The Board will vote to approve a FINAL agenda at each meeting. Board members have received a copy of the REVISED agenda for the July 9, 2014 Board Meeting with changes highlighted. Once adopted, the REVISED agenda becomes the FINAL agenda. Ms. Lewis asked if there were any changes to the REVISED agenda. There were none. The revised agenda was unanimously approved by roll call vote. Voting in favor were Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

III. Approval of Minutes, *Diane Lewis, Chair*

The minutes from the June 17, 2014 meeting was unanimously approved by roll call vote. Voting in favor were Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

Ms. Lewis welcomed a new board member, the Interim Director for the Department for Human Services as appointed by the Mayor, Deborah Carroll, taking over for David Berns. Ms. Lewis noted that in Ms. Carroll's previous role as Administrator for DHS' Economic Security Administration the Board has already worked closely with her. Ms. Lewis officially welcomed Ms. Carroll into this new role.

Ms. Lewis noted that Executive Board Elections for Chair, Vice-Chair, Treasurer and Secretary will be held at the regularly scheduled September board meeting on September 10, 2014.

Ms. Lewis inquired whether an August board meeting, at the regularly scheduled second Wednesday of the month, August 13th, will work, considering member vacations and a potential inability to reach a quorum. It was determined a quorum was questionable, so the Board will not meet on August 13, 2014.

IV. Executive Director Report, Mila Kofman, Executive Director

Ms. Kofman echoed Ms. Lewis welcome to Ms. Carroll's addition to the Board.

- 1) *CCIIO*. Ms. Kofman reported that CCIIO had held a meeting in late June of the state-based marketplaces. She stated it was an excellent opportunity to share and learn from other states' experiences.
- 2) *Standard Plans Advisory Working Group*. Ms. Kofman reported that Dr. Ku had agreed to chair the Standard Plans Advisory Working Group, and Dania Palanker had agreed to vice-chair. Mr. McPherson had to bow out of chairing due to scheduling conflicts. However, Mr. McPherson agreed to provide staff support as necessary. Mary Beth Senkewicz will lead the staff support, assisted by Brendan Rose and Jenny Libster as needed. An announcement had been circulated and posted to the HBX website soliciting members. Ms. Kofman thought the working group would start meeting at the end of July. She noted that the work would be time-intensive in order to be done by October. She also noted that the issue of recommending a reasonable deductible for pediatric dental benefits when they are embedded in a QHP would be addressed by the working group.

Mr. Lucia stated that it was conceivable that the new working group would require actuarial assistance. Ms. Kofman replied that Mercer is one of our consultants so they could be tapped if needed.

- 3) *Enrollment*. Ms. Kofman reported that DC Health Link was still enrolling people. Persons with life events (baby, loss of job, etc.) have special enrollment periods and if you qualify for Medicaid or are a small business, you can enroll at any time. Present enrollment figures:

Individual Market – 12,530

SHOP - 13,779

Medicaid - 24,750

Total - 51,059 covered lives

- 4) *Rates and Forms*. Ms. Kofman reported that proposed rates and forms for 2015 had been filed with DISB. DISB recently issued a press release noting that CareFirst had re-filed with lower rates.

Mr. Lucia asked if HBX would review the rates as well. Ms. Kofman replied that the same as last year, HBX contractor Mercer would review the rates and provide feedback to DISB. DISB, of course, has authority to approve or disapprove the rates. Mr. McPherson stated that DISB welcomes any feedback from HBX for DISB's consideration.

V. Executive Board Business Operations Committee Report, Diane Lewis, Chair

Ms. Lewis reported that the Committee met on Tuesday, July 1st. The Operations Committee will be working closely with HBX staff as HBX develops policies and operating procedures for the operations of the Health Benefit Exchange Authority. In addition, the Committee specifically discussed the policies regarding the application of the conflict of interest provisions in section 11 of the DC Health Benefit Exchange enabling legislation, particularly the prohibition on board members and staff acting as an agent or broker. Staff is in

discussion with the Board of Ethics and Government Accountability with regard to application of this provision and its interaction with other District ethics laws.

