political updates

Creating Access in Changing Times: Transitioning New Hampshire Midwives to the Commercial Insurance Market

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Access to professional liability insurance has shaped the development of midwifery in the United States. For Certified Nurse-Midwives (CNMs), the unavailability of insurance slowed development of the profession and led to multiple practice closures in the mid-1980s. The effects of high premium costs, insurer-imposed restrictions on place of birth, uncertain understanding of vicarious liability in consultative relationships, and insurer-mandated practices that make collaboration with physicians difficult continue to impact nurse-midwifery practice today.[1] High costs, limited access, and insurer practice standards that consider the midwifery model a deviation from the "standard of care" create significant barriers to community and independent practice.[1] In this article we describe New Hampshire Certified Midwives' legislative action related to the closure of their professional liability insurance provider, the New Hampshire Medical Malpractice Joint Underwriting Association (NHMMJUA). In this story, midwives partnered with policy-makers and the New Hampshire Insurance Commission to ensure continued access to professional liability insurance not only for certified midwives, but for other vulnerable providers in the state as well.

Nationally, the United States Midwifery Education, Regulation, and Association (USMERA) collaboration has created unprecedented momentum toward licensure in all states, a trend that expands opportunities and, in some instances, introduces the obligation to carry insurance. Although licensure remains the primary barrier to practice for CPMs, it is not the only potential barrier; as increasing numbers of CPMs work within the maternity care system, new challenges will arise. CPM participation in Medicaid and health insurance plans is a critical component of scaling up midwifery, particularly as the Affordable Care Act expands access to health insurance; it is no coincidence that states in which women can use their health insurance at the birth setting of their choice have higher rates of birth center and home birth. However, some of these Medicaid and insurance plans require provider participants to carry professional liability insurance. In New Hampshire, professional liability insurance is required for midwives working in birth centers, for midwives who take NH Medicaid through the state's two managed care companies, and by most third-party payers. Finally, the individual midwife's own life circumstances are also a factor. As more young women enter the profession envisioning a long and sustainable career, they may prefer to carry insurance for their own protection.

As Certified Professional Midwives become a more visible part of the landscape of maternity care delivery in the United States, the potential effects of insurer policies on community midwifery practice also become apparent. For instance, although NHCMs legally are permitted to attend VBACs at home, and this service was covered by the NHMMJUA, it is specifically exempt from coverage by available commercial insurers. This illustrates a significant concern for midwives: that the commercial insurance market will have the power to redefine

their scope of practice. While New Hampshire was able to craft a temporary solution to the problem of affordable professional liability insurance, challenges remain in aligning insurance options with the midwifery model of care.

New Hampshire Midwifery on the Rise

For generations, babies have been born at home in New Hampshire. The state's direct-entry midwives, called New Hampshire Certified Midwives (NHCMs), were first issued voluntary licenses in 1981. Mandatory licensure occurred in 1999 under a statute including the following statements of purpose: "I) The general court finds that the practice of midwifery has been a part of the culture and tradition of New Hampshire since colonial days and that it is in the public interest to remove impediments to the practice of midwifery. II) For personal and economic reasons some New Hampshire citizens will have home births. It is the intent of the general court to preserve the rights of women to deliver children at home, to remove obstacles to safe out-of-hospital deliveries, and to assure quality care."[2] New Hampshire has long been a national leader in supporting the rights of its citizens to choose where, how, and with whom their babies are born. Importantly, the state also has a strong record of supporting midwives in their independent practice.

During the 1978 insurance market crisis, when many healthcare providers were unable to access professional liability insurance at affordable rates, the state established the NHMMJUA. Since then, the NHMMJUA has provided affordable coverage to any state-licensed provider, including midwives, focusing on risk-sharing to insure all who seek coverage. In 1993, the state began licensing independent, freestanding birth centers,[3] and in 2008 the state mandated the reimbursement of midwifery services provided by certified midwives, including home birth and birth in independent birth centers, by all health insurance providers covering maternity care, including Medicaid and private insurers.[4]

