

FINAL REPORT

Pen Bay Healthcare and MaineHealth Certificate of Public Advantage

DATE: October 13, 2010

TO: Brenda M. Harvey, Commissioner, DHHS

THROUGH: Catherine Cobb, Director, Division of Licensing and Regulatory Services

FROM: Phyllis Powell, Assistant Director, Planning, Development and Quality
Larry Carbonneau, Health Care Financial Analyst

SUBJECT: Proposal by Pen Bay Health Care and MaineHealth for a certificate of public advantage for the definitive agreement whereupon Pen Bay Health Care is to become a subsidiary corporation of MaineHealth.

ISSUE ACTIVATED BY: The referenced proposal requires Certificate of Need approval as defined in "Maine's Hospital and Health Care Provider Cooperation Act," 22 M.R.S.A. §1841 et seq., as amended.

Persons Requesting Notification of an application from the department:
Anthem Blue Cross and Blue Shield

Interveners:

Office of the Attorney General - 22 M.R.S.A. §1855 (6)
Governor's Office of Health Policy and Finance – 22 M.R.S.A. §1855 (6)

I. BACKGROUND:

- Pen Bay Healthcare has entered into a definitive agreement with MaineHealth to become a subsidiary of MaineHealth. Pen Bay Healthcare is a not-for-profit corporation located in Rockport, Maine. Pen Bay Healthcare is licensed for 150 acute care beds. Pen Bay Healthcare's primary service area is Knox County.
- MaineHealth is a not-for-profit charitable corporation organized and existing under the laws of the State of Maine headquartered in Portland, Maine. MaineHealth oversees a system of healthcare providers including: Maine Medical Center in Portland; Stephens Memorial Hospital in Norway; Miles Memorial Hospital in Damariscotta; St. Andrews Hospital in Boothbay Harbor; Spring Harbor Hospital in Westbrook; Southern Maine Medical Center in Biddeford; Home Health Visiting Nurses; NorDx; Synernet; MMC Physician Hospital Organization; Maine Physician Hospital Organization; and Maine Medical Partners.
- The Division of Licensing and Regulatory Services, Medical Facilities Unit, confirms that Pen Bay Healthcare is a general hospital licensed in the State of Maine and is MaineCare and Medicare certified. The Medical Facilities Unit also confirms that the hospital subsidiaries of MaineHealth are general hospitals licensed in the State of Maine

and are MaineCare and Medicare certified. Pen Bay Healthcare and Maine Medical Center, MaineHealth's largest subsidiary, are both accredited by the Joint Commission.

- The applicants, MaineHealth and Pen Bay Healthcare, request that the Department issue a Certificate of Public Advantage pursuant to Maine's Hospital and Health Care Provider Cooperation Act, under 22 M.R.S.A., §1841, et seq. for a cooperative agreement to which they are parties. The cooperative agreement included in the record is a "Definitive Agreement" between MaineHealth and Pen Bay Health, and signed by the Chief Executive Officers for each of the parties.
- Pen Bay Healthcare has not applied for a Certificate of Public Advantage previously. MaineHealth received a Certificate of Public Advantage in 2009 when they transacted a similar arrangement to this one with SMMC.

II. HIGHLIGHTS:

Letter of Intent dated	January 13, 2010
Application and Signed Copy of Definitive Agreement filed	May 12, 2010
Notice of Public hearing published	May 24, 2010
Public hearing held	June 28, 2010
Record closed	July 28, 2010
Preliminary analysis released	September 16, 2010
Preliminary analysis published in newspapers	September 18, 2010
Record closed	October 1, 2010

III. PUBLIC COMMENTS RECEIVED IN RESPONSE TO THE PRELIMINARY ANALYSIS:

No public comments were received relative to this application.

IV. COMMENTS RECEIVED IN RESPONSE TO THE PRELIMINARY ANALYSIS FROM INTERVENORS:

Attorney General Response

The Attorney General submitted comments relative to the September 16, 2010 Preliminary Analysis on October 1, 2010.