VI. Executive Board Finance Committee Report, *Diane Lewis, Member*

Ms. Lewis reported that the Finance Committee met July 8th for its monthly meeting.

MONTHLY FINANCIAL UPDATE: HBX staff reviewed spending for the preceding month. Of the \$79 million in grant funding available, expenditures and obligations to date total approximately \$30 million. That leaves HBX with \$49 million available.

Ms. Lewis reported that of the remaining funds, most is slated for ongoing IT needs and spending will begin shortly. Part of the reason these funds haven't been expended yet is that in order to spend the IT funds, we need to apply to CMS to release those funds. On June 24th, we obtained the release of funds for the recent \$7.9 million supplemental grant we received so that spending will proceed now. Staff is in the process of applying for the release of \$22.5 million in IT funds in our Level 1 grant. Also, she reminded Board members that the staff is working on an MOA with DHS for \$19 million for IT spending.

HOW TO PRESENT FINANCIAL INFORMATION: The committee continued its discussion from the last meeting with regard to how to better present the financial status of the Health Benefit Exchange Authority to the full Board and display that information for the public. Staff is making progress in this regard and we hope to soon be able to put in place an interim report that will clearly describe our grant spending. Staff is also in the process of refining the agency organization structure— which will require sign off from the Mayor's office – in order to present our budget in a way that serves the public interest better. The goal is to have the reorganization approved prior to the start of the new fiscal year in October 2014 so that we can begin the new fiscal year with the new reporting.

VII. Executive Board Research & Data Analysis Committee Report, *Dr. Leighton Ku, Chair*

Dr. Ku reported that the Committee was pursuing a two-track process for surveying enrollees. The first phase would be conducted in-house and use software to send a very brief survey to enrollees in individual QHPs. The second survey would be fancier – a contractor would probably be needed – to survey the population in more depth. The three targets for both surveys are: People enrolled in Qualified Health Plans, Medicaid enrollees, and SHOP enrollees. Ms. Kofman added that the software for the first survey is the same used by the Massachusetts Connector after it got started; the software is tested, safe and secure. She added that a third phase would survey small employers.

Ms. Carroll inquired about the context for the Medicaid questions. Ms. Kofman replied that we want to know if people were previously uninsured, that could inform our strategy for the next open enrollment period. Ms. Sullivan Hare shared an interest in the small employer survey instrument. Ms. Kofman stated that we would just use what Massachusetts did – the questions have been tested, and we do not have time to reinvent the wheel.

Dr. Ku stated the biggest problem would be the non-response weighting strategy. He and Mr. Lucia did not have a problem sharing the questions with Ms. Sullivan Hare if there was sufficient time to do so.

Mr. Lucia stated that at some point, we need to figure out the experience of consumers with their QHPs, such as the level of out-of-network activities, and a review of external review activities. He stated that the ACA gives authority to review those activities.

VIII. Discussion Items

- Amending the Exceptional Circumstances that Qualify an Individual for a Special Enrollment Period – *Dania Palanker, Standing Advisory Board Member*

Ms. Palanker stated the DC law allows domestic partners to have health coverage. But the SEP previously adopted by the Board did not recognize leaving a domestic partner to do abuse or divorce. The Explanation of Benefits (EOB) going to the former partner is a problem. The Standing Advisory Board (SAB) is recommending that the Board amend the previously-adopted SEP to include domestic partners.

Alex Alonso, HBX staff, also reported that at the previous meeting, Mr. Lucia had asked about individuals who find that they are newly eligible for a tax credit or cost-sharing reduction and they are not enrolled. Staff researched the issue and discovered that the federal regulation originally included these individuals. However, in July CCHIO changed the language to include only enrolled individuals because of adverse selection considerations. Thus, staff concluded that under the doctrine of conflict preemption, HBX cannot include those individuals in an SEP. Mr. Lucia said his colleagues had come to the same conclusion, but it did not make sense to him.

Mr. Alonso also related that Claire McAndrew, vice-chair of the SAB, had reached out to him regarding other trends concerning SEPs. Her thought was that the Board should give the SAB the authority to review these trends at any time, rather than formally sending them to the SAB one by one. No Board member objected to the change in process.

