



Governmental Policy Committee
January 21, 2021

Governmental Policy Council Present

Amy Goeglein, Western Hills Health Care Center
Melissa Latham, Larchwood Inns
Michael Schmitt, Professional Risk
Courtney Petek, Pharmcare USA
Elizabeth English, Greenberg Traurig
Melissa Latham, Larchwood Inns
Melissa Lopez, Arbor View
Lynn Stockwell, Holly Heights
Janet Snipes, Holly Heights
Paul Laundry, LCCA
Kevin Peters, Vivage Senior Living
Thomas Sylvain, Orchard Park
Chrissy Swanson, Colonial Columns

Carol Glover, C& G Healthcare
Courtney Petek, PharmCare USA
Joyce Humiston, C & G Healthcare
Kat LeNeave, Saint Paul Health Center
Mariah Cook, Sewald Hanfling
Fred Miles, Greenberg Traurig
Debra Welker, Pikes Peak Center
Sara Dent, Villa Manor Care Center
Jay Moskowitz, Vivage Senior Living
Janet Snipes, Holly Heights
John Brammeier, Vivage Senior Living
Mark Usery, Denver Beverage

Staff/Consultants Present

John Kunkle, Lobbyist
Josh Fant, Director of Finance
Erin Thomas, Director of Quality & Regulatory Affairs
Bonita Jones, VP of Operations

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

Call to Order

The January Governmental Policy Meeting was called to order at 10:04 a.m.

Approval of Minutes

The December Governmental Policy Meeting minutes were approved at 10:05 a.m.

Legislative Report

Arlene Miles

The number one issue is currently the Governor's proposal for freezing rates and removing the methodology from statute. There is a new member JBC staffer who is making the recommendation on this issue, Robin Smart. She is open to discussion with Arlene Miles and Doug Farmer regarding the issue, and a meeting will take place next week.

There is a service CHCA is becoming involved with that will assist members with addressing law makers and allow CHCA to push this information to leadership. This service will be marketed as coming from CHCA; and members will be automatically connected to their law makers. It is cost efficient and will benefit our advocacy efforts.

Census

Doug Farmer, with CHCA has been tracking census in Colorado; as of the last data release, there are 28 facilities that are below 50%, 39 that are between 51% and 60% and 54 that are between 61% and 70%. Addressing this concern will be a primary focus of CHCA because based on census drop; Long Term Care in Colorado is down an estimated \$200 million in revenue from all funding sources.

Legal Report

Fred Miles

New AHCA Amicus case on three-day hospital stay- Burrows v. Azar

The legal committee has recommended to the Association that AHCA participate in the case: Burrows v. Azar. This case is taking place in the US District Court in Connecticut; it was brought by the Center for Medicare Advocacy. The court is addressing the manner that hospitals use to determine if a patient will be admitted and begin the three day stay or if the patient will be listed under the observation stay. The court has determined that those Medicare beneficiaries that are subject to this determination violates their right to due process of law. The court has sustained the Centers case with respect to declaring that in that context, CMS is required to provide these individuals with an appeal right. The government has taken exception to this ruling and has appealed it to the United States Court of Appeals in the second circuit. Currently, the three-day hospital stay is the subject of a pandemic waiver, however, AHCA legal committee anticipates that once the pandemic subsides that this waiver will be revoked. AHCA's Reimbursement Committee has declared that removal of the three-day hospital stay requirement is their primary goal for the upcoming year. Accordingly, the legal committee voted that the Association join the Centers in filing an amicus supporting this position as it is in the Court of Appeals.

Update on PREP ACT Immunity cases and Khalek v. South Denver

There are two cases that the CHCA legal committee are currently following.

Martin v. Riano: In this case, AHCA is participating as an amicus.

Maglioni (New Jersey): CHCA legal committee is currently monitoring this case. This case does not look promising.

