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presents

EHR Contracts and Regulations
What Rural Health Care Providers Must Know

Health IT Vendor Fair
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Outline

I.   About Rural Health Care

II. Regulatory Framework
    A.   HITECH Act
    B.   Meaningful Use Regulations

III. Purchasing Software
    A.   Initial Considerations
    B.   Types of Software Models
    C.   Key Provisions and Negotiation Techniques

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II. Regulatory Framework
    A.   HITECH Act
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    B.   Types of Software Models
    C.   Key Provisions and Negotiation Techniques

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Why is Rural Health Care Different?

	Rural	Urban
Percentage of USA Population	nearly 25%	75% +
Percentage of USA Physicians	10%	90%
No. of Specialists per 100,000 population	40.1	134.1
Population aged 65 and older	18%	15%
Population below the poverty level	14%	11%
Average per capita income	$19K	$26K
Adults who describe health status as fair/poor	28%	21%

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Why is Rural Health Care Different?

- Unique *combination* of factors that create disparities in health care not generally found in urban areas
  - Economic
    - High rates of poverty
    - No transportation
  - Cultural and social differences
  - Education
  - Lack of recognition by legislators because less people to represent

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Primary Issues Affecting Providers

- **Lack of Resources:** *Lack of Money*
  - Medicaid reimbursement rate disparities
  - Low income population
    - High percentage of subsidized patients
    - High percentage of uninsured patients

  BUT, have the same fixed overhead expenses as health care providers in urban areas.

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Primary Issues Affecting Providers

- **Lack of Resources:** _Lack of Money_

  On August 16, 2011, Agriculture Secretary Tom Vilsack announced that he and HHS Secretary Sebelius will sign a memorandum of understanding to make it easier for rural hospitals to **make use of existing capital loan programs to buy high-tech information technology software and hardware**.

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Primary Issues Affecting Providers

- **Lack of Resources:** _Workforce Shortage_
  - Fewer and fewer doctors become generalists and of those that do, fewer still practice in the rural area
    - Find urban practice more attractive
    - Medicaid reimbursement disparities (**same costs as urban doctors but fewer patients**)
  - Nursing shortage
  - Specialists shortage

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Primary Issues Affecting Providers

- **Lack of Resources:** _Workforce Shortage_

  On **Aug. 16, 2011**, HHS announced that it will soon **issue guidance expanding eligibility under the National Health Service Corps program**, which provides $60,000 in student loan repayments for primary physicians, family nurse practitioners, den ists and other qualifying health providers who agree to work for two years in medically underserved areas.

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How Can Information Technology Help?

- Provide better care (enhance patient safety)
  - Telemedicine
  - Remote home monitoring
- Coordinate care
- Improve disease surveillance
- Target health education
- Compile regional data
- Help practitioners be more efficient
- Make care more cost efficient

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How Can Information Technology Help?

- 2011 ONC literature review of HIT research found that 92% of HIT articles between 2007 - 2010 came to positive conclusions about HIT
  - 3 NYC dialysis centers - 3 yrs after implementing EHRs, patient mortality ↓ by as much as 48% and nurse staffing ↓ by 25%
  - 41 Texas hospitals - hospitals with more advanced HIT had fewer complications, lower mortality and lower costs than hospitals with less advanced HIT

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Outline

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Regulatory Framework: HITECH

- **Health Information Technology for Economic and Clinical Health (HITECH) Act**
  - Enacted as part of the American Reinvestment and Recovery Act of 2009
  - Gives HHS authority to establish programs to improve health care quality, safety, and efficiency through HIT
  - Certain specified health care providers and hospitals must adopt electronic health records by 2015
  - Provides incentive payments from Medicare and Medicaid for those that adopt EHR systems

Regulatory Framework: MU

- **HITECH Act enacted "to promote the adoption and meaningful use of health information technology"**
- To be eligible for EHR incentive payments, eligible hospitals and eligble professionals must use "certified" EHR technology *and* be "meaningful EHR users"
- Three stages (*the panel developing Stage 2 clinical and process measures has endorsed a 1 year delay - stay tuned!*)

Regulatory Framework: HITECH

- **Eligible Professionals**
  - <u>Medicare</u> - as much as $44,000 over five years
  - <u>Medicaid</u> - as much as $63,750 over six years
    - Can receive their 1st year's payment for adopting, implementing and upgrading certified EHR technology but must demonstrate meaningful use in subsequent years to qualify for additional payments
  - Can only participate in Medicare or Medicaid

Regulatory Framework: HITECH

- **Eligible Hospitals & Critical Access Hospitals**
  - <u>Medicare</u> and <u>Medicaid</u> - both have complicated calculations but amounts to millions of dollars in payments
  - Unlike eligible professionals, eligible hospitals (including CAH) may be able to receive payments under both Medicare and Medicaid
- Payments already started - Beth Israel Deaconess Medical Center was first hospital nationally to receive the federal MU payment ($2.57 million)

Outline

Initial Considerations: Organization

- Develop a work plan
  - What are your organization's needs?
  - How do you see your organization growing in 5, 10, 15 years?
  - What are the HIT objectives?
  - What are the legal requirements - federal, state

Initial Considerations: Organization

- Assess the current infrastructure - environment is generally a complex combination of IT applications
  - Clinical decision support system
  - Clinical data repository
  - Medical vocabulary
  - Pharmacy
  - Computerized provider order entry
  - Reference lab
  - Electronic health record

Initial Considerations: Organization

- What is the current workflow?
- What are the functional requirements?
- Interview the stakeholders
  - Are they open to new technology?
  - How will they be impacted?
  - Are the *users* part of the process?

