

January 24, 2018

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& SINGAL**

Via Email and Hand Delivery – Return Receipt Requested

Nora Mann, Esq., Program Director
Determination of Need Program
Department of Public Health
250 Washington Street
Boston, MA 02108

Re: Application Number – PHS-17071716-TO
Partners HealthCare System, Inc. Application for Transfer of Ownership of
Massachusetts Eye and Ear Infirmary

Dear Attorney Mann:

On behalf of Partners HealthCare System, Inc. (“Applicant”) and Massachusetts Eye and Ear Infirmary (“MEEI”), we write to thank the Department of Public Health (“Department”) for its collaborative approach in reviewing the proposed change in control of MEEI. We recognize that this is the first application for a change of control of a hospital under the new Determination of Need (“DoN”) regulations and appreciate the efforts of the Department’s staff to conduct a thoughtful analysis of the potential effects of the transaction.

In addition, pursuant to 105 CMR 100.510(C) we write to submit written comments on behalf of the Applicant and MEEI (together, the “Parties”) regarding certain of the proposed conditions contained in the “Other Conditions” section of the Department’s Staff Report to the Public Health Council (the “Report”) for the above-captioned application for a Determination of Need. The Parties understand that the one of principal purposes of the proposed conditions is to ensure that patient access to MEEI’s clinical services is not adversely affected by the proposed transaction, and we agree that it is appropriate for the Department to require that the Parties take reasonable steps to safeguard that access. However, for the reasons explained in more detail below, the Parties are concerned that they may not be able to comply with the conditions as currently written, and therefore we have attached for the Department’s consideration proposed clarifications to certain of the conditions contained in the Report as shown in both redlined (Exhibit A) and clean (Exhibit B) format.

1. The language used to describe the services to be reported upon and about which the Applicant is to provide affirmations of compliance varies somewhat among the seven conditions and therefore creates potential ambiguity about the scope of the conditions. Because the application under review involves the proposed change of control of MEEI and the purpose of the proposed conditions is to ensure continued patient access to MEEI’s OPH and ORL clinical services, we suggest that all of the applicable references be changed to read “MEEI’s OPH and ORL services”.

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2. With respect to Conditions 2.e., 3 and 4, the Parties are committed to facilitating continued access to MEEI's services on a non-discriminatory basis for patients in all health plans included in "MEEI'S Network Participation" (as defined in Condition 1). As currently drafted, these conditions require the Parties essentially to guarantee that there will be no changes to MEEI's payer mix and/or scope of Network Participation that would indicate reduced access for the specified patient populations (for example, MMCO patients). However, as explained below, MEEI's payer mix and scope of Network Participation may change in the future for reasons beyond the control of the Parties.
 - a. As the overall patient population ages, MEEI is likely to experience disproportionate growth in its Medicare patient panel. MEEI also treats a large number of dual-eligible patients (Medicaid patients with a Medicare-covered disability) who are counted as Medicare patients. Therefore, the relative percentage of MEEI's Medicare patients is very likely to increase, and as a result the Parties cannot guarantee that MEEI "will retain an equivalent or higher share of its patient panel in MMCOs"
 - b. As a specialty hospital, MEEI is dependent upon referrals from both Partners and non-Partners physicians who may elect from time to time to refer more, or less, of a given health plan's patients to MEEI. Non-Partners physicians in particular may have referral policies that are intended to keep care in their own networks and therefore will actively shift referrals away from MEEI. Thus, both MEEI's payer mix and percentage of Partners vs. non-Partners patients are likely to change over time.
 - c. With respect to Network Participation, both in Medicare and Medicaid managed care plans and in commercial tiered and limited network products, the health plans, not the providers, ultimately determine whether or not a provider is included in the plan's network and, in the case of tiered products, the tier in which the provider is placed. Therefore, MEEI's payer mix in general and its "rate of participation" in limited and tiered network products are likely to change due to future decisions of the health plans.

Accordingly, to ensure that the Applicant and MEEI are not held to conditions that they cannot achieve due to reasons beyond their control, as described in the examples set forth above, we propose clarifying Conditions 3 and 4 to require in annual affirmation that the Parties have offered to have MEEI participate in all of the relevant plans, provided that the terms and conditions of participation offered to MEEI are consistent with those offered to all other Massachusetts acute-care hospitals. We are also proposing to revise Condition 2.e. to require an annual

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affirmation that the Parties have not implemented participation terms for MEEI that favor Partners over non-Partners patients.

3. The Parties believe that the Department staff intended Condition 2.a. to be the reporting mechanism for the affirmation contained in Condition 7, and therefore we revised the language of both of those conditions accordingly.

The Parties appreciate your consideration of our suggested clarifications to certain of the proposed conditions as explained above and set forth in the attachment (which includes both a clean version of our proposed conditions and one that shows the changes to the conditions in the Report).

