Bundled Payments for Care Improvement: ADLS # 5

Contractual and Governance Issues Among Providers in Bundled Payments

Weslie Kary, Moderator
March 22, 2012
You Should Know

• Where to find the slides: http://cmmi.airprojects.org/BPCI.aspx

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Objectives for Accelerated Development Learning Sessions

• Support practitioners in their efforts to successfully implement bundled payment in support of the three-part aim.
• Share expert knowledge and lessons learned by early adopters.
• Set stage for continued collaborative learning during implementation.
Agenda

- **Presentation:** *Contractual and Governance Issues Among Providers in Bundled Payments*

- **Questions & Answers**
Alice G. Gosfield, Esq., of Philadelphia’s Alice G. Gosfield and Associates, PC, has a national practice limited to health law and healthcare regulation with a special emphasis on physician representation, managed care, quality, fraud and abuse, and medical staff issues. A graduate of Barnard College and NYU Law School, she has been named as one of the top twenty-five health lawyers in the country in 2007 and 2009. She served as Chairman of the Board of Directors of the National Committee for Quality Assurance for five terms (1998-2002) and was President of the National Health Lawyers Association (now the American Health Lawyers Association) from 1992-93. She was the founding Chairman of the Board of PROMETHEUS Payment Inc., a not for profit organization developing a new payment model, and a member of the original and continuing Design Team. She is the first Chairman of the Board of the Healthcare Incentives Improvement Institute, Inc, (HCI3) the merger of PROMETHEUS Payment Inc and Bridges to Excellence, Inc. A prolific author, in addition to consulting for the federal Agency for Healthcare Research and Quality, the GAO and the Congressional Budget Office among others, Ms. Gosfield is also a popular and dynamic lecturer on health law and policy issues for national, state, and local groups, including the American Medical Association, the American Health Lawyers Association, the American College of Cardiology and more. She has been listed as one of the Best Health Lawyers in America for more than 20 years, and among the top 25 in 2007 and 2009 (a bi-annual listing).
Contractual and Governance Issues in Bundled Payment

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Bundled Payment for Care Improvement
Accelerated Development Learning Session #5
March 22, 2012
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Overview

- Types of entities that can play in this sandbox
- Governance issues including super majorities
- Contract Issues
- Dispute Resolution/Appeals
Calculating the Bundle; Capturing the Bundle

- Defining the episodes is critical to bundling

- Calculating the bundle
  - What triggers a bundle
  - What breaks a bundle
  - When does it end

- How the bundle binds the providers is a contract issue

- Potential contracts: Depends on how many and what conditions
  - Physicians to Physicians
    - PCPs and Specialists
    - Among specialists
  - Hospital to Physicians
  - Hospitals to Other Providers

- Upside and downside risk trigger governance and dispute resolution issues
Who Can Play?

- A single physician group
  - Large multispecialty or one specialty already dedicated to a hospital
  - Doesn’t have to be universal so splitters can participate
- An IPA of physicians: some still exist
  - Even outside of California
  - Contract with the hospital and other providers
- In these models the contract between the hospital and physicians would control governance-type issue
- Bundled payment requires clinical integration
Who Can Play? (2)

- A co-management entity already exists
  - Typically an LLC:
    - Corporate protection for liability
    - In corporate practice states a PLLC
    - Taxed as a partnership
  - Often condition or service line focused: cardiology and cardiovascular disease; orthopedics; urology
  - Usually established with small investments from the physicians
  - Typically all share equally in return on investment
    - Could be otherwise but risk of disputes rises
  - Governing document is an Operating Agreement
  - There is an agreement between the hospital and the entity
Who Can Play?: A PHO

- A PHO already exists
  - Typically a corporation in which there is small dollar investment by participants or membership model
  - Physicians and other providers participate by contract
  - Messenger model issues
  - Controlling documents are typically bylaws, shareholders agreements if for profit, participation agreements for providers

- Create a physician sub-network for the targeted conditions?
  - Governance of a sub-network within the PHO?
  - Different participation agreements

- For Model 2 a PHO can take the bundled payment from Medicare

- For Models 1 and 4: PHO can be mechanism to share gains even though the hospital is getting the payment from Medicare
New Entities Might Be Formed

- For Model 3: Post-acute network: HHAs, SNFs, LTACHs
  - All the issues of forming an IPA/network
  - Capital for the entity and to demonstrate ability to bear downside risk
  - Governance
    - Which providers to be included?
    - Providers with the laboring oar can own, but everything can be done by contract as well
- A new IPA of physicians:
- A new PHO: today called an ACO
Governance Issues