The NHMMJUA's affordable coverage helped to nurture and increasingly mainstream midwifery in the state. Coverage availability allowed birth centers to flourish, since state-licensed birth centers are required to carry professional liability insurance. Today, more than 50% of the state's out-of-hospital births each year take place in three freestanding birth centers across the state, and the number of babies born in birth centers has risen over the past 10 years, surpassing the home birth rate for the first time in 2013.[5] NHMMJUA coverage also allowed midwives to be reimbursed by Medicaid and as in-network providers by private insurance companies, with the state's 2008 health insurance mandate making access to professional liability insurance even more advantageous. By 2013, nearly 90% of all births in New Hampshire's birth cen-

ters were paid for with insurance: 65% by private insurance, and 23% by Medicaid.[5]

NHMMJUA in Decline

Then, in 2014, spurred by an unusual set of circumstances, the future of the NHMMJUA was called into question. The New Hampshire State Legislature convened the Insurance Commission to determine whether the NHMMJUA was still necessary in today's relatively healthy commercial insurance market. In a 2010 attempt to balance the state budget, the state attempted to seize $110 million dollars of surplus funds from the NHMMJUA. A policyholder initiated and won a class action lawsuit on behalf of all 6,240 policyholders from the NHMMJUA's prior 26 years of operation, stopping the state's seizure of funds, and resulting in a payout to policyholders of $0.36/$1.00 of all premiums paid since 1986. Checks arrived in the mailboxes of thousands of policyholders. But this lawsuit also corresponded with, and perhaps contributed to, a sharp decline in the number of enrolled policyholders.[6]

By 2013, there were only 300 policyholders, including NHCMs, and the NHMMJUA was found to be increasingly financially unviable, with dwindling subscribers and skyrocketing administrative costs.[6] In 2014 the New Hampshire Insurance Commission was tasked by the legislature to assess whether or not professional liability insurance was readily available to the state's providers, and whether the NHMMJUA was still necessary. In January 2015, the Insurance Commission released its findings that private professional liability insurance was in general readily available to the state's various providers.[7] At the same time, HB 508 was introduced into the State House of Representatives to bring about an orderly closing of the NHMMJUA.[8]

The prospect of a dismantled NHMMJUA without viable alternatives for coverage threatened the structure of accessible community midwifery services in New Hampshire. In response, the state's midwives began organizing in November, 2014, to secure access to affordable professional liability insurance, recognizing it as one of the keys to maintaining both their ability to practice and their patients' access to care. The state's birth centers, critically dependent on income from facility fees and in-network insurance reimbursements, anticipated closure without access to professional liability insurance. Some individual midwives also preferred to practice with insurance, believing that as their services became more mainstream, potential liability issues might increase.

Organizing for Access

After testifying at a public hearing in November, a number of midwives were invited to a meeting with the New Hampshire Insurance Commission the following month. At this meeting, midwives educated the Insurance Commission on the state's history of supporting independent midwifery practice, and also clarified the state and national landscape of midwifery licensure. Midwives shared documentation of their excellent maternal and neonatal outcomes and the cost-effectiveness of their care. Additionally, they outlined the impact that lack of access to affordable professional liability insurance would have on midwifery services in the state: without it,

WASHINGTON: WA STATE MIDWIFERY AND BIRTHING CENTER MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION (WA JUA)

The WA JUA was founded in the 1990s because the commercial liability insurance market excluded independent midwives and freestanding birth centers - in fact, midwives were the only group without access to the commercial market. At the time, the state was already supportive of out-of-hospital midwifery care, recognizing that midwives saved the state money as maternity care providers, and had strong consumer backing. The legislative basis for the WA JUA is detailed in RCW 48.87 (http://apps.leg.wa.gov/Rcw/default.aspx?cite=48.87&full=true) and Chapter 284-87 WAC (http://app.leg.wa.gov/WAC/default.aspx?cite=284-87&full=true).

The WA JUA is a non-profit entity with a board of directors that includes 3 insurance company representatives and 3 midwives, who together decide whether to settle cases, introduce new policy programs, and adjust premium costs, and with whom to contract for administration of claims, risk management, and policy administration. Changes to pricing or programs must be approved by the state's insurance commissioner, a representative of whom attends all board meetings. The initial start-up costs of the WA JUA's administration were split among all of the state's commercial insurers offering liability insurance based on their market share. Relative to the net worth of these commercial insurers, the cost paid to cover the WA JUA is minimal. Although the WA JUA is technically in debt to these commercial insurers, it will only pay off this debt if it closes.

