

Monitor's investigation into the commissioning of elective care services at the North East London Treatment Centre

Spire Healthcare response to Statement of Issues

Introduction

1. This note sets out the response by Spire Healthcare Limited (Spire) to the Statement of Issues published by Monitor in relation to its investigation into the commissioning of elective care services at the North East London Treatment Centre (the Treatment Centre) by Barking and Dagenham CCG, Havering CCG and Waltham Forest CCG (the CCGs).
2. Spire is a key stakeholder in the provision of routine elective care services in North East London through its provision of services to NHS patients at Spire Roding Hospital and Spire Hartwood Hospital, both of which are within 20 minutes' drive-time of the Treatment Centre.
3. Spire notes that Monitor's Statement of Issues focuses on three areas, namely:
 - i. whether the process to select a provider allowed commissioners to assure themselves of the quality and efficiency of the services concerned;
 - ii. whether the commissioners' process to select a provider was appropriate; and
 - iii. whether the commissioners' proposed use of a locally agreed price is consistent with NHS tariff rules.
4. Spire believes that the CCGs' actions also raise broader issues in relation to patient choice and competition in routine elective care services, and that Monitor should ensure that these issues are also reviewed as part of its investigation.
5. In summary, Spire's concerns are that:
 - the CCGs have engaged in price competition contrary to national tariff guidance;
 - the CCGs, contrary to national tariff guidance, did not consult with Spire, which is also a provider of elective care services in North East London, about the planned tariff at the Treatment Centre;
 - the CCGs' plans to establish a separate, lower tariff for elective care services at the Treatment Centre will undermine patient choice and competition in routine elective care services in this area;
 - Barking, Havering and Redbridge University Hospitals NHS Trust (BHR) has acted anti-competitively through, in effect, financing its ability to operate the Treatment Centre through bail out monies supplied by the Department of Health; and
 - BHR's acquisition of the Treatment Centre, if it was to proceed, would represent a substantial lessening of competition for routine elective care services in North East London.

6. The specific issues set out above in relation to this investigation also feed into Spire's broader concerns about the integrity of the national tariff being eroded through local behaviours that are contrary to national guidelines.
7. The remainder of this submission elaborates on each of these points.

Price competition

8. The framework for local variations that is set out in *2014/15 National Tariff Payment System*, jointly published by NHS England and Monitor, is clearly envisaged as a means of encouraging payment arrangements that support innovative models of service delivery (eg bundled payments for multiple services) that will deliver better services for patients. Spire supports the use of local variations to achieve this objective.
9. It is equally clear that the framework for local variations is not envisaged as a tool for negotiating below tariff prices from providers. As Monitor would know, the tariff guidance states that "it is not appropriate for local variations to be used to introduce price competition that would create risks to the safety or quality of care for patients" (p.133).
10. Spire believes that patient choice is most effective as a driver for high quality routine elective services where there is a uniform tariff. This ensures that the referral behaviour of GPs (and commissioners) is not distorted, and the incentives that each provider has to attract patients through offering the highest quality care remain in place.
11. Where the tariff in a locality is not uniform, this will inevitably distort referral patterns as GPs are encouraged to refer to the lowest cost provider. This, in turn, will diminish the incentive for the provider with the lower tariff to offer the highest quality of care as a means of attracting referrals, and will have a knock-on effect in terms of the competitive pressure on other providers in the locality to pursue continuous quality improvement.
12. As a result, Spire believes that the price competition introduced by the CCGs creates significant risks to the quality of care for routine elective care patients in North East London. It also follows that the local variation that has been pursued by the CCGs is not in the best interests of patients, which is one of the three principles that commissioners must apply when putting in place a local payment approach (see *2014/15 National Tariff Payment System*, p.130).

Consultation on local tariff variations

13. The *2014/15 National Tariff Payment System* states that one of three principles that must be applied in local tariff setting is that "providers and commissioners must engage constructively with each other when trying to agree local payment approaches" (p.130).
14. As set out in the introduction to this submission, Spire is a key stakeholder in the provision of routine elective care services in North East London through its provision of services to NHS patients at both Spire Roding Hospital, which is approximately 10 minutes' drive-time from the Treatment Centre, and Spire Hartswood Hospital, which is approximately 20 minutes' drive-time from the Treatment Centre.
15. The adoption of a new, lower tariff at the Treatment Centre might be argued to be a matter that only needs to be agreed between the CCGs and the operator of the Treatment Centre. However, in reality, the adoption of this payment mechanism represents a change in the overall approach to provider payment for all providers in North East London. This is

because of the effect that its introduction will have on referral incentives and behaviours. As such, the CCGs should have constructively engaged with Spire as part of the process leading up to any decision to adopt this payment variation.

