MINUTES OF THE COST TRENDS AND MARKET PERFORMANCE COMMITTEE

Meeting of December 3, 2014

MASSACHUSETTS HEALTH POLICY COMMISSION

THE COST TRENDS AND MARKET PERFORMANCE COMMITTEE OF THE MASSACHUSETTS HEALTH POLICY COMMISSION
Center for Health Information and Analysis
Daley Room, Two Boylston Street, 5th Floor
Boston, MA 02116

Docket: Wednesday, December 3, 2014, 11:00 AM – 12:30 PM

PROCEEDINGS

The Massachusetts Health Policy Commission's (HPC) Cost Trends and Market Performance (CTMP) Committee held a meeting on Wednesday, December 3, 2014 in the Daley Room at the Center for Health Information and Analysis (CHIA) located at Two Boylston Street, 5th Floor, Boston, MA 02116.

Members present were Dr. David Cutler (Chair), Dr. Paul Hattis, Dr. Wendy Everett, and Mr. Rick Lord.

Mr. Glen Shor, Secretary of Administration and Finance, was absent.

Dr. Cutler called the meeting to order at 11:05 AM.

ITEM 1: Approval of minutes

Dr. Cutler asked for any changes to the minutes from October 1, 2014. Seeing none, he called for a motion to approve the minutes as presented. Dr. Everett made the motion and Mr. Lord seconded. Members voted unanimously to approve the minutes.

Dr. Cutler introduced Mr. David Seltz, Executive Director, to review the day's agenda.

Mr. Seltz stated that the committee would hear an update on preliminary findings from the 2014 Cost Trends Report. He noted that the bulk of the day's agenda would be devoted to the discussion and potential advancement of the final proposed regulation governing Notices of Material Change (MCN) and Cost and Market Impact Reviews (CMIR).

Dr. Cutler stated that many of the topics included in the 2014 Cost Trends Report stemmed from discussions at the 2014 Cost Trends Hearing.

Mr. Seltz stated that he shared many of these preliminary findings with the HPC's Advisory Council members, who indicated significant enthusiasm for the findings of this report.

ITEM 2: Approval of the Final Proposed Regulation Governing Notices of Material Change (MCN) and Cost and Market Impact Reviews (CMIR) (VOTE)

Mr. Cutler reviewed the history of the proposed regulation governing MCNs and CMIRs. He stated that the committee endorsed the proposed regulation at its August 6 meeting. The proposed regulation was then approved by the board on September 3 and entered a public comment period. Dr. Cutler stated that the goal of the day's meeting would be to review the incorporation of public comment into the proposed final regulation, with the goal of advancing it to the full board for approval.

Mr. Seltz noted that, since March 2013, the HPC has been operating under interim guidance when reviewing MCNs. Mr. Seltz stated that the interim guidance was put in place to allow the HPC the time to research and develop rigorous final regulations to inform the MCN and CMIR process. He stated that the HPC would work with market participants to produce a guide to make the MCN and CMIR process as simple as possible. He noted that the adoption of a final regulation would not be the end of this process. The HPC will continue robust discussion on these topics to keep pace with the rapidly evolving market.

Mr. Seltz introduced Ms. Katherine Scarborough Mills, Deputy Director for Market Performance, to review the proposed final regulation.

Ms. Mills stated that the HPC has spent more than a year engaging extensively with a broad range of stakeholders and local and national experts to develop the proposed regulation. She added that the proposed final regulation provides clear guidance, where technically possible. It also allows the HPC to develop further guidance across select areas as data becomes available. She stated that the HPC would continue to engage stakeholders as it develops methodologies and analyses for providers.

Ms. Mills stated that more than a dozen public and private stakeholders submitted testimony on the proposed regulation. She noted that the HPC received additional comments from six stakeholders throughout fall 2014.

Dr. Everett asked whether the HPC received feedback from individual Massachusetts State Senators and Representatives. Ms. Mills stated that there was collective feedback from concerned Senators and Representatives regarding the expansion of the MCN process to include closures.

Ms. Mills introduced Ms. Kate McCann, Legal Analyst, to provide an update on the proposed final regulation.

Ms. McCann reviewed the table of contents for the proposed final regulation. She stated that the regulation is divided into 2 parts. The first part contains definitions, either drawn primarily from the statute and interim guidance, or agreed upon by the CTMP committee. She added that the remainder of the regulation addresses the process for filing MCNs and conducting a CMIR.