Please contact Crystal Bloom, Esq. or me if you have any questions regarding this letter and our proposed changes. We would also make ourselves available to meet with you to discuss the proposed changes prior to the Public Health Council meeting on February 14, 2018.

Sincerely,



Andrew S. Levine
Enclosure

cc: R. Rodman, Esq.
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Attachment/Exhibit

A

Findings and Recommendation

Pursuant to 105 CMR 100.735, the staff recommends approval of the proposed project. Any approval is subject to 105 CMR 100.735(D)(1)(a) which provides that any DoN shall not go into effect until 30 days following HPC's completed Cost and Market Impact Review. Approval is further subject to 105 CMR 100.735(D)(3)

Approval shall be subject to the Standard Conditions relevant to Transfers of Ownership (see Attachment 1) and the following additional requirements which shall become conditions of the DoN Ongoing compliance with the conditions and all terms of the DoN is, pursuant to the Regulation, a precondition to the filing of any future DoN by the Applicant. In the event that the Holder believes that compliance with any of the additional conditions may become unreasonably burdensome due to events or circumstances that are beyond the control of the Holder or MEEI, the Holder may request appropriate relief from the affected condition:

Other Conditions

1. The date of the DoN shall constitute the Baseline Date for the purpose of MEEI's Network Participation. Network Participation shall mean, for the purposes of these conditions, MEEI's participation in MassHealth fee for service and managed care, Medicare fee for service and managed care, and in commercial payer contracts, including its rate of participation in limited network and tiered products and the tier in which MEEI is placed.
2. In its first report mandated by 105 CMR 100.310(L), the Holder will provide baseline measures for MEEI's OPH and ORL services followed by subsequent annual submission of data for ~~the Partners-HealthCare~~MEEI's OPH and ORL services.
 - a. ~~A report on the percentage change in reimbursement rates (facility and physician) to MEEI (or for OPH and ORL services), as measured against the statewide cost control benchmark. An annual certification to the Department of compliance with section 7 of these Other Conditions accompanied by any information requested by the Department that is reasonably necessary to assess such compliance.~~
 - b. A description of the then-current Network Participation of MEEI, including but not limited to the number of:
 - i. Limited network products;
 - ii. Tiered products, including MEEI's tier level for each of these products;
 - iii. Other commercial products;
 - iv. MassHealth Fee for Service;
 - v. MassHealth Managed Care
 - vi. Medicare Fee for Service; and
 - vii. Medicare Managed Care
 - c. A description of the current payer mix of MEEI, reported by each of the insurance product categories listed in 2.b, above with the addition of self-pay;
 - d. The percentage of Partners and non-Partners patients seen at MEEI;

- e. An affirmation that ~~there has been no decrease in access to care at MEEI, for non-~~ the terms of MEEI's participation in Massachusetts health plans, including MassHealth MMCO's and Medicaid ACOs, do not favor Partners patients over non- Partners patients ~~or for MMCO patients;~~
 - f. A description of the operating efficiencies ~~and savings associated with those operational-~~ efficiencies achieved by integrating MEEI into Partners in the past year and cumulatively since the Baseline Date; and
 3. ~~Partners and MEEI will ensure that MEEI (or OPH and ORL services) will retain an equivalent or higher share of its patient panel in MMCOs and accepts an equivalent or higher percentage of patients served by MassHealth fee for service as was in effect upon the Baseline Date. An affirmation that the Holder and MEEI have offered to have MEEI participate in Massachusetts Medicaid managed care organizations (MMCOs and Medicaid ACOs) and in MassHealth fee for service plans to the same extent as MEEI participated in such organizations and plans on the Baseline Date; provided that the terms and conditions of participation offered to MEEI by each MMCO and Medicaid ACO and each MassHealth fee-for-service plan are the same as the terms of participation offered to all other Massachusetts acute-care hospitals.~~
 4. ~~At such time as MEEI joins Partners in contract negotiations with commercial payers, Partners and MEEI will ensure that the rate of participation by MEEI (or its OPH and ORL services) An~~ affirmation that Partners and MEEI have offered to have MEEI participate in limited network and tiered products does not decrease from the rate on the Baseline Date network products of Massachusetts commercial health plans to the same extent as MEEI participated in such limited network and tiered network products on the Baseline Date; provided that the terms and conditions of participation in such limited network and/or tiered network products offered to MEEI by each commercial health plan are the same as the terms and conditions of participation offered to all other Massachusetts acute-care hospitals.
 5. With respect to each of the Assessment Tools that the Applicant has defined (see Attachment 3) the Holder shall, in its first report mandated by 105 CMR 100.310(L), submit to the Department: a report that details, for each: the baseline measures; expected benchmarks; measure specifications; and the anticipated time to meet goals. This information shall be updated annually in accordance with 105 CMR 100.310(L)
 6. With respect to its commitment to improve detection, screening, or treatment, a report that:
 - a. describes the core set of OPH and ORL measures;
 - b. sets forth established benchmarks; and
 - c. defines quality outcomes over time

Any and all measures shall include baseline measures, measure specifications, and expected benchmarks for these proposed improvements. These reports shall be updated annually in accordance with 105 CMR 100.310(L).

7. At such time as MEEI joins ~~Partners the Holder~~ in contract negotiations with commercial payers, Partners the Holder and MEEI will ensure that the contracted rates for MEEI (or OPH and ORL services) do not increase in excess of any calendar year by an amount that exceeds the Commonwealth's cost growth benchmark ~~in any 12-month period. The parties shall annually~~

Applicant's Proposed Changes

~~certify compliance with this section to the Department and provide any requested documentation necessary to assess compliance for such year.~~

Attachment/Exhibit

B

Findings and Recommendation

Pursuant to 105 CMR 100.735, the staff recommends approval of the proposed project. Any approval is subject to 105 CMR 100.735(D)(1)(a) which provides that any DoN shall not go into effect until 30 days following HPC's completed Cost and Market Impact Review. Approval is further subject to 105 CMR 100.735(D)(3)

Approval shall be subject to the Standard Conditions relevant to Transfers of Ownership (see Attachment 1) and the following additional requirements which shall become conditions of the DoN. Ongoing compliance with the conditions and all terms of the DoN is, pursuant to the Regulation, a precondition to the filing of any future DoN by the Applicant. In the event that the Holder believes that compliance with any of the additional conditions may become unreasonably burdensome due to events or circumstances that are beyond the control of the Holder or MEEI, the Holder may request appropriate relief from the affected condition:

Other Conditions

1. The date of the DoN shall constitute the Baseline Date for the purpose of MEEI's Network Participation. Network Participation shall mean, for the purposes of these conditions, MEEI's participation in MassHealth fee for service and managed care, Medicare fee for service and managed care, and in commercial payer contracts, including its rate of participation in limited network and tiered products and the tier in which MEEI is placed.
2. In its first report mandated by 105 CMR 100.310(L), the Holder will provide baseline measures for MEEI's OPH and ORL services followed by subsequent annual submission of data for MEEI's OPH and ORL services.
 - a. An annual certification to the Department of compliance with section 7 of these Other Conditions accompanied by any information requested by the Department that is reasonably necessary to assess such compliance.
 - b. A description of the then-current Network Participation of MEEI, including but not limited to the number of:
 - i. Limited network products;
 - ii. Tiered products, including MEEI's tier level for each of these products;
 - iii. Other commercial products;
 - iv. MassHealth Fee for Service;
 - v. MassHealth Managed Care
 - vi. Medicare Fee for Service; and
 - vii. Medicare Managed Care
 - c. A description of the current payer mix of MEEI, reported by each of the insurance product categories listed in 2.b, above with the addition of self-pay;
 - d. The percentage of Partners and non-Partners patients seen at MEEI;
 - e. An affirmation that the terms of MEEI's participation in Massachusetts health plans, including MassHealth MMCO's and Medicaid ACOs, do not favor Partners patients over non-Partners patients;

- f. A description of the operating efficiencies achieved by integrating MEEI into Partners in the past year and cumulatively since the Baseline Date;
3. An affirmation that the Holder and MEEI have offered to have MEEI participate in Massachusetts Medicaid managed care organizations (MMCOs and Medicaid ACOs) and in MassHealth fee for service plans to the same extent as MEEI participated in such organizations and plans on the Baseline Date; provided that the terms and conditions of participation offered to MEEI by each MMCO and Medicaid ACO and each MassHealth fee-for-service plan are the same as the terms of participation offered to all other Massachusetts acute-care hospitals.
4. An affirmation that Partners and MEEI have offered to have MEEI participate in limited network and tiered network products of Massachusetts commercial health plans to the same extent as MEEI participated in such limited network and tiered network products on the Baseline Date; provided that the terms and conditions of participation in such limited network and/or tiered network products offered to MEEI by each commercial health plan are the same as the terms and conditions of participation offered to all other Massachusetts acute-care hospitals.
5. With respect to each of the Assessment Tools that the Applicant has defined (see Attachment 3) the Holder shall, in its first report mandated by 105 CMR 100.310(L), submit to the Department: a report that details, for each: the baseline measures; expected benchmarks; measure specifications; and the anticipated time to meet goals. This information shall be updated annually in accordance with 105 CMR 100.310(L)
6. With respect to its commitment to improve detection, screening, or treatment, a report that:
 - a. describes the core set of OPH and ORL measures;
 - b. sets forth established benchmarks; and
 - c. defines quality outcomes over time

Any and all measures shall include baseline measures, measure specifications, and expected benchmarks for these proposed improvements. These reports shall be updated annually in accordance with 105 CMR 100.310(L).

7. At such time as MEEI joins the Holder in contract negotiations with commercial payers, the Holder and MEEI will ensure that the contracted rates for MEEI (or OPH and ORL services) do not increase in any calendar year by an amount that exceeds the Commonwealth's cost growth benchmark for such year.