- Grant Modification of DC Health Link Assister Grant to African Methodist Episcopal Church, Second District Religious, Educational and Charitable Development Projects, Inc. (AME Second District RED) – *Mila Kofman, Executive Director*

Ms. Kofman reported that staff wanted to extend the AME contract to the end of the 2015 open enrollment period, and add \$50,000 to the contract. The Finance Committee has approved the extension and addition of funds.

- Grant Modification for Restaurant Association Metropolitan Washington – *Mila Kofman, Executive Director*

Ms. Kofman reported that the RAMW was critical to our outreach to the restaurants in the District. The grant modification would add \$145,000 for the second year.

Dr. Ku thought the outreach would need to shift to HBX eventually. Ms. Kofman said in round one, we targeted workers with no job-based coverage or non-workers with no source of coverage. The focus would shift for round two. Dr. Ku asked that staff think about the transition.

Ms. Sullivan Hare questioned the details of the grant arrangement. She agreed that we should use Andy Shallal and Busboys and Poets again, but she questioned Chef Geoff's being on the list as there were hundreds of employees working in those restaurants. Ms. Kofman replied that large restaurants have employees that do not qualify for coverage. Ms. Sullivan Hare then asked about the article she had seen about the private exchange for restaurants. Ms. Kofman stated that she did not see it as competition because it is targeting restaurants with 100+ employees. HBX wants to get the people it does not insure – many of them will be eligible for tax credits. In fact, we plan to reach out to the organization and see if we can partner.

- Contract Extension for Business Strategy Consultants – *Mila Kofman, Executive Director*

Business Strategy Consultants is one of our CBE vendors. Staff wants to increase its funding by \$155,700 to a total of \$338,000. The Finance Committee has approved the addition of funds.

- Contract Modification for Carahsoft Technology Corporation – *Mila Kofman, Executive Director*

The Carahsoft modification is for the renewal of Salesforce licenses, 100 of which will expire shortly. This contract is cost-allocated and HBX share is \$173,573. The Finance Committee has approved the modification. Ms. Kofman explained that this is the software we use to connect Contact Center and to view the consumer file.

- Contract Modification of an Existing DHS Contract with Accenture – *Mila Kofman, Executive Director*

Accenture is our IV&V vendor (independent verification and validation). We must have an IV&V to monitor IT implementation, and we need them since we are still adding functionality. This contract belongs to DHS and it is not cost-allocated. Our cost is \$150,000. The Finance Committee has approved the modification.

- Hobby Lobby Update – *Mary Beth Senkewicz, Associate General Counsel and Policy Advisor*

Ms. Senkewicz stated that plaintiffs were family-owned, closely-held for-profit corporations. Both families hold sincere religious beliefs and oppose abortion. Four FDA-approved contraceptives “may” operate after fertilization of the egg to prevent implantation. The case was decided under the Religious Freedom Restoration Act of 1993 (RFRA), not the free exercise clause of the First Amendment. RFRA analysis is three-pronged: 1) does the government requirement impose a substantial burden on a sincere religious belief; 2) is the government interest compelling; and 3) is the action the least restrictive means of serving the compelling interest.

Ms. Senkewicz stated that Justice Alito went through the history of RFRA, and analyzes whether the plaintiffs can assert a RFRA violation (i.e. can a for-profit corporation exercise religion?). Apparently before RFRA the Supreme Court had decided a string of free exercise cases using a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Then a case called *Smith* came along and the Court rejected the balancing test and found that “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” Congress responded to *Smith* by enacting RFRA, which essentially codified the pre- *Smith* balancing test, according to the dissenter Justice Ginsberg. According to the majority, however, it went further and the Court held that that closely-held for-profit corporations are protected by RFRA. The logic extends to publicly traded companies as well, but Alito concluded it was “unlikely” that such companies will assert RFRA claims.