"The Preliminary analysis includes considerable statistical analysis of the relevant market, including depiction of the suggested service area and relative market shares of the Applicants and other Hospitals"... "While the Attorney General engaged in a very different competitive analysis, we share the DLRS' ultimate conclusion that, with appropriate conditions, the likely benefits outweigh the disadvantages likely to result from the proposal. To ensure that balance, the DLRS in its Preliminary Analysis recommends requiring the conditions reflected in the Agreement among the parties and also sets forth additional conditions it recommends be incorporated into a certificate. The Attorney General supports the additional conditions."

“In sum, the Attorney General supports the issuance of a Certificate of Public Advantage with conditions for the Applicants’ Definitive Agreement consistent with the recommendation reflected in the Preliminary Analysis.”

IV. CONU ANALYSIS/Applicants’ RESPONSE TO PRELIMINARY ANALYSIS

Applicants’ Response

The applicants responded in a joint response on September 30, 2010. The pertinent comments regarding the analysis for the COPA are as follows:

“The applicants believe that defining a 90% service for purposes of assessing the potential competitive effects of the subject transaction (Preliminary Analysis, pp. 57) is not necessarily the best tool for undertaking the analysis. In the circumstances presented by the current application, given the geographic configuration and small size of the hospitals involved, the small degree of patient origin overlap on the outer edges of their respective service area areas are too small to affect managed care reimbursement responses.”

CONU Response

In the preliminary analysis, CONU made the following determinations: CONU recommends the Commissioner issue a certificate of public advantage for a cooperative agreement because the applicants have demonstrated by a preponderance of the evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition likely to result from the agreement. CONU recommends the Commissioner make the following findings subject to the conditions specified below.

The following benefits are likely to result from the cooperative agreement:

1. Enhancement of the quality of care provided to citizens of the State;
2. Preservation of hospitals or health care providers and related facilities in geographical proximity to the communities traditionally served by those facilities;
3. Gains in the cost efficiency of services provided by the hospitals or others;
4. Improvements in the utilization of hospital or other health care resources and equipment;
5. Avoidance of duplication of hospital or other health care resources; and
6. Continuation or establishment of needed educational programs for health care providers.

The following disadvantages are not likely to result from the cooperative agreement:

1. The extent of any likely adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents or other health care payors to negotiate optimal payment and service arrangements with hospitals or health care providers;
2. The extent of any likely adverse impact on patients or clients in the quality, availability and price of health care services; and
3. The extent of any likely adverse impact on the access of persons enrolled in in-state educational programs for health professions to existing or future clinical training

programs.

The following disadvantages are likely to result from the cooperative agreement:

1. The extent of any disadvantages attributable to reduction in competition among covered entities or other persons furnishing goods or services to, or in competition with, covered entities that is likely to result directly or indirectly from the cooperative agreement; and
2. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the agreement.

The likely disadvantages may be ameliorated by the enforceable conditions included as Attachment A, as well as the following conditions recommended by CONU:

1. Reporting of free care; MaineHealth and Pen Bay Medical Center will report free care as required by 22 M.S.R.A. §1716.
2. Submitting all tax returns for all entities under the control of MaineHealth for the term of the Certificate of Public Advantage.

CONU recommends to the Commissioner that all conditions of approval stand, with one addition. CONU recommends that the commissioner adopt the following condition regarding on-going supervisory conditions:

Upon each submission of the required review materials to the Department, at 27 and 54 months following the date of when Pen Bay Health Care becomes a member of MaineHealth, an amount of \$5,000 shall be submitted by the applicant to be used by the Department to fund expenses for consultants or experts necessary for the continuing supervision of the agreement.

V. RECOMMENDATION:

The Certificate of Need Unit recommends this proposal be **Approved subject to the following conditions.**

CONU recommends the Commissioner issue a certificate of public advantage for a cooperative agreement because the applicants have demonstrated by a preponderance of the evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition likely to result from the agreement. CONU recommends the Commissioner make the following findings subject to the conditions specified.

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The following disadvantages are likely to result from the cooperative agreement:

1. The extent of any disadvantages attributable to reduction in competition among covered entities or other persons furnishing goods or services to, or in competition with, covered entities that is likely to result directly or indirectly from the cooperative agreement; and
2. The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the agreement.