The WA JUA wrote its first policy in 1998, and currently provides approximately 120 policies. Midwives and birth centers pay premiums that ideally cover any pay-outs needed. Because of the low number of policy-holders, all of whom are insured at the $1 million/$3 million level, if the WA JUA does not have enough money to fully pay out a claim, any remaining amount is split among the state's commercial insurers based on market share. The initial premiums were set too low to withstand losses, and in 2004 rates doubled. Since then, there has not been an increase in premiums, and the WA JUA has been fully self-supporting in paying out claims. Current rates are listed online at http://www.washingtonjua.com/.

OREGON: RURAL MEDICAL PRACTITIONERS INSURANCE SUBSIDY PROGRAM

Since 2004, the Oregon Office of Rural Health has provided subsidies for professional liability insurance to qualifying physicians, osteopathic doctors, and nurse practitioners. The program is intended to increase rural access to healthcare by reducing the financial burden on providers choosing to practice in remote areas.

Providers who wish to take part must insure themselves with a program-approved underwriter at limits not exceeding $1 million per occurrence and $3 million aggregate, submit an affidavit to the OORH, and pay their premium. At that point, approved providers will receive reimbursement at the following rates:

- 80% for doctors specializing in obstetrics and nurse practitioners certified for obstetric care
- 60% for doctors specializing in family or general practice who provide obstetric services
- 40% for doctors and nurse practitioners engaging in one or more of the following practices: family practice without obstetrics, general practice, internal medicine, geriatrics, pulmonary medicine, pediatrics, general surgery, anesthesiology
- 15% for sub-specialties not named above

Details of the program, including its legislative basis, can be found online: http://www.ohsu.edu/xd/outreach/oregon-rural-health/providers/rural-insurance-subsidy.cfm

the state's freestanding birth centers would not be able to sustain themselves, and the more than 30% of clients using Medicaid to pay for their midwifery services might no longer be able to access community midwifery care.[5]

Midwives pointed out that nationwide, only two companies offered professional liability insurance to CPMs/NHCMs and CNMs who work independently in freestanding birth centers or in homes, with rates ranging from affordable to exorbitant. In addition to concerns about affordability, it was clear that midwives would have a unique problem when the NHMMJUA closed: they were the only provider specialty that did not have robust options for coverage in the commercial market. While challenging for all independent midwifery practices – thriving small businesses throughout the state – this uncertainty about access to coverage was especially difficult for birth center owners, who had made multi-year investments developing infrastructure for their businesses, including property and building improvements to meet state requirements. Finally, midwives emphasized that eliminating the NHMMJUA jeopardized New Hampshire's position as a national leader in supporting community midwives and independent birth centers, compromising the state's clear intent outlined in 1999 to "preserve the rights of women to deliver children at home, to remove obstacles to safe out-of-hospital deliveries, and to assure quality care."[2]

At the same time, midwives researched alternative structures employed by other state JUAs, as well as other stakeholders' creative efforts to help providers access professional liability insurance, including programs in Oregon and Washington. Additionally, in part because New Hampshire has the nation's largest state legislature with 424 members elected every two years, midwives decided to hire a lobbyist who could help them identify allies, keep track of evolving legislation, and help to draft bill language that might be more favorable not only to midwives, but to all providers negatively impacted by the NHMMJUA's imminent closure.

The NH Insurance Commission Report and HB 508

The New Hampshire Insurance Commission's January 2015 report found that insurance was in fact available to the vast majority of the state's healthcare providers. NHCMs were a notable exception, having the fewest private market alternatives to the NHMMJUA. Other affected provider groups included physicians in claims-made policies within 5 years of retirement, whose options for tail coverage with a new insurer were prohibitively expensive. Critically for midwives, the Insurance Commission found that "[i]nsurance may be expensive, even unaffordable, but still considered readily available… [T]he cost of insurance is not a factor in determining availability" (p 5).[7] Further, despite there being only two insurance providers for community midwives, the Insurance Commission found that "[m]edical malpractice insurance may be offered by relatively few insurers and still be found to be readily available" (p 6).[7] And, even though the available insurers did not cover the full scope of practice of NHCMs, the Insurance Commission confirmed that "[i]nsurance carriers may limit the manner in which healthcare providers practice, and insurance still may be considered readily available"(p 5).[7] Accordingly, HB 508, introduced into the State House in early January, proposed a dissolution of the NHMMJUA, finding it no longer in the public's interest to provide a state plan for professional liability insurance.