Ms. McCann stated that she would spend the remainder of the presentation reviewing additional comments on the proposed final regulation and respective recommendations. She noted that all of the public comments can be found on the HPC's website.

Ms. McCann reviewed recommendations in response to comments regarding further clarification of the term “clinical affiliation.” She stated that the HPC recommends exempting affiliations solely for clinical trials or graduate medical education programs from the definition.

Dr. Cutler asked if stakeholders only gave feedback on exempting clinical trials and graduate medical education programs. Ms. McCann stated that the HPC was generally asked about the scope of the definition with a specific concern around the types of affiliation without a market impact.

Dr. Cutler asked if there were other examples beyond affiliations for clinical trials and graduate medical education programs. Ms. McCann stated that there were others, but that these two exemptions reflect consistency with other HPC regulations, such as those governing the Registration of Provider Organization (RPO) Program.

Ms. McCann reviewed recommendations from comments asking for further clarification of the term “similar providers or provider type.” She stated that the HPC expanded the language in the Technical Bulletin to provide methodological detail on how the HPC defines “similar providers or provider type.” She added that the revised language not only describes the HPC’s approach to defining “similar providers or provider types,” but also notes that exemplary sets of similar providers and provider types are published in HPC’s CMIRs.

Dr. Cutler asked where in the Technical Bulletin there is further clarification around “similar providers or provider type.” Ms. Mills responded that it is in Section III, Subsection B of the Technical Bulletin.

Dr. Hattis asked whether a community teaching hospital would have to be compared to another teaching hospital or simply another community hospital. Ms. Mills noted that this definition is only relevant when the HPC is conducting a full CMIR. At that point, the HPC uses discretion when assessing similar providers.

Dr. Cutler stated that future MCNs and CMIRs would inform a knowledge base to expand this definition.

Dr. Cutler asked if there would be inherent tension between the inability to explicitly state this definition and providers’ desire to know exactly what to expect. Mr. Seltz stated that the MCN and CMIR processes differ based on transaction. He added that the HPC has addressed this by providing a broader definition that can be applied in a diverse range of transactions.

Dr. Hattis agreed that allowing for flexibility makes sense. Mr. Seltz stated that the HPC will continue to add to this definition as more CMIRs are conducted.

Dr. Cutler asked for clarification on which sections of the proposed regulation market participants would like more information. Mr. Seltz stated that the provider market has called for further clarity on “dominant market share.” As such, the HPC has set both quantitative and qualitative thresholds for this. Ms. Mills added that the comments received regarding the definition of “similar providers

or provider type" prompted the HPC to provide further technical guidance on the term and engage stakeholders more extensively.

Ms. Lois Johnson, General Counsel, stated that the regulation offers both a legal and procedural perspective. She stated that it is important to be clear to stakeholders regarding their obligations as well as those of the HPC. She noted that there would be opportunities for more extensive guidance as the process continues.

Dr. Everett asked for clarification regarding the description of "clinical affiliation," which includes "video technology" in the technical bulletin. Dr. Everett expressed concern that the inclusion of video technology could act as a barrier to quality and access transformation. Ms. Mills noted that there is a threshold for the trigger for filing an MCN for a clinical affiliation. She added that MCNs are not inherently negative.

Dr. Cutler stated there is a difference between clinical and corporate affiliations. He added that the HPC should be careful when considering these different types of affiliations in the CMIR process. Mr. Seltz stated that the HPC requires notice for clinical affiliations; these do not typically warrant a CMIR. Mr. Seltz added that filing a MCN with the HPC is not negative, but rather indicates a change in the market. He noted that the HPC had made an effort to reduce the burden on the provider community throughout this process.

Dr. Everett stated that the MCN and CMIR processes appear to be without undue administrative burden. She added that the HPC should not define "clinical affiliation" in a way that will negatively impact market competition.

Dr. Hattis stated that he does not see the HPC's MCN process as a barrier for "telehealth," but rather as a means of encouraging further exploration of the market. He stated that the HPC could amend the regulation and Technical Bulletin if there appeared to be a negative impact after the implementation of the regulation. Mr. Seltz stated that this would be discussed further at the December 17 board meeting.

