Building a Strong Administrative Record

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What is an Administrative Record?

Administrative agencies engage in both quasi-legislative and quasi-judicial functions. Developing regulations through the notice and comment process reflects the agency's quasi-legislative capacity, while the federal agency's review and adjudication of a State's request for a Section 1115 experimental waiver is an example of the agency acting in a quasi-judicial capacity.

Administrative agencies must base their final agency actions, whether issuing regulations or adjudicating waivers, on the administrative record. The administrative record is a compilation of all materials that were "before" the federal agency at the time it made its final decision, including public comments submitted during any notice and comment period.

In a court challenge, with rare exceptions, the court determines the lawfulness of the agency's decision based exclusively upon a review of the documents contained in the administrative record for the contested decision. The federal agency is responsible for preparing the administrative record. It should include copies of all public comments and other documents, memos, or evidence the agency considered. The official administrative record is the "certified administrative record." The Administrative Record will be bates-stamped, meaning that every page is tagged with a unique number to make it easier to search through the record (*e.g.*, "AR 0005").

The court reviews both the agency's decision and the administrative record to determine whether the agency considered the correct factors, whether it entirely failed to consider an important aspect of the problem, and whether it reviewed relevant data and articulated a satisfactory explanation for its decision. If an agency refuses to consider evidence bearing on the issue before it or ignores evidence contradicting its position, this can be a basis for finding the agency action unlawful.

How do I contribute comments for an administrative record?

Individuals who want to comment on a state's Section 1115 waiver application can submit written comments to the U.S. Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS). Information about the comment period for each waiver and where

to submit comments are posted for each pending waiver on CMS's website: https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html.

Individuals who want to comment on a proposed regulation can also submit written comments to the agency. Information about the comment period and where to submit comments are included in the Notice of Proposed Rulemaking for the particular rule when it is published in the Federal Register: https://www.federalregister.gov/

What are some general considerations when submitting comments?

The overarching goal for advocates when submitting public comments is to ensure that the administrative record (1) identifies all important aspects of the problem and (2) includes all the evidence, data, and arguments that support your position. Therefore:

- ### Take time to introduce yourself

Establish your expertise. This can be clinical expertise, knowledge about the population, your experience as a Medicaid enrollee, etc. If you are a membership organization or represent individuals, discuss how many individuals/providers/organizations you represent.

- ### Cite to data, evidence, and studies whenever possible

Because the agency must review the relevant data, it is important to include in the comments any and all evidence, studies, or data that support your position. For instance, if rates of unemployment in certain counties are relevant to your argument, rather than simply assert "some counties have high rates of unemployment," you should also provide the agency with the data that supports that conclusion.

Evidence can also come in the form of experience. Use examples. This could include real life examples of how the proposal will affect people or providers, health coverage, or health access. Even if you do not have a real life example, you can use a generalized example based on your experience (*e.g.*, "Our organization frequently sees….").

- ### The more citations the better

The agency must not only demonstrate that it considered relevant data, but it must also demonstrate that any factual findings it makes are supported by "substantial evidence," when considering the record "as a whole." This means that the reviewing court will evaluate the balance of evidence in the record. Therefore, including multiple studies that reach the same conclusion can help establish that the record "as a whole" supports your position.

- ### Attach copies of studies and articles that are referenced

The agency is only required to consider evidence that is "before" the agency. Case law is thin on whether evidence that is referenced in comments (*e.g.*, in footnotes or endnotes) is actually "before" the agency.

The safest strategy is to attach copies of the studies, data, or other evidence that are referenced in the comments and support your position. If the comment contains too many studies to attach them all, at least attach the ones that are most important and/or least likely to be identified by other commenters.

> *Logistics of attaching comments*: Regulations.gov and other online comment pages typically allow users to upload multiple attachments (Medicaid.gov allows up to 10), enabling users to include copies of studies that have relied upon. If the number of attachments exceeds the on-line limit, you can combine PDFs into a "Binder" so that all of the studies and articles referenced in your comments are included as a single PDF that can be uploaded as one attachment with the text of your comment.

If it is simply not feasible to include the copies themselves, then to the greatest extent possible, be sure to include active and publicly accessible hyperlinks to each citation. Then, in the text of the comment, request that the agency specifically consider the evidence cited in the hyperlinks, such as the following:

> *Our comments include numerous citations to supporting research, including direct links to the research for the benefit of [the agency] in reviewing our comments. We direct [the agency] to each of the studies cited and made available to the agency through active hyperlinks, and we request that the full text of each of the studies cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act.*

- ## Aim for variation rather than duplicate or template comments

Encouraging variation among comments is helpful because it places a wider range of evidence and considerations before the agency. It has the added benefit of slowing down the agency's review and delaying a final agency action, because the agency should sort through each comment to determine what issues were raised, rather than grouping all form or template comments together.

For similar reasons, submitting multiple comments (with some variation) is more effective than submitting a single comment with numerous sign-ons. Multiple comments demonstrate to the court the balance of evidence in the record. You should encourage multiple comments, and reserve sign-ons for individuals or groups that will not comment without a sign-on.

Form or template comments can show broad-based public support or opposition for a proposed agency action. Because template comments raise the same arguments, data, and evidence, the federal agency can easily group these comments together and address them at once. However, that is not to say that template comments are unimportant. If you do not have access to data or studies or are not able to perfectly craft an argument, copy and paste from template letters. You can use a template word for word if you agree with it!

- ## Don't let perfect be the enemy of the good

Comments do not need to be perfect. The important thing is to raise the full range of concerns.