Midwives Respond

The Insurance Commission's report left the majority of NH midwives feeling uneasy about their future ability to practice. At the time of the report's publication there were still only two identified plans willing to cover midwives in community settings, one of which quoted premium rates 400% higher than the NHMMJUA's rates. Midwives who owned birth centers, accepted NH Medicaid, and were required to carry insurance by third-party payers feared they would be left in breach of their state and payer contracts if the one affordable plan on the commercial market changed its terms or discontinued its offering. In January of 2015, a working group of NH midwives was formed to address both access to and affordability of professional liability insurance for community midwives.

In early 2015, the workgroup began advocating with legislators in the House and Senate, and also made the decision to hire a lobbying firm to help with representation and strategy. Once a firm was chosen, lobbyists and midwives collaboratively defined the issue at hand, wrote talking points, identified other stakeholders who might serve as allies, identified and communicated with sympathetic senators and representatives, and evaluated conflicts of interest. With this preparatory work complete, the lobbyists attended all meetings and public hearings with the midwives, represented the midwives when they could not be present, utilized their relationships at the capitol to bring the midwives' issue forward, and worked on several drafts of language for a bill amendment. The lobbyists also gave

HIRING A LOBBYIST

A lobbyist is a professional ally in legislative processes. Lobbyists research issues, educate elected officials, represent their clients' interests, attend hearings, and monitor legislative actions relevant to their clients' needs. Relationships with lobbyists are structured according to their clients' goals. Lobbyists can be engaged on an ongoing basis (a monthly retainer) or for a specific issue. A good lobbyist will have strong relationships with policy-makers and legislators, expertise in the legislative process and specific workings of your state or local government, and will be able to develop and implement an effective policy strategy.

We spoke with state leaders from NH and WA who offered the following tips:

- Use your network of clients when you start your search. You probably already know someone who could recommend a good firm.
- Don't expect your lobbyists to do all of the work—partnership is key. They will work to understand your issues, but the strongest partnership combines their legislative expertise with your midwifery expertise.
- Have a clear contract and plan for communication.
- Midwives still need to attend hearings, even when they're represented. It shows you care, and there will be questions that you can answer more effectively.
- Be alert for potential conflicts of interest. For example, a consideration in New Hampshire was whether or not potential firms also represented commercial insurers.
- Hire a lobbyist who is smart, personable, and has experience—even if he/she is relatively new to lobbying.
- It's helpful if the lobbyist has spent time in the legislature and knows the players and the system.
- If possible, hire a lobbyist who is personally committed to what you're trying to do.
- It helps if a lobbyist has other, well-resourced clients—he/she may be in a better position to give you a discounted rate on services.

advice on legislative strategy, while the midwives remained content experts in the areas of midwifery history and practice in New Hampshire.

In March, the NH House passed an amended version of HB 508, which included technical corrections to the bill's language and an amendment addressing tail coverage. This amendment, which was written to address the needs of physicians and providers nearing retirement, requires the NHMMJUA to "calculate the amount of tail coverage premium collected, using reasonable actuarial methodologies and standards of practice, and return the tail coverage premium to the policyholder."[9] Midwives insured with claims-made policies would also be beneficiaries by the terms of this amendment. Meanwhile, the workgroup and allies had conceived of another plan to specifically address the needs of community midwives: a temporary hardship fund to provide a financial subsidy to midwives demonstrating an inability to secure affordable coverage on the commercial market. A strategic decision was made to add this plan, in the form of an amendment, to the bill during the Senate cycle.

At the end of March, 2015, the now-amended bill moved from the House to the Senate. State senators convened a meeting of stakeholders, including midwives, lobbyists, and representatives from the Insurance Commissioner's office, to discuss the midwives' concerns, enforceable amendment language, and whether unencumbered funds were potentially available to set up a hardship grant program. April was spent drafting "hardship fund" amendment language. The lobbyists were the primary authors of the amendment, with commentary from the NH Insurance Department (NHID). The NHID's participation was neutral to the issue, but their expertise helped create language that was clear, enforceable, and relevant to the technical aspects of the NHMMJUA's closure. HB 508, now containing an amendment addressing a return of tail coverage plus an amendment creating a hardship fund for NH midwives and other licensed healthcare providers, passed its committee of conference on June 17 and was signed into law in July, 2015.