Ms. McCann reviewed comments concerning "near-majority of market share in a given service or region." She noted that this term comes directly from the statute and is still undefined. She added that the HPC anticipates future work with the committee and stakeholders to model this term. Finally, she noted that, as it is yet undefined, stakeholders are not currently held to this threshold for triggering a material change.

Mr. Lord asked whether stakeholders provided a definition for this term or simply asked for clarification. Ms. McCann stated that stakeholders asked only for clarification.

Ms. McCann reviewed comments on definitions regarding the scope of material changes. Some comments called for MCNs and CMIRs to be expanded to include a review of the market impact of closures. Ms. McCann stated that the recommendation of the HPC is to not further expand the scope of the MCNs and CMIRs.

Mr. Seltz noted that the conversation about the impacts of service and facility closures is ongoing and the HPC will continue to be involved in these discussions. He stated that this is an area of extreme importance to issues of access and quality, but that the HPC will have to assess its role given the agency's statutory requirements. He added that the Legislature has acknowledged this systemic issue and subsequently created the Essential Services Task Force (ESTF), on which the HPC's Executive Director sits, to address the matter.

Dr. Everett asked if the Department of Public Health (DPH) is able to impose consequences on hospitals that violate requirements of the essential services process. Mr. Seltz stated that the ESTF is currently performing an examination of essential service reviews in other states, but preliminary research shows the use of fines or de-licensing as a consequence for violating requirements.

Dr. Cutler noted that Mr. John Polanowicz, Secretary of Health and Human Services, had been consulted on this matter. He stated that the Secretary indicated that the essential services review process under DPH is the appropriate forum for addressing closures. He added that it will be important to consult the incoming Secretary of Health and Human Services on this matter. Mr. Seltz noted his agreement and stated that the ESTF is chaired by the Secretary of Health and Human Services. He stated that this process would continue under of the new administration. He added that the HPC's scope of material changes could be amended following the conclusion of the ESTF process.

Dr. Everett stated that the HPC should consult the incoming Secretary of Health and Human Services as well as the ESTF to draft a more concrete set of recommendations.

Ms. McCann reviewed comments regarding the term "employment." She stated that the HPC clarified that "employment" is meant in the conventional sense (employment of health care professionals). To be eligible for a notice of material change, the employment of health care professionals must meet the $10M Net Patient Service Revenue materiality threshold.

Ms. McCann noted that one stakeholder asked for a definition of specific health care services. She stated that the HPC incorporated the definition of Health Care Services from the statute into the proposed final regulation.

Ms. McCann reviewed comments suggesting additional factors for a CMIR. She noted that, by statute, the list of factors that may be examined in a CMIR is non-exhaustive. She noted that the HPC may consider any factors determined to be in the public interest during a cost and market impact review. She stated that having a limited list of factors would run contrary to the statutory intent.

Ms. McCann reviewed comments regarding the timing of a final CMIR report. She stated that the updated language clarifies that the 185-day timeframe for completion of a CMIR can only be extended "commensurate with any additional time" granted by the HPC for the parties to complete production.

Dr. Cutler asked if this was a legal inclusion to mean parties could have additional time only if the HPC granted it. Ms. McCann responded in the affirmative.

Ms. McCann reviewed comments regarding the HPC's ability to make an elective referral to the Office of the Attorney General. She stated that the statute sets forth certain circumstances in which the HPC must refer a final CMIR report to the Attorney General. She added that the statute clearly states that the Attorney General retains all its existing authority to protect consumers in the health care market. Thus, the HPC may make an elective referral based on this statute.

Dr. Hattis stated that the timeframe in the existing statute does not allow parties enough time to adequately address the concerns of a preliminary CMIR. Mr. Seltz stated that providers can be granted additional time to address the HPC's findings. Ms. Johnson added that the statute does not prevent this type of agreement. Dr. Hattis asked if this would require an additional regulatory mandate to put a stay on both the transaction and the CMIR process. Mr. Seltz stated the HPC would examine this issue further.

Dr. Cutler stated that some providers have indicated that they do not believe the HPC will make elective referrals to the Attorney General. He stated the proposed final regulation clarifies that the HPC has this ability in addition to the mandatory referral requirement. Mr. Seltz noted that this was a key consideration for setting a higher bar in triggering a mandatory referral.

