Regulatory and legislative developments occur in telemedicine

New developments have occurred in the area of telemedicine in both the regulatory and legislative arenas since the last update appeared in Hotline in November. Both the Oklahoma Board of Medical Licensure and the Oklahoma Corporation Commission issued rules on telemedicine in January.

Oklahoma Corporation Commission proposed rule changes impact telemedicine

After more than six months of pre-rulemaking and gathering of information, the Oklahoma Corporation Commission opened a rulemaking on the Universal Service Fund (RM 201400003) beginning Jan. 16 with comments due Feb. 14. The Oklahoma Hospital Association, through Sandra Harrison, coordinator of advocacy and regulatory affairs, has entered an appearance and will be participating in the Corporation Commission rulemaking. The now recommended definition in the OUSF which will impact hospitals is the following:

165:59-1-4 Definitions: (Excerpt only relevant definition) All new language “Hospital” means a healthcare entity that has been granted a hospital license by the Oklahoma Department of Health for that particular location.”

The definition of “not-for-profit hospital” was not amended as had been recommended during pre-rulemaking. The Telehealth Alliance of Oklahoma (of which OHA is a member) in filed proposed language in the pre-rulemaking at the Corporation Commission in CAUSE NO. PUD 201300108 Sept. 5, 2013 as follows:

“The definition of a not-for-profit hospital for purposes of telemedicine funding should reflect how hospitals (“provider”) are classified for purposes of Medicare. Note that the term “provider” is used by the Centers for Medicare & Medicaid Services (CMS) to reference hospitals. Also note that hospitals may have spaces including departments or clinics that CMS deems to have provider-based status. Therefore the following change in the definition [of not-for-profit hospital in OAC rules 165:59-1-4] is recommended:

“Not-for-profit hospital” means:

a) a hospital, including any space that has provider-based status, established as exempt from taxation pursuant to the provisions of the Internal Revenue Code, 26 U.S.C., Section 501(c)(3), or

b) a not-for-profit hospital, including any space that has provider-based status, owned by a municipality, county, or the state, that is primarily funded by county, state, or federal support, located in this state, and devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment, or care of patients admitted overnight or longer in order to obtain medical care, surgical care, or obstetrical care.”

Please review the Commission rules with your staff and let us know if there is any concern over the Commission rules. The first deadline for comments to the Commission is Feb. 14.
Oklahoma Board of Medical Licensure update on telemedicine

On Jan. 16, the Oklahoma Board of Medical Licensure adopted the final telemedicine rules OAC 435:10-1-4 and 435:10-7-13, which were tabled at the November 2013 meeting as published in the Nov. 27 issue of Hotline. One important modification was to remove the language that a licensed health care provider must be available at originating site. The OMB believes that the physician should have the discretion if they require an extender to present the patient at the originating site. The prior language regarding technology specifications was also removed. The rules must be submitted for approval by the Legislature and governor and, if approved, will be effective summer 2014.

For the new rules click here.

SB 1389 by Sen. Ivester sponsored by OHA

As part of the rulemaking prior to the one that is attached to this article, the OHA along with the Telehealth Alliance of Oklahoma (TAO) worked on language for the Ivester bill. The language in the Ivester bill, SB 1389, is slightly different than what the TAO proposed in the rulemaking to the Corporation Commission, but is much closer than the Commission Rulemaking filed Jan. 16.

SB 1389 by Sen. Ivester in Title 17, Section 139.102 Definitions of the Oklahoma Universal Service Fund:

15. “Not-for-profit hospital” means a facility located in this state and licensed as a hospital pursuant to Section 1-701 et seq. of Title 63 of the Oklahoma Statutes, including any space that has provider-based status, which includes a provider-based entity, pursuant to the provisions of the Centers for Medicare & Medicaid regulations, 42 C.F.R. 413.65, and devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment, or care of patients in order to obtain medical care, surgical care, or obstetrical care, including:

a. a hospital established as exempt from taxation pursuant to the provisions of the Internal Revenue Code, 26 U.S.C., Section 501(c)(3), or

b. a not-for-profit hospital owned by a municipality, county, or the state, that is primarily funded by county, state, or federal support, located in this state, and devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment, or care of patients admitted overnight or longer in order to obtain medical care, surgical care, or obstetrical care;

To further fill out the picture, the rules and the statute should mirror one another, or at least that’s how Administrative Law is supposed to work. The TAO in October provided language to the
Corporation Commission in October as delineated above, which OHA supported at the time but with further discussion prefer the slightly modified language in the Senator Ivester bill SB 1389.

1 The Telehealth Alliance of Oklahoma, Inc. (TAO) was formed as a not-for-profit organization in June, 2013. The purpose of TAO, as stated in its By Laws, is to educate and provide technical assistance to health care providers as a means of reducing service barriers to the underserved and/or those living in rural Oklahoma. The Board of Directors and membership represent the diverse interests of telehealth stakeholders (physicians, nurses, administrators, information technology professionals, and consumers) across the state and include representatives of not-for-profit hospitals, health care clinics, mental health facilities, and tribal and state agencies. The vision for TAO originated during the summer of 2011 with the formation of the working group, the Telemedicine Advisory Group (TMAG), which was comprised of professionals in health care, technology and universal service funding. TAO’s members have a shared interest in protecting the Oklahoma Universal Service Fund (OUSF) for the benefit of Oklahoma Health Care providers and the many Oklahomans they serve. We believe telemedicine has the potential to improve patient care and access to healthcare throughout Oklahoma. The OUSF has provided vital funding to healthcare entities, allowing for the development of telemedicine practices across the state.”

See http://taoklahoma.org/member-directory to see if you are a member. OHA joined as members of TAO in October 2013.

2 “Provider-based status” means a department, clinic, or other space of a hospital that is recognized by CMS pursuant to the provider-based regulations promulgated at 42 C.F.R. 413.65. Both the hospital and any provider-based spaces are considered “not-for-profit hospitals” for purposes of telemedicine funding.

3 CMS has promulgated regulations that set out the requirements for achieving provider-based status. (42 C.F.R. 413.64, also included in Attachment 3). Achieving provider-based status means that other spaces located on and/or off the hospital campus are deemed to be treated as hospital-based space. Therefore, it is recommended to add the words “including provider-based status” to both paragraph (a) and paragraph (b). By including “provider-based status”, the definition accurately reflects the reality of hospitals.

4 The requirement for an overnight stay should be removed as this is no longer applicable for provider services. The words “admitted overnight or longer” are included in the definition of hospital in both the Oklahoma statute applicable to the Oklahoma Telecommunications Act of 1997 (Okla Stat Title 17, §139.102) and Title 63- Public Health and Safety, §1-701. However, since the qualifier “admitted overnight or longer” is not included in part a of the current definition of not-for-profit hospital in Chapter 59 of the Oklahoma Corporation Commission rules, the removal of the overnight stay qualifier is not technically required although removal of the words “admitted overnight or longer” should be considered in future legislation.