16. The CCGs lack of consultation with Spire in relation to this matter is not consistent with the requirements set out in the *2014/15 National Tariff Payment System*.

Impact of differential tariffs on patient choice and competition

17. As set out above, differential tariffs for routine elective care in a locality will inevitably result in pressures on GPs to refer patients to the low tariff provider, with the effect of curtailing patients' rights of choice. The curtailment of patients' rights of choice that will come about as a result of the differential tariff regime will be in conflict with the requirements of the Procurement, Patient Choice and Competition regulations.
18. Further, Spire believes that the CCGs in establishing such a local payment regime that confers a privileged position on a single provider, and will result in patients being directed to the Treatment Centre, are engaging in anticompetitive behaviour. As Monitor knows, anticompetitive behaviour by CCGs is prohibited under the Procurement, Patient Choice and Competition regulations.

Impact of Department of Health bailout money for BHR

19. BHR has, Spire understands, received £44.6 million in 2014-15 in financial support from the Department of Health. Without this money, it seems that BHR would have been unable to pay its creditors and would have ceased to function as an independent entity providing services to patients. Two points follow from this.
20. First, any other bidder for the Treatment Centre contract that was in a similar financial position (ie dependent on external grants to secure its ongoing viability) is highly unlikely to have qualified as a bidder. It would appear that the CCGs, in allowing BHR to bid (and win) this contract, have discriminated in favour of BHR and against other bidders for the contract through the favourable treatment extended to BHR given its financial position.
21. Second, as BHR is apparently reliant on central government financing for its ongoing operations, it is unclear how the CCGs are complying with the objective of "securing the needs of health care service users" as required under Regulation 2 of the Procurement, Patient Choice and Competition regulations. There is a significant risk that BHR will have to take radical action in the near future to bring its expenditure in line with revenues. This, in turn, is likely to impact on the scope and quality of services provided by BHR.
22. Finally, it is clearly anti-competitive for BHR to be able to win such a significant contract against other more financially robust providers as a result of it receiving financial support from the Department of Health. This anticompetitive behaviour extends to the CCGs that have selected BHR as the winning bidder. As Monitor knows, such behaviour by the CCGs is prohibited under Regulation 10 of the Procurement, Patient Choice and Competition regulations

BHR's acquisition of the Treatment Centre represents a significant loss of competition in routine elective care services in North East London

23. The Treatment Centre is a key supplier of routine elective care services in North East London. The acquisition of this provider represents a major strengthening of BHR's competitive position in North East London, and the loss of a key competitor to BHR.
24. Allowing such an acquisition is likely to significantly reduce the incentives to improve the quality of services in NE London given the loss of competition that such an expansion by BHR entails. This is contrary to the obligation on the CCGs, under Regulation 2 of the Procurement, Patient Choice and Competition regulations, to improve the quality of services. There is also a question of whether the CCGs' decision to award the contract to BHR in these circumstances represents anticompetitive behaviour by the CCGs.
25. To the extent that BHR's acquisition of the Treatment Centre represents a merger under the terms of the Enterprise Act, then Spire trusts that Monitor will liaise, as needed, with the Competition & Markets Authority. If Monitor considers that the transaction does not qualify as a merger under the Enterprise Act, then Spire considers that it is incumbent on Monitor to assess the effect on competition of this change in market structure under the general prohibition on anticompetitive behaviour.

Spire's broader concerns about the integrity of the national tariff for NHS services

26. The specific issues set out above in relation to this investigation also feed into Spire's broader concerns about the integrity of the national tariff being eroded through local behaviours that are contrary to national guidelines, and other financing arrangements that exist outside the national tariff. This includes the use of block contracts, that remunerate providers outside the framework of the national tariff, and 'bail out' monies that provide financing for Trusts that are unable to supply services at the national tariff.
27. Spire recognises that payment innovation is a legitimate and desirable way forwards in support of new models of care and rewarding outcomes rather than activity. However, other deviations from the national tariff are not in support of achieving these objectives, but represent the provision of selective financial assistance to particular service providers that is not generally available.
28. As a result, Spire believes that a clear signalling by Monitor that it will defend the integrity of existing tariff arrangements from changes that are detrimental to the interests of patients is critical to ensuring that the system of national tariffs continues to be viable, even while there is a process of identifying and transitioning to improved payment arrangements.

Conclusion

29. In conclusion, Spire believes that the CCGs' behaviour raises several issues in addition to those identified in Monitor's Statement of Issues, and these should be closely reviewed by Monitor as part of its investigation.
30. On the information available to Spire, it would appear that the CCGs' behaviour has breached not only national tariff rules but also the Procurement, Patient Choice and Competition regulations in several respects.
31. Spire would be happy to discuss these matters further with Monitor as required.

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