Ms. McCann reviewed technical clarifications in the proposed final regulation. She stated that the proposed final regulation clarifies that one of the types of material changes - the formation of an organization for contracting - includes an organization for administering contracts with Carriers, third party administrators, or current or future contracting on behalf of one or more providers or provider organizations. She stated that there is language included that states that if a provider or provider organization fails to file a MCN, the HPC may refer that provider or provider organization to the Attorney General. Finally, she noted that the proposed final regulation now includes statutory language that a material change transaction may not close until at least 30 days after a final CMIR report is issued or the HPC informs a provider or provider organization that it has made a determination not to initiate a CMIR.

Dr. Hattis asked how the HPC would address issues of non-compliance. Ms. Johnson stated that, in issues of non-compliance prior to a MCN, the Executive Director of the HPC is delegated the authority to refer it to the Attorney General as a consumer protection issue. Mr. Seltz added that this is the legal administration part of this process and that it is not the intent of the HPC to refer every instance to the Attorney General.

Mr. Lord asked if there were any instances of non-compliance since the inception of the MCN and CMIR process. Ms. Johnson stated that there have been ambiguities and misinterpretations of the interim guidance, but the HPC has worked with provider organizations to address these before escalating the issue to the Attorney General. Mr. Seltz added that providers have been compliant for the majority of transactions.

Dr. Everett requested changes to the definitions of "clinical affiliation" and content regarding closures in the proposed final regulation. Mr. Seltz noted that there is no reference to closures in the proposed final regulation. Dr. Cutler stated that issue would be revisited with the incoming Secretary of Health and Human Services.

Dr. Hattis asked if advancing the proposed final regulation at today's meeting meant that the board would be asked to approve the regulations at its December 17 meeting.

Dr. Cutler stated the committee could advance this matter today or could wait for the new Secretary of Health and Human Services to weigh in on the matter of. He stated that he would not support withholding the proposed final regulation based on the issue of hospital closures.

Dr. Hattis stated that the committee should advance the proposed final regulation and make any necessary amendments at the December 17 board meeting.

Dr. Cutler asked if there was any public comment. Seeing none, he made a motion to advance the proposed final regulation. Dr. Hattis seconded. The members present voted unanimously to approve the motion. Voting in the affirmative were the four members present. There were no abstentions and no votes in the negative.

ITEM 3: Discussion of 2014 Cost Trends Report

Mr. Seltz stated that the 2014 Cost Trends Report would be released at the December 17 board meeting. He introduced Dr. Marian Wrobel, Director for Research and Cost Trends, to provide a brief summary of preliminary findings.

Dr. Wrobel stated that the preliminary findings are reflective of the baseline research set by the 2013 Cost Trends Report and the 2014 Cost Trends Hearing. She stated that the report focuses on the Commonwealth's health care spending with an emphasis on performance relative to the health care cost growth benchmark, opportunities to improve quality and efficiency, and progress in key areas such as Alternative Payment Methods (APMs) and demand-side incentives.

Dr. Wrobel sought any comments from Committee members on the report.

Dr. Hattis noted his support for the topics under consideration.

Mr. Lord asked for clarification on which efficiency and waste topics the report examined. Dr. Wrobel stated that the HPC examines low-acuity, non-emergent emergency department use by geographic area. She noted that the report focuses strongly on the provider market and that the HPC will expand to payers over time. Mr. Seltz stated that previous examinations of waste and inefficiency were very broad and that the 2014 Cost Trends Report contains a very narrow focus to inform specific policy recommendations.

Dr. Cutler stated that this focus is reflective of conversations about specific best practices regarding waste and inefficiencies at the 2014 Cost Trends Hearing.

Dr. Everett stated that this report represents a tremendous opportunity, providing the HPC with targeted messages for progress in 2015. She added that she would be interested to see specific examinations and recommendations regarding shortcomings for post-acute care.

Mr. Seltz stated that the report is an important policy document for the HPC and will provide an essential framework for the 2015 goals of stakeholders in health care transformation.

Dr. Hattis asked that substance abuse and behavioral health be further broken out in the report.

Dr. Cutler stated that the results and themes from the 2014 Cost Trends Report would inform next steps for the committee and board.

ITEM 4: Schedule of Next Committee Meeting

Seeing no further comment, Dr. Cutler announced that the next committee meeting would be held in early 2015 and adjourned the meeting at 12:36 PM.