The likely disadvantages may be ameliorated by the enforceable conditions included as approved by the applicants and interveners (A-I), as well as the following conditions recommended by CONU (J-L):

Agreed Upon Conditions:

A. Administrative Savings

1. Commitment: During the initial 36 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will achieve administrative expense savings for Pen Bay Healthcare of at least \$1 million. The failure to have achieved savings in administrative expenses for Pen Bay Healthcare of at least \$1 million for the initial 36 months following the date upon which PBMC becomes a member of MaineHealth, if not substantially justified, may be treated as an “unanticipated circumstance” within the meaning of 22 M.R.S.A. §1845(3)(b).
2. Target: MaineHealth and Pen Bay Healthcare have established a target of \$3 million savings in administrative expenses for Pen Bay Healthcare in the 6 years following the date upon which Pen Bay becomes a member of MaineHealth.
3. Report: At 48 months and 66 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth will report to the

Department the savings in administrative expenses then achieved, the extent to which such savings have produced community benefit, and plan for achieving the targeted savings. For these purposes, community benefit includes preservation and improvements in access to care, preservation or improvements in quality of care, reduction in operating losses, and containment of cost increases or reductions in the cost of care. The report should also quantify any increase in aggregate administrative expenses greater than the rate of inflation as measured by the CMS Market Basket Index, and identify the reasons for such increase.

B. Clinical Efficiencies/Savings

1. Report and Plan: At 24 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will report to the Department the results of their efforts to date to identify any unnecessary redundancies in current clinical services, and describe any measures deployed to reduce or avoid such redundancies in future clinical services. The report will address measures for regional planning of health care services in Waldo, Knox and Lincoln counties, including as appropriate joint configuration and staffing of home health, mental health and substance abuse, oncology, general surgery, orthopedic surgery, urology, and nephrology services in the region, and will estimate the financial savings (including cost avoidance) associated with such measures. The report will propose an appropriate plan for achieving savings associated therewith, within 48 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, and benchmarks by which to measure the success of such a plan. The Department may thereafter modify the conditions of the certificate to incorporate the plan proposed.
2. Follow-up Reporting: At 48 months and 66 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will report to the Department the extent to which benchmarks identified in the plan have been achieved, and the extent to which such savings have produced community benefit. For these purposes, community benefit includes preservation and improvements in access to care, preservation or improvements in quality of care, reduction in operating losses, and containment of cost increases or reductions in the cost of care. The failure to achieve the additional benchmarks starting with 48 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, if not substantially justified, may be treated as an “unanticipated circumstance” within the meaning of 22 M.R.S.A. §1845(3)(b).

C. Ambulatory Electronic Medical Record System Deployment

1. Commitment: Consistent with the objectives of Maine’s 2008-2009 State Health Plan (April 2008), as amended in 2010, which identifies the deployment and use of electronic medical record systems as a state health policy objective, MaineHealth will provide financial support of at least \$3.0 million for the deployment and integration of ambulatory electronic medical record systems for use by employed members of Pen Bay Healthcare’s medical staff in accordance with the Definitive Agreement. This amount will not be recovered by

MaineHealth or Pen Bay Health Care as charges from patients or payers.

2. Target: Within 36 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will have at least fifty (50) physician members of the Pen Bay Healthcare medical staff using ambulatory electronic medical records.
3. Report: At 48 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will submit a report to the Department describing the level of electronic medical record system deployment achieved, and the plan for achieving the targeted level, if not yet achieved. The failure to achieve the targeted deployment within 48 months, if not substantially justified, may be treated as an “unanticipated circumstance” within the meaning of 22 M.R.S.A. §1845(3)(b). In order to help ensure that quality care continues and the agreement assists in reaching these goals the applicants agree to the following condition.

D. Access to Care for MaineCare and Uninsured Patients

1. Commitment: During the six years following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, Pen Bay Healthcare will require all physicians employed by Pen Bay Healthcare to accept patients without regard to the patient’s insurance status or ability to pay, consistent with Pen Bay Healthcare’s charity care policies. During the same period, Pen Bay Healthcare’s charity care policy will provide, at a minimum, that person(s) whose incomes are below 175% of the then current DHHS federal poverty guidelines will receive free care.
2. Report: At 24 months, 48 months and 66 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, Pen Bay Healthcare will report to the Department the number of charity care patients and MaineCare patients served by Pen Bay Healthcare- employed physicians.

