



Governmental Policy Committee
December 17, 2020

Governmental Policy Council Present

Amy Goeglein, Western Hills Health Care Center
Melissa Latham, Larchwood Inns
Dana Runager, Genesis
John Stewart, Kenton Manor
Rufus Brown, HCSG
Carly Olsen, Edura Healthcare
Lindsey Keener, PowerBack of Lakewood
Joyce Humiston, C&G Healthcare
Blake Crawford, AssuredPartners
Paul Laundry, LCCA
Kevin Peters, Vivage Senior Living
William Hartung, Consolidated Billing Services

Carol Glover, C& G Healthcare
Courtney Petek, PharmCare USA
Joyce Humiston, C & G Healthcare
Sandra Whitley, Ensign Services
Kenda Spaulding, E. Dene Moore
Fred Miles, Greenberg Traurig
Debra Welker, Pikes Peak Center
Lynn Stockwell, Holly Heights
Jay Moskowitz, Vivage Senior Living
Janet Snipes, Holly Heights
Jerusha Siegel, Accel and Longmont

Staff/Consultants Present

John Kunkle, Lobbyist
Josh Fant, Director of Finance
Erin Thomas, Director of Quality & Regulatory Affairs

Doug Farmer, President & CEO
Arlene Miles, Legislative Consultant
Colleen Olsen, Exec. Admin. Assist

Call to Order

The December Governmental Policy Meeting was called to order at 10:05 a.m.

Approval of Minutes

The February minutes were approved at 10:10 a.m.

Legislative Report

Election Overview

The democrats continue to have the majority in both the Senate (obtained one additional seat in the Senate) and the House in Colorado. The Majority Leadership will continue to be LeRoy Garcia, from Pueblo who is President of the Senate. The Senate Minority Leader will be Steve Fenberg. Other positions of Leadership in the Majority include Rhonda Fields, Assistant Majority Leader; Jeff Bridges, Whip and the two JBC Members will be Dominic Moreno (Chair) and Chris Hansen (succeeds Rachel Zenzinger).

The Senate Health and Human Services Committee includes Rhonda Fields (Chairman), Joanne Ginal, Janet Buckner, Sonja Lewis, Barb Kirkmeyer, Steve Simpson, Jim Smallwood.

The Speaker of the House is Alex Garnett, the Majority Leader is Daneya Esgar. The House JBC members are: Julie McClusky (Vice Chairman), Leslie Harrod, Kim Ransom (Republican in the House for the JBC).

The House Health Committee will be chaired by Susan Longtine, the committee is primarily comprised of the same members as last year.

Colorado Financial Update

The financial projection for 2021-2022 is not promising, according to the revenue estimates in the OSPB report in May. After case load increase and inflation spending pressures, there is estimated to be \$1.6 billion shortfall. Another report will be completed tomorrow, and the projection is estimated to be worse than previously thought. The government is requiring that all departments issue a 10% cut to their budget requests. The Department of Health Care Policy and Finance went directly to Long Term Care regarding large portion of the budget cut.

The Department of Health Care Policy and Financing, as part of the Governors budget, has recommended that they take the reimbursement system for Nursing Homes out of Statute, leave the ability to set rates subject to available appropriations and in the hands of Health Care Policy and Finance. This proposal would freeze the current rates.

When this was brought forward at the end of last session, CHCA compromised due to the situation that the state was in financially and accepted a 2% ceiling on costs. The JBC accepted that compromise and it was passed unanimously. CHCA does not believe that we should compromise any further.

CHCA Providers advised to note the challenges and financial hardships they have endured due to the pandemic and to share it with their lawmaker. CHCA and the lobby team will also address with lawmakers the challenges that Communities are encountering.

What to Expect for the 2021 Legislative Session

Please note that votes must be unanimous to be approved by the JBC for a JBC bill.

The Colorado Chamber of Commerce and Health Care Council met to go over the bills they were aware of that may be introduced. No bills were discussed that would affect Long Term Care. These bills include: Pharmaceutical Transparency bill, Health Care Affordability Board creation, Pharmacy Benefit Management Transparency.

The public options bill will also be introduced again. Last year they had a fee assessed against hospitals in order to help fund the bill. At one point they also considered placing a fee on nursing homes to help fund the public option. CHCA will watch to make sure they do not attempt to require Long Term Care to pay a fee.

The Prescription Drug Monitoring Program should not affect Long Term Care Providers.

The trial lawyers may introduce a bill that would increase liability under the Colorado Health Care Affordability Act. There are currently caps regarding how much they may sue for if there is litigation. The trial lawyers are seeking to increase these limits.

Presumptive Eligibility for Workman's Compensation is likely to be introduced again, to presume that COVID 19 contraction comes from the workplace for the purpose of workman's compensation.

The most difficult challenge for this session for Long Term Care will be the reimbursement issue.

Legal Report

Pending AHCA Amicus cases

Care Alternatives vs Druiding

This is a false claims act case that addresses whether it is required to have objective medical opinion as opposed to subjective disagreements between physicians; and if there is a subjective basis for the disagreement between physicians as to a course of care- can that provide a basis for an action under the false claims act. It was decided that you could file under a false claims case with respect to that type of basis, this conflicts with the 11th circuit in another case that AHCA was involved with. The Supreme Court has a petition pending before them to accept this case in terms of making a decision due to the split in the circuits. It is still pending. The plaintiff has been requested to file a brief response to the petition by the first part of December.

Kavelsky vs Health and Hospital Corporation

This is an appeal pending in the 7th circuit, on a district court decision that the Federal Nursing Home Reform Act does not create a Private Right of Action in residents or other third parties for a basis upon which to file a civil case. AHCA has joined three state affiliates on this case in filing briefs, supporting the district court decision.