- Co-management entity sometimes includes hospital and sometimes doesn’t
  - Hospital investment is not necessary
  - Generally hospitals do this for control and input
  - Governance is different from ownership
- Odd numbers of directors?
  - Otherwise it’s the War of the Roses
- One man, one vote?
  - Voting by size of group participating?
- Voting by investment: numbers of shares?
- Permitting in kind contributions for capitalization
Supermajority issues: e.g. 75% of each class of ownership/representation

- Typical issues requiring supermajorities
  - Dissolution
  - Incurring debt
  - Amending the agreement
  - Approval of budget
  - Change in legal form

- In this context could also include
  - To change compensation/allocation metrics
  - Adding providers
  - Adding classes of providers
  - Terminating a provider
  - Resolving an appeal
  - Terminating the pilot
Episode-driven Issues

- Which classes of providers buy in if it’s an LLC or corporation?
- Which classes of providers are involved in governance: councils, voting, etc?
  - Governance can be separate from ownership
- Depends on the episodes
- Some providers are more important in some settings than others:
  - In avoiding readmissions HHA is important; they might be owners
  - In treatment of pneumonia PT may not be so important; they might participate only by contract
Contractual Issues

- Address downside risk: allocated how?
  - In mid-90’s PHOs, hospital took the risk although some looked to physicians to make up losses
  - Another approach is the set aside: but where physicians are already getting discounted FFS, that’s a problem
  - A hospital can front the credit under the waivers for ACOs but not for bundled payment alone unless CMS waives
  - Ask for it.

- Upside distributions: allocated based on predetermined metrics documented in the agreements
  - The food fights were what killed PHOs
  - Clinical practice guidelines can help
  - Go back to the basic definition of the episode
    - Who did what?
    - What did the budget project?
Issues to Address in Contracts among Providers

- What are grounds for involuntary termination of providers during the term?
  - Going onto pre-payment review
  - Loss of basic qualifications:
    - Licensure, clinical privileges, Medicare participation
  - Becoming the subject of an investigation that would lead to becoming sanctioned
  - Cherry picking or lemon dropping patients
  - Failing to comply with standards
    - What standards and where are they?
  - Opportunity to cure?
- What are the bases for voluntary termination?
  - How much notice?
  - Only before the end of a term or at any time?
More Issues

- Can anyone else join during the pilot?
- Can they join the governance entity or just participate contractually?
- If so, who is eligible to participate during the term and based on what criteria?
  - Enough business to review quality?
  - Length of time in the entity (e.g., system, IPA, PHO, staff privileges)?
- How does that affect distribution of upside or collecting monies for downside contributions?
  - Spreads the risk on downside, dilutes the reward on upside
Financial Issues

- Financial consequences:
  - Post-termination contribution to the downside failure?
  - Right to pro rata up to termination on upside at the end?
  - Does it matter when the termination occurred?
  - Voluntary terminations by providers can undermine the whole project,
  - But who wants disgruntled participants?

- What happens if two providers claim the right to payment for the same part of the episode?
  - Neither gets the bonus;
  - The one with the most visits wins;
  - They have to work it out;
  - There’s an appeal

- Co-management agreements typically pay all physicians in accordance with their ownership so reward from upside isn’t pro rata and ‘layabouts’ get as much as hard workers.
Disputes

- Matters that ought not be subject to appeal:
  - The definition of the episode
  - Which part of the episode the provider contracted to provide
  - The rules pertaining to when an episode is triggered, broken or ends
  - Medicare’s direct payment to the provider

- Matters which may be subject to dispute resolution
  - Whether an episode was triggered
  - Two providers want the same piece of the budget
  - Whether an episode is triggered, broken or ended
  - Whether severity adjustments apply
  - Whether quality thresholds have been met
Dispute Resolution/Appeals

- Reconsideration by the same decision-maker (e.g., Leadership Council in a co-management arrangement)
- Reconsideration by a different internal body specially established for this purpose, ultimately subject to Board/Managers including representatives of the class of aggrieved provider (“peer review”)
- Full fair hearing
- External arbitration (e.g., AHLA Dispute Resolution Service)
Issues to Address in Designing Dispute Resolution

- Timeframes
- Scope of evidence permitted
- Whether attorneys are involved (not required)
- Whether it is a record review or oral argument and/or face-to-face meeting are required
- Type of records maintained
- ADDRESS DISPUTE RESOLUTION IN THE CONTRACTS OR YOU WILL END UP IN COURT OVER DISPUTES
Questions?
Questions for Presenters

1. Ask a question of one of today’s speakers by using the chat function.

2. Direct a question about CMS Innovation Center Bundled Payment for Care Improvement Initiative to: BundledPayments@cms.hhs.gov.
What’s Next—Upcoming Sessions

Topic: Gainsharing

April 6, 11:30 AM - 1:00 PM EDT

Announcements, slides and transcripts: http://cmmi.airprojects.org/bpci.aspx
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