E. Quality Improvements

1. Commitment: During the 6 years following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, Pen Bay Healthcare will continue its current level of participation in MaineHealth-sponsored clinical integration programs (identified in its Joint Application for a Certificate of Need and Certificate of Public Advantage, and Pen Bay Healthcare will participate in any new clinical integration programs hereafter established by MaineHealth for all of its hospital members. Pen Bay Healthcare will publish the results of its participation in such programs in the same manner and to the same extent as other hospital members of the MaineHealth system.
2. Report and Plan: At 24, 48 and 66 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, MaineHealth and Pen Bay Healthcare will report to the Department on the extent of Pen Bay Healthcare’s

participation in MaineHealth's clinical integration programs, and any gains in quality achieved by Pen Bay Healthcare during the period covered by the report.

F. Limitations on Operating Margin and Commercial Reimbursement

1. Operating Margin Target Limits. During the term of the certificate, Pen Bay Healthcare will set its annual consolidated budgeted operating margin at a level less than or equal to 3% of its total operating revenue.
2. Notification. During the term of the certificate, if Pen Bay Healthcare's budgeted consolidated operating margin exceeds 3% of total operating revenue, Pen Bay Healthcare will notify the Department within 60 days thereafter, and provide an explanation for the reasons therefore.
3. Commercial Payor Reimbursement Limitations.
 - a) During the term of the certificate, for any fiscal year beginning after the date upon which Pen Bay Healthcare becomes a member of MaineHealth, Penobscot Bay Medical Center's increase in payment rates under any contract with any commercial payor for the prior fiscal year; provided that MaineHealth and Penobscot Bay Medical Center may seek to negotiate increases greater than 4% in order to accommodate:
 - i. expense increases resulting from projects for which the Department has approved a Certificate of Need;
 - ii. differences of more than 1% between the scheduled increases in the Medicare Program's payment rates and the expected impact of inflation on the costs of goods and services required by Penobscot Bay Medical Center, as measured by the CMS Market Basket Index;
 - iii. any reduction in the MaineCare Program's payment rates; and/or
 - iv. an increase in the CMS Hospital Market Basket Index greater than 3%.

Commercial payor, for purposes of this provision, means any private insurer, benefit plan, or employer whose payments to Penobscot Bay Medical Center for hospital services in the preceding fiscal year exceeded \$5 million.

4. Report. At 24 months, 48 months and 66 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, Pen Bay Healthcare will report to the Department the extent to which its consolidated operating margin during the period of the certificate, averaged to an annual basis, has conformed to the target, and the extent to which reimbursements to Penobscot Bay Medical Center has conformed to the limits on annual increases. At 48 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth, if the average annual consolidated operating margin for Pen Bay Healthcare has exceeded the targeted level, and is not substantially justified by factors beyond the control of Pen Bay Healthcare, the occurrence may be treated as an "unanticipated circumstance" within the meaning of 22 M.R.S.A. §1845(3)(b).

- G. Report: Any report submitted by MaineHealth or Pen Bay Healthcare under the terms of this Agreement on Conditions shall be simultaneously provided to the Attorney General and the Governor's Office of Health Policy & Finance.
- H. Review. Supervisory review by the Department will occur at 27 months and at 54 months following the date upon which Pen Bay Healthcare becomes a member of MaineHealth. The Department may conduct additional supervisory reviews as necessary in response to reports filed by the applicants in accordance with these conditions.
- I. Term: The certificate will expire in 6 years.
- J. Reporting of free care: MaineHealth and Pen Bay Healthcare will report free care as required by 22 M.S.R.A. §1716.
- K. Submitting all tax returns for all entities under the control of MaineHealth for the term of the Certificate of Public Advantage.
- L. Upon each submission of the required review materials to the Department, at 27 and 54 months following the date of when Pen Bay Healthcare becomes a member of MaineHealth, an amount of \$5,000 shall be submitted by the applicant to be used by the Department to fund expenses for consultants or experts necessary for the continuing supervision of the agreement.