Khalek v. South Denver Rehabilitation (Orchard Park)

This case is in the US District Court in Colorado. It is currently being determined whether this case should be sent back to a lower court. The PREP ACT Immunity issues involves whether legislation provides immunity to providers who have commenced COVID 19 preventative measures; and whether these measures were properly implemented. Counsel is attempting to keep these cases in Federal Court due to the immunity issue and to maintain Federal Court Jurisdiction under the Federal Officer Provision. This allows communities to act as an extension of being a federal officer, since the CDC guidance and the DHHS guidance is federally related. In this case, the plaintiffs are attempting to convert this case to wrongful death due to the resident passing away, allegedly due to COVID 19 contraction.

Update on other 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.

Avon Nursing (2nd Circuit)

In this case, it is being decided whether the government can ignore the statutory provision in Federal Nursing Home Reform Act, which requires there to be a registered nurse on complaint surveys. CMS adopted a regulation that states this is not a requirement.

Kavelsky vs Health and Hospital Corporation

This case addressed whether the Nursing Home Reform Act creates a Private Right of Action for residents or other third parties as a basis upon which to file a civil case. The district court decided in favor of the facilities, and the plaintiff appellant is supported in their attempt to have this decision overturned by three different amicus briefs (including one by AARP). AHCA and three additional state affiliates have filed briefs supporting that the district court's opinion be upheld.

National Consumer Voice for Quality Long Term Care et al v. Azar – Per instance CMP's for past non-compliance

The National Consumer Voice is supported by AARP. In this claim, CMS made the determination that when they made a finding related to past non-compliance that they would enact a specific type of sanction. If this sanction was to be a civil/monetary penalty, it would be issued per instance rather than per diem; this is due to the lapse of time when the compliance occurred and the finding of the non-compliance.

AARP is now challenging this, claiming that this policy in the form of regulatory sub guidance violates the Federal Nursing Home Reform Act of 1987. The AHCA legal committee anticipates that the AHCA will directly participate in this case in support of the government's position.

Local Government Use Tax

This issue involves sales and use taxes pertaining to the City of Westminster; however, there is concern that it will be used as a means to expand the tax base in other cities. The dispute began by the city of Westminster assessing the community, Park Forest Care Center, approximately \$75,000 during an audit of a three-year period regarding meals. Park Forest Care Center has a contract with HSG; they provide the dietary support and meals for this community. Based on this transaction, it is being alleged that Westminster was purchasing these meals from HSG and was therefore taxable. This had been appealed and was brought before the Supreme Court. In 2020 the Supreme court determined that this transaction as a two-step transaction, whereby the facility purchased the meals from HSG as a wholesale transaction. The taxable transaction transpired when the sale was made to the resident, there was also an exclusion in the Westminster Code that states these meals would only be taxable if sold to the employees or the public.

The city of Westminster is now insisting that if these are wholesale transactions, then vendors providing goods and services to long term care communities are also providing wholesale transactions that are then being sold to the residents. It is now being attempted to charge facilities for the entire per diem rate that is charged to the resident. Since many residents are Medicaid recipients this may not be passed through, which would result in the community being held responsible for the tax. The city is now claiming that since services and goods for residents are bundled and unable to be separated, that communities should be taxed using a common law theory called the True Object Test Facilities.

There are currently five facility members in Westminster. CHCA is currently seeking support from the membership on this cause.

Department of Health Care Policy & Finance

Provider Fee Advisory Board (PFAB) – Did not meet in January. Currently working on gathering 2020 census to use in the 2021 Provider Fee Model

Nurse Facility Advisory Committee (NFAC) - The following topics were briefly updated by Richard Clark from HCPF at the January NFAC Meeting:

- An Updated Memo on Section Q of the MDS is now Live – [Click Here](#) to view it.
- The 2021 Pay for Performance Portal has been live since mid-December and the application is due on 2-28-21. [Click Here](#) for the most recent excel version of the application. If you have trouble accessing the portal for your Nursing Facility please contact Matt Haynes with HCPF (haynes@co.state.us)
- The 2021 COVID-19 Supplemental Payment for Medicaid Nursing Facility providers is targeted to paid at the end of February. It will be paid via the supplemental payment system and follow the same methodology as the payment made during 2020. Also similar to the 2020 payment, the amount received will offset on the 2021 Medicaid Cost Report. The total amount expected to be distributed is \$13.3 million.
- For those residents who have Colorado Medicaid as their primary or sole insurance coverage, a nursing facility should not pay their vaccine partner pharmacy for any expense related to the resident being inoculated for COVID-19. These pharmacy partners will be able to bill Medicaid directly for these charges.

Regulatory Update

Erin Thomas

Surveys

The health department has begun conducting full surveys, and Infection Control surveys are being decreased. During this time annual surveys will increase, and they are now continuing to conduct old complaint surveys. Several members are encountering complaint surveys from early 2020. There have been fewer citations for infection control (880) and they have reclassified many 880 citation to 658 (Services meeting professional standards). This is usually used if the issue is regarding paper compliance or service materials (such as taking temperature, missing documentation, and is not part of the rationale for an outbreak). There has been an uptick in harm tags relating to old complaint surveys. They are mainly focusing on complaint surveys surrounding abuse. If there was actual harm, or current egregious deficient practice, they will cite, however if not, they will substantiate the complaint with no deficiency.

CEO Update

National Update

It is anticipated there will be more stimulus provided through another round of payments through the provider relief fund. On the Quality incentive payment announced by the Trump administration in August, there were approximately 400 million each month being distributed by rates of spread and mortality rates compared to community. There were payments made for the September and October time frame. AHCA was informed there should be a payment made for the November time frame by the 25th of January. The issues with this payment are that is not in statute, congress did not pass or approve it, and there is no requirement that it continues. AHCA has had no notification that the current administration intends to stop it, however, they have also not received a guarantee that it will continue. AHCA continues to converse with those at the National Level, and to lobby for these payments by expressing the importance of these payments being made to Providers. The individual responsible for the QIP payments will retain their position during the beginning of the new administration to help

transition issues at HHS.

Vaccine Program

CHCA has been discussing with the state that at some point the pharmacy partnership will end, and these clinics will come to their conclusion sometime in March; but that it is necessary to understand the path going forward for our Providers, their employees and their residents. CHCA is seeking a formal solution regarding these concerns.

Curative Labs

The State is cancelling their contact with Curative Labs effective immediately. Doug Farmer has reached out to the State for guidance on how Providers should proceed. The State is assigning the 1,100 communities to new laboratory partners to ensure that the needs of facilities are met. It is beneficial to Long Term Care for this contract to have been cancelled, due to the inconsistency of Curative and their apparent problems. However, this immediate change was unexpected and CHCA is working to find solutions for Members while Curative testing is unavailable.

Visitation

Several members have sought guidance from CHCA regarding visitation, requesting information on what percentage of vaccination is required in order to reopen visitation and usual practice. Any change in this regard will require a change in guidance from CMS and CDPHE. Dr. Gifford at AHCA has expressed that it will be three to six months before the federal government makes this determination. The goal is to have the vast majority of the country vaccinated prior to opening up visitation.

Five Star

Janet Snipes: Five Star will become live again at the end of January. This means that, if there was a red abuse icon; most will be removed unless another citation was issued. It was stated that the quality of care in most communities has declined during the course of COVID, because ADL's are not as independent. The Staffing metric has improved due lower census in the buildings.

Provider Relief Funds

John Brammier: The Provider Relief Funds had a reporting deadline at the end of February, but this has been extended. There is a link available where you may register for your reporting. You must report your 12/31 2020 Provider Relief Funds that are claimed as lost revenue or Reimbursement of expenses. In addition, one of the tranches is restricted to only be used for testing, please keep this in mind.

Adjourned

The meeting was adjourned at 11:42 a.m.