Initial Considerations: Vendor

- Select your vendor based on *your needs*

  - Are they certified? (HealthIT.HHS.gov)
  - New to health care? New to rural health care?
  - Adaptability of "standard" product
  - Integration wi h existing technology?

Initial Considerations: Vendor

- Verifiable history of meeting deadlines and pricing (i.e., avoiding "change orders")?
- Verifiable history of producing products that **WORK**?
- **Ask for current references**
  "**Certified" EHR technology DOES NOT MEAN working EHR technology**

Initial Considerations: Process

- Define roles: Technical, Practical, Procurement, Legal
- Gather data (use questionnaires)
- Create a functional specification
- Consider the use of template agreements

Initial Considerations: Process

- Large providers should develop an RFP; smaller providers might simply interview potential vendors
- Review proposals, and obtain clarifications
- Develop a clear term sheet with fully defined deliverables, pricing, and support terms
- Negotiate final agreements
- Implement and administer (including internal training)

Types of Software Models

- Open Source
  - Has worked well in other industries (Internet!)
  - But, may not be right for your organization
    - May not be supported in the same manner as a proprietary system but still requires installation, maintenance, upgrades and training
    - Must be willing to work with software not backed by a large company (although some companies do offer support for open source systems)
    - Licensing terms are non-negotiable (public licenses)

Types of Software Models

- Open Source
  - Examples in health care
    - *VistaA Office EHR* - version of the VA Hospital records system adapted for small and medium sized practices
    - *Open Dental* - record management, patient scheduling and dental office management
    - *ClearHealth* - practice management software including scheduling, billing, EMR, H PAA Security and accounts receivable
    - *OpenEMR* - EMR software
    - *OpenMRS* - enterprise EMR framework

Types of Software Models

- Proprietary
  - Developed by a company and the software is "secret" to that company
    - Allscripts
    - GE Healthcare IT (Centricity)
    - eClinicalWorks
    - Practice Fusion
    - *See* InformationWeek, *17 Leading EHR Vendors (Dec. 2010) for informative review* http://www.informationweek.com/news/galleries/healthcare/EMR/228800 771?pgno=4

Types of Software Models

- Software Licensing Metrics
  - Hosted (internally or 3rd party)
    - Enterprise license
    - Site license
    - Per user/client
  - Subscription (SaaS)
    - The "Cloud"

Critical Contract Terms

- Functional Specification: Something against which to measure performance, and should include elements necessary for HIPAA/HITECH compliance and meaningful use certifica ion criteria
- License Scope: Includes (i) who (will need access to he software), (ii) what (functions must be covered), and (iii) where (geographic reach of license rights as well as any physical restrictions on installation/use)

Critical Contract Terms

- Warranty Rights: This must cover not only the scope and duration of the performance warranty, but also **remedies** for nonconformance. Beware of the refund pushback (revenue recognition issues), and be prepared to get this issue on the table early. Additionally, in the MU context he vendor should warrant that it will, through its maintenance obligations, keep the product compliant with regulatory updates or changes, and consider a remedy that includes reimbursement of **lost EHR incentive payments**.

Critical Contract Terms

o <u>Maintenance and Support</u>: Distinction from warranty rights; support hours (check the time zone); response imes; repair times. These issues are sometimes addressed via "service level agreements". This is also a continuity of use issue - must consider what rights you should have if vendor ceasing supporting the product.

Critical Contract Terms

o <u>Term and Termination</u>: Also a continuity issue, and will depend in part on whether the license is a hosted or subscription solution. If hosted, will want perpetual rights to use the software <u>unless</u> the vendor terminates for cause. If subscription, will want to build in enough time to enable transition to another solution.

Critical Contract Terms

o <u>Confidentiality</u>: The integration and implementation of the vendor's product may necessarily involve disclosure of confidential information, including PHI, to the vendor. It is therefore imperative that the vendor agree to maintain confidentiality of the information, and that the use of such information be restricted to the minimum extent necessary for the implementation and use of the software.

Critical Contract Terms

o <u>Indemnification</u>: Applies generally to third party claims against you, that arise due to your use of the software. Should cover property damage/personal injury (although unlikely), but more importantly property rights infringement claims (patent, copyright, etc.) **and potentially claims involving unauthorized disclosure of PHI**. This last element will likely be initially rejected by the vendor, but the issue should be addressed (particularly in a subscription model). Keep in mind that many indemnified risks are not typically insured over, and that therefore the financial viability of the vendor is relevant.

Critical Contract Terms

o <u>Limitations of Liability</u>: (i) At a minimum **carve out** the vendor's indemnification and confidentiality obliga ions from any limit on liability. (ii) Make sure to negotiate your own limit of liability. (iii) There is no "custom" as to how to determine a fair cap on the vendor's liability, and thus this is a negotiated issue (we have seen caps range from an amount equal to the fees paid for the prior 12 months, up to a stated amount of $40 million (for a very large ERP software vendor)).

Critical Contract Terms

o <u>Damages Disclaimers</u>: These address not the amount, but the types of damages that are available. The vendor will seek to disclaim incidental, consequential, and other "indirect" damages. It is not uncommon to agree to these disclaimers, but beware that they do not undercut otherwise available remedies (e.g., if you have a right to recover forgone EHR incentive payments for breach of warranty, it must be clear that these disclaimers do not undermine that right).

Critical Contract Terms

o <u>Technology Escrow</u>: Particularly if you have a hosted solution and the vendor is not a large company, consider having the vendor name you as a beneficiary to a technology escrow (whereby access to the escrowed materials would enable you to continue to support the software in the vendor's absence). Key elements include the description of the escrowed items, duty to update, and definition of the triggering events allowing access. Keep in mind that an escrow may be fruitless if the underlying code is such that very few professionals could use the escrowed materials to maintain the software.

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