Justice Alito went through the tax and penalty implications, and concluded that the burden on plaintiffs’ religious beliefs were substantial. The next conclusion was that the government did not meet the least restrictive means standard, a “demanding” standard. Alito says the easiest thing would be for the government to provide the benefit itself. A second option is what HHS already does in providing an “accommodation” for religious organizations – the self-certification that can be provided to the HHS or the insurer that sets off the series of events of the insurer providing the benefit outside of the employer-sponsored health plan. Alito says the Court is not actually deciding that question (that is the case the Little Sisters of the Poor filed on Colorado and that is in the Supreme Court pipeline) but talks an awful lot about it as an option, as does Kennedy in his short concurrence.

In dissent, Justice Ginsburg stated that until this litigation, “no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free

Exercise Clause or RFRA.” She states that would be expected because the exercise of religion is characteristic of natural persons, not artificial legal entities. She says the Court has recognized churches and other nonprofit religion-based organizations (the nonprofits HHS “conceded” were covered). These organizations exist to foster the interests of person subscribing to the same religious faith. She goes all the way back to Blackstone in 1765 to lay out the differences between for-profit corporations and religious nonprofits to conclude the former are not subject to RFRA protection. (Breyer and Kagan did not join in this section of the dissent, saying the challenge to contraceptive requirements fails on the merits and the Court need not decide whether for-profit corporations or their owners may bring claims under RFRA.)

Even if the plaintiffs were proper parties, Ginsburg concluded that any burden is not substantial. She states the Court is required to come to a legal conclusion that religious exercise is substantially burdened in order to sustain the challenge, an analysis the majority did not undertake. She distinguishes the legal conclusion from the sincerity of the belief, agreeing that the belief is sincere. However, she concludes that the connection between the plaintiffs’ religious objections and the contraceptive coverage requirements is too attenuated to be substantial. The decision to obtain any benefit is not made by the employer but by the covered person. Any linkage is interrupted by independent decision makers – the covered person and her health care provider.

Three days after the Hobby Lobby decision, the Court issued an injunction pending appeal, an extraordinary form of relief, to Wheaton College, saying the college did not need to use the form prescribed by the government to notify its third-party administrator of its religious objection, that same “accommodation it had cited in Hobby Lobby as a less restrictive means. That decision drew a scathing dissent authored by Justice Sotomayor and joined by Justices Ginsberg and Kagan. Justice Sotomayor said the college’s application comes nowhere near the high bar required for extraordinary relief, and imposes an unwarranted and unprecedented burden on the government’s ability to administer an important regulatory scheme.

In response to questions, Ms. Senkewicz noted that it was a federal law at issue, and she needed to think through what, if any, ramifications the decision held for state-based marketplaces.

IX. Public Comment

Ms. Lewis asked if there was any public comment on any of the issues raised. There was none.

X. Votes

- Resolution – *Amending the exceptional circumstances that qualify an individual for a special enrollment period*

It was moved and seconded to adopt the amendment to the Resolution “To define additional “exceptional circumstances” permitting a Special Enrollment Period.” The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

- Grant Modification of DC Health Link Assister Grant to AME Second District RED

It was moved and seconded to adopt the grant modification for AME 2nd District RED. The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

- Grant Modification for Restaurant Association Metropolitan Washington

It was moved and seconded to adopt the grant modification for the Restaurant Association of Metropolitan Washington. The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

- Contract Extension for Business Strategy Consultants

It was moved and seconded to adopt the contract extension for Business Strategy Consultants. The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

- Contract Modification for Carahsoft Technology Corporation

It was moved and seconded to adopt the modification to the Carahsoft contract. The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

- Contract Modification of an Existing DHS Contract with Accenture

It was moved and seconded to adopt the modification to the DHS Accenture. The motion passed unanimously with the following Board members voting yes: Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia.

XI. Closing Remarks and Move to Executive Session (contracting, personnel and litigation)

A motion was made to move into closed executive session pursuant to DC Code Sections 2-575(b)(2) and (10), and 31-3171.11 to discuss contracting, personnel and litigation. Upon a unanimous roll call vote of the members present, the meeting went into closed executive session. Ms. Sullivan Hare, Dr. Ku, Ms. Lewis, and Mr. Lucia voted yes. The meeting ended at 7:15 p.m. and the Executive Board moved into closed executive session.

XII. Adjournment

The meeting adjourned at 8:45 p.m.