In 2016, the NHMMJUA will enter its final year of operation. The Hardship Grant Application Process was approved by the NHID in October of 2015. A $2 million fund will "be available to provide grants payable directly to midwives certified under RSA-326-D and other healthcare providers who are licensed or approved by the state… who can demonstrate… that they will suffer significant adverse economic hardship as a result of an increase of at least 25% in the cost of medical malpractice insurance coverage in the private market…"[9,10] The hardship grant fund will consist of money allocated from the NHMMJUA surplus and continue until the funds are exhausted or until the receivership of the NHMMJUA ends, whichever comes first. Any excess funds remaining at the close of the receivership will be donated to a charity that aids healthcare providers working with medically underserved populations. Midwives with claims-made coverage will be eligible for return of their tail coverage premiums paid.

The amendments to HB 508 represent an important, if limited, victory for New Hampshire midwives. The amendments provide time and financial relief for midwives who depend on their insurance access to practice, and creating them strengthened the midwifery association's relationships with legislators. Working with lobbyists helped to develop midwives' skill with legislative processes, and established a valuable working relationship that may be utilized in the future. However, challenges remain, including the temporary nature of the hardship fund, limited options for insurance plans on the commercial market in a climate of state and payer-mandates to carry insurance, and real and potential practice restrictions imposed by those plans.

New Hampshire was able to mount an effective response to the NHMMJUA's impending closure for several reasons, including having a strong and well-organized midwifery association; the presence of allies in the legislature, especially the Senate; the ability to quickly select and approve funding for a lobbyist; and the existence of a long history of legislatively supported midwifery practice in the state. New Hampshire's experience makes a strong case for the importance of midwives' continued investment in their state and national professional associations, as these associations provide the organizational framework and hold the institutional knowledge necessary for rapid planning and implementation of legislative strategy. In an effort to improve the commercial market, midwives with access to insurers would do well to invest time in educating underwriters about the midwifery model of care and the need for affordable and non-restrictive coverage for community midwives. Improving the commercial market by increasing options and lowering cost continues to be a critical factor in preserving community midwifery practice and bringing it to scale. ◉

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WE'D LIKE TO HEAR FROM YOU!

Write in and share the status of access to professional liability insurance in your state. We would also like to hear about any creative solutions or approaches midwives in your state have taken to address the issue. We will share them in the next issue of MM. Send your response to ana@birthwisemidwifery.edu.

References

1. Rooks JP. Midwifery and childbirth in America. Philadelphia, PA: Temple University Press; 1997.
2. Midwifery, NH RSA 326-D (1999): http://www.gencourt.state.nh.us/rsa/html/XXX/326-D/326-D-mrg.htm
3. Birthing Center Rules, NH Code of Administrative Rules, Part He-P 810 (1993): http://www.dhhs.nh.gov/oos/bhfa/documents/he-p810.pdf
4. Accident and Health Insurance, Coverage for Certified Midwives, NH RSA 415-6-l (2008): http://www.gencourt.state.nh.us/rsa/html/XXXVII/415/415-6-l.htm
5. Vollmar A. A Report on Midwifery and the NHMMJUA from the New Hampshire Midwives Association. New Hampshire Midwives Association. Concord, NH; 30 Jan 2014: http://www.nh.gov/insurance/legal/documents/14.pdf
6. Vergo A. New Hampshire Midwives Association: JUA Dissolution. Presentation to NHMA meeting. Concord, NH: 10 Mar 2015.
7. State of New Hampshire Insurance Department. Report on Availability of Medical Malpractice Insurance, New Hampshire Medical Malpractice Joint Underwriting Association. Concord, NH; 19 Feb 2014: http://www.nh.gov/insurance/legal/legal_nhmmjua_phtestimony.htm
8. House Bill 508 (24 Jun 2015): http://www.gencourt.state.nh.us/legislation/2015/HB0508.html
9. Gencourt.state.nh.us [Internet]. New Hampshire: General Court; c2015 [updated 2015 Mar 11; cited 2015 Nov 19]. Available from: http://www.gencourt.state.nh.us/legislation/2015/HB0508.html
10. NH.gov/insurance [Internet]. New Hampshire: New Hampshire Insurance Department; c2015 [updated 2015 Nov 2; cited 2015 Nov 19]. Available from: http://www.nh.gov/insurance/legal/nhid_nhmmjua_recvrshp.htm