Monitor

Making the health sector work for patients

Investigation into the commissioning of elective services in Blackpool and Fylde and Wyre: Final report

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About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

Contents

1. Background to the complaint 4

The complaint 4
The CCGs 5
The complainant 5

2. Structure of this report 6

3. Analysis of patient activity and referral data 7

4. The CCGs' approach to commissioning services from Blackpool Teaching Hospitals FT 12

The CCGs' response 13
Our analysis of the complaint regarding the CCG's approach to commissioning 15
Future work on local payment arrangements 15

5. Patient choice for routine elective care 17

The complaint 17
The relevant rules 17
The CCGs' response 18
Our assessment of compliance with Standing Rule 39 21
Our assessment of compliance with Standing Rule 42 22
Conclusion 24

6. Choice of alternative provider for patients waiting 18 weeks or more 25

The complaint 25
The relevant rules 25
The CCGs' response 26
Our assessment 27

7. Conclusions 29

Appendix 1: Analysis of patient activity data 30

Please note: All documentation relating to this investigation (case CCD 05/13) – including a summary of the case and a remedies consultation document on our next steps – is available on the case webpage: https://www.gov.uk/government/publications/case-investigation-into-the-commissioning-of-elective-services-in-blackpool

1. Background to the complaint

The complaint

1.1. In September 2013 Spire Healthcare Limited ('Spire') complained to Monitor that Blackpool Clinical Commissioning Group and NHS Fylde and Wyre Clinical Commissioning Group ('the CCGs') were in breach of their legal obligations. Broadly, Spire complained that the CCGs had taken a number of actions which had led to patients being directed away from Spire Fylde Coast Hospital and towards Blackpool Teaching Hospitals NHS Foundation Trust ('Blackpool Teaching Hospitals FT').

1.2. Spire provided data on the number of referrals it received at Spire Fylde Coast Hospital, copies of correspondence between the CCGs and local GPs, and publically available data on referral to treatment times to support its allegations. Spire also provided other documentary evidence, including copies of a patient choice newsletter.

1.3. Spire identified three specific actions by the CCGs that it said had led to patients being directed away from Spire Fylde Coast Hospital to Blackpool Teaching Hospitals FT:

- entering into a 'block' contract with a fixed value, covering all services, with Blackpool Teaching Hospitals FT
- sending biased or incomplete information to GPs about patient choice and the provision of care in the area, which favoured NHS providers
- preventing patients who were waiting longer than 18 weeks from choosing a suitable alternative provider.

1.4. Spire's complaint was that these actions constituted breaches of the CCGs' legal obligations in relation to transparency, non-discrimination, anti-competitive behaviour, patient choice for first outpatient appointments and right to a choice of suitable alternative provider at 18 weeks.

1.5. Monitor can investigate complaints that commissioners have failed to comply with a requirement imposed by Regulations 2–12 of the Procurement, Patient Choice and Competition Regulations (the Regulations) or by Standing Rules 39,

42 or 43.[1] We opened a formal investigation into the complaint on 10 October 2013 and published a case initiation notice, setting out the initial scope of the investigation.[2]

The CCGs

1.6. Blackpool Clinical Commissioning Group consists of 23 GP practices.[3] It has an annual budget of £230 million for a population of approximately 172,500.[4]

1.7. NHS Fylde and Wyre Clinical Commissioning Group consists of 21 GP practices.[5] It has an annual budget of £215 million for a population of approximately 152,000.[6,7]

The complainant

1.8. We can only investigate a complaint where we are satisfied that the complainant has sufficient interest in the arrangement that the complaint relates to.[8]

1.9. Spire provides healthcare services to both NHS and private patients, with 39 hospitals across the UK.

1.10. In Blackpool, Spire operates Spire Fylde Coast Hospital, a 39-bed hospital, which has a high dependency unit and offers ear, nose and throat (ENT), general surgery, orthopaedic surgery, cardiology, gynaecology and neurology. The hospital treats patients suffering from conditions ranging from hernia and heart disease to thyroid problems and diabetes.[9]

1.11. In this case, Spire raised a number of concerns regarding the CCGs' joint approach to commissioning services, the operation and promotion of patient choice in the local commissioning area, and the potential impact that was having on patients.

1.12. We determined that as a provider of elective care to patients in the area, Spire had sufficient interest in the matters its complaint related to.

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[1] Regulation 13(1) of the Regulations.
[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325672/Notice_of_initiation_of_investigation_-_CCD-0513.pdf
[3] http://blackpoolccg.nhs.uk/about-blackpool-ccg/who-we-are/
[4] http://blackpoolccg.nhs.uk/wp-content/uploads/2013/05/CCG-Prospectus-spreads1.pdf, page 14.
[5] www.fyldeandwyreccg.nhs.uk/about-us
[6] https://s3-eu-west-1.amazonaws.com/platform-ccg-live-eu-2/attachments/270/original/Commissioning_Plan_19_04_13_FINAL.pdf?AWSAccessKeyId=AKIAJ3TZGA3TUZPPHIWQ&Expires=1406653899&Signature=Ak70p6Ch44PBeNal4CxzgRVvjVs%3D
[7] The complaint related to both CCGs, and the CCGs elected to co-ordinate their responses to the complaint and to our information requests. Where relevant to do so, we have split these responses and our analysis between each CCG. Prior to 1 April 2013, primary care trusts were responsible for commissioning healthcare services.
[8] Section 76(2) of the Health and Social Care Act 2012.
[9] www.spirehealthcare.com/fyldecoast/

2. Structure of this report

2.1. In Section 3, we set out our analysis of the patient referral data which Spire provided in support of its submission that actions taken by the CCGs had the effect of directing patients away from Spire's Fylde Coast Hospital to Blackpool Teaching Hospitals Foundation Trust.

2.2. In Section 4, we describe Spire's concerns regarding the CCGs' commissioning approach for 2013/14. We set out our understanding of the reasoning behind their approach and some of the potential issues that could arise from commissioning services in this way.

2.3. In Section 5, we set out our assessment of what arrangements the CCGs had in place to ensure that patient choice for first outpatient appointment for elective referrals was offered and promoted.

2.4. In Section 6, we set out our assessment of what arrangements the CCGs had in place to offer patients a suitable alternative provider where they are waiting (or likely to wait) more than 18 weeks for treatment.

2.5. In Section 7, we set out our overall conclusions.

3. Analysis of patient activity and referral data

3.1. In its complaint Spire submitted that since at least December 2012 the CCGs had taken actions which had led patients being directed away from Spire Fylde Coast Hospital and towards Blackpool Teaching Hospitals FT.

3.2. Alongside other information, it provided data on patient referrals. On the basis of this data, Spire submitted that:

- in December 2012 there had been a significant decline in referrals to Spire Fylde Coast Hospital by GPs in the CCGs' commissioning areas
- the number of referrals between December 2012 and May 2013 was 30% lower than the number of referrals in the preