



Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Acting Commissioner

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

May 12, 2023

VIA ELECTRONIC MAIL
Hon. Xavier Becerra, Secretary
Department of Health and Human Services
Washington, DC

Dear Secretary Becerra:

The State of New York has always demonstrated a commitment to providing access to low cost, high value health coverage to as many eligible residents as possible. This includes individuals who are not currently eligible for Medicaid due to their immigration status.

We face a significant challenge providing and financing health care for the current population of undocumented New Yorkers. The recent influx of migrants arriving in New York has further strained the State's health care delivery system.

The State is seeking new solutions to solve this ongoing health care crisis and is considering whether to seek approval to establish a 1332 State Innovation Waiver for coverage for individuals otherwise ineligible due to their immigration status. Specifically, the State requests a formal opinion from the Department of Health and Human Services ("HHS") regarding the permissibility of use of funds in the Basic Health Program Trust Fund toward coverage for such individuals under a 1332 Waiver. This would offer an interim solution to this health care crisis and give the federal government and New York time to develop a longer-term solution. In the event that HHS does not approve the use of the Trust Fund balance, New York will seek additional federal funding to help the State offer health coverage to undocumented New Yorkers. Without federal assistance or action by Congress, the State would be unable to shoulder the significant financial burden in meeting the health care needs of this immigrant population.

We look forward to working with you to ensure that, working together, we can meet the health care needs of all New Yorkers. Thank you for your attention and assistance with this urgent matter.

Sincerely,

James V. McDonald, M.D., M.P.H.
Acting Commissioner



Administrator
Washington, DC 20201

June 6, 2023

James V. McDonald, MD, MPH
Acting Commissioner
Department of Health, State of New York
Empire State Plaza, Corning Tower
Albany, NY 12237

Dear Acting Commissioner McDonald:

Thank you for contacting Secretary Becerra on May 12, 2023 to request a formal opinion from the U.S. Department of Health and Human Services (HHS) regarding the permissibility of use of funds in the Basic Health Program (BHP) Trust Fund toward health insurance coverage for individuals who are otherwise ineligible for coverage due to immigration status. Specifically, you asked whether this result could be attained through a State Innovation Waiver under section 1332 of the Patient Protection and Affordable Care Act (ACA) (also referred to as a section 1332 waiver). The Secretary has asked me to respond on his behalf.

First, it is important to stress that the Biden-Harris Administration is committed to expanding access to affordable, quality health care coverage. The Centers for Medicare & Medicaid Services always stands ready to work with states and develop new and innovative ways to close critical health equity gaps to the extent possible under our statutory authority.

Regarding your question, section 1331(d)(2) of the ACA limits the use of BHP Trust Funds to reducing the premiums and cost-sharing of, or providing additional benefits for, eligible individuals enrolled in the BHP's standard health plans. BHP-eligible individuals must be lawfully present in the United States under section 1331(e)(1) of the ACA. Therefore, BHP Trust Funds may not be used toward BHP coverage for individuals who are not lawfully present. Additionally, section 1331(e)(1) of the ACA is not a waivable provision under section 1332(a)(2) of the ACA, and BHP Trust Funds may not be used to finance activities under a section 1332 waiver. We note, however, that there is no prohibition on using section 1332 waiver pass-through funding to fund state affordability programs (such as state subsidies) under the waiver plan for health insurance coverage for individuals not lawfully present, so long as the waiver plan meets the section 1332 statutory guardrails.^{1,2}

¹ For example, Colorado has an approved section 1332 waiver amendment under which the state is allowed, in part, to use its pass-through funding to expand access to affordable health care coverage for individuals not lawfully present. Additionally, Washington has an approved section 1332 waiver that allows for all Washington residents, regardless of immigration status, to enroll in qualified health plans and qualified dental plans through its state Exchange, and to benefit from state subsidies that lower premium costs.

² ACA sections 1332(b)(1)(A)-(D).

As you know, on May 12, 2023, New York submitted a section 1332 waiver application to waive certain ACA requirements to create a new coverage program that generally mirrors the State's Essential Plan and to expand eligibility for that new coverage program to certain residents with incomes up to 250 percent of the Federal Poverty Level who would otherwise be eligible for subsidized coverage on the Marketplace for plan years 2024 through 2028. As part of the State's proposed waiver, New York also is requesting to suspend its current BHP for the duration of the waiver period and to maintain its current BHP Trust Funds for future use under a BHP. New York's waiver application does not include a proposal to expand coverage to individuals not lawfully present. HHS and the Department of the Treasury (collectively, the Departments) are currently reviewing New York's section 1332 waiver application in accordance with applicable timelines and requirements.³

We appreciate New York's longstanding commitment to providing affordable health insurance coverage to its residents, and look forward to continuing to work with the State on this matter.

Sincerely,

A handwritten signature in blue ink that reads "Chiquita Brooks-LaSure". The signature is written in a cursive, flowing style.

Chiquita Brooks-LaSure

³ ACA section 1332(a)(4)(B), 45 C.F.R. § 155.1308 and 31 C.F.R. § 33.108.