Smith vs Surgery Center at Lone Tree

The case involves the ambulatory surgery center with respect to the plaintiffs claiming that if you show statutory negligence that can base upon a private right of action concerning their compliance regulations. The court of appeals decided against the plaintiff, and the plaintiffs have filed a petition of cert in the Colorado Supreme Court.

Prep Act and COVID Related Cases

Martin vs Cerreana

This Post-Acute California case addresses whether the Prep Act grants immunity when facilities are attempting counter measures due to COVID. Whether they are immune to civil liabilities when they have implemented these procedures, and if they are sued directly if they may have it send to Federal Court under the Prep Act. McConnell will not be putting forth the immunity issue in the next stimulus bill (this was traded off in order to obtain a compromise). This is not finalized, however McConnell states that he will include immunity eventually in his legislative agenda.

In Colorado, the Greenberg-Traurig firm tracks COVID litigation and have identified one case (**Kalick vs Orchard Park/** Arapahoe County District Court). The allegation of this case concerns the pandemic. The nursing home has removed the case to Federal Court but the plaintiffs have filed a motion to remand. The case currently has no new developments.

In this case the family is claiming they attempted to have the resident discharged due to a COVID 19 outbreak at the facility. They claim the discharge was delayed due to the facilities assurances that the resident was okay and had not contracted COVID 19. After the resident was discharged, he developed symptoms of COVID 19 and was transported to a hospital where he underwent ventilator treatment. It is alleged by implication that this resident's care was negligent because he ultimately contracted COVID. They have not singled out anything specific that the facility had failed to do.

Most federal courts at this point are not accepting prep act immunity because facilities are unable to show that they properly implemented COVID 19 infection control measures. The records that have gone to court have not been supportive.

Avon Nursing Case (2nd Circuit)

An Amicus has been filed in the district court, it is now in the 2nd circuit. It addresses whether CMS can ignore the statutory requirement that is in the nursing home reform act regarding whether there must be an RN on all complaint surveys. The district court decided against this based on a procedural issue, it looks promising that the case will be back to district court to address the statutory question.

Hospital "Observation Stay" Litigation

The three-day hospital stay has been suspended during the COVID pandemic by CMS. It is an educated guess that once the Federal Health Orders are lifted that the stay will be reinstated. Recently, a court in Connecticut in a case that has been pending for 8 or 9 years issued a decision in favor of Medicare Beneficiaries. It states that when placed on observation status that it violates due process rights because there is no way for them to appeal a hospital UR committee of a physician's determination that they should be on Observation stay.

Department of Health Care Policy & Finance

The Nursing Facility Advisory Council did not meet in December. The Provider Fee Advisory Board outlined the plan for applying for reimbursement related to the increase in Denver City/County minimum wage. If an employee was making less than \$12.85 an hour prior to 1/1/20 when the minimum wage increase was enacted a Nursing Facility located in Denver can receive the reimbursement for the difference for a maximum of \$.85 (The difference between the State-wide minimum wage and the Denver city minimum wage). The committee also reviewed continued analysis trying to estimate the reduction in Provider Fee that will be collected for State fiscal year 21-22 due to the decrease in census related to COVID-19.

Regulatory Update

There has been an increase of OSHA presence in the facilities; communities have stated that they are being asked to send in information regarding their outbreaks. CHCA has worked with OSHA to inquire if we could send out an informal ask on their behalf to obtain the information they are seeking proactively from the communities. This will allow the facilities to prepare on their timeline.

CHCA will continue working with Epidemiology at CDPHE to clarify some of the conversations that were held with April Burdorf around lifting admission bans. Facilities may now admit, if they have a COVID wing to take residents from the acute care setting. CHCA is requesting details regarding what is involved (what does the COVID wing need to look like, what are the surveyor's expectations, is county aware of this).

CEO Update

NHA Data

There are recently 99 nursing homes with outbreaks, 2600 cases, 315 deaths (mortality is at 12%).
There are 134 outbreaks in assisted living, 1500 resident cases, 120 death (8% mortality rate). There have been

almost 2000 staff positives in nursing homes, including two deaths; 1100 staff in Assisted Living, and zero deaths.

There are just over 14,000 occupied beds, which places us at 70% occupied.

There are currently 16 building at 50% or below census, 35 buildings 51% and 60%, and 32 buildings between 61% and 70% census.

The second round of value-based payments has come out, and the numbers have increased significantly. 148 facilities qualified, 8.3 million was distributed (\$56,000 average).

Vaccine Program

Previously we were told there would be two tracks regarding vaccines; the state has informed us that residents and staff will receive the vaccine through the pharmacy partnership. The state is responsible for determining how many vaccines are given to the pharmacy partnership (40,000). Long Term Care is Tier1A in order for the pharmacy partnership to distribute in Colorado. Long Term Care is in a relatively positive position to receive the vaccines.

Centralization of Regulatory Guidance

CHCA has been discussing with CDPHE the inconsistencies in regulatory expectation at the county level, and the need for the state to take full control of the regulatory environment since April. The department would like to take over the regulatory requirement, however a new PHO will not be released. CHCA has requested that CDPHE create a memo from the executive director to address the high point issues to local health departments to address how they should adhere to regulatory guidance.

CHCA is working with groups across the state, including HCPF to ensure our membership can help decompress the hospitals. CHCA has spoken with Providers regarding who is able to bring in transfers, the issue is that the state is utilizing EMResource as a basis for available beds. A webinar may be held for Providers to address why the questions on EMResource are being asked and will hopefully help with community census.

Adjourned

The meeting was adjourned at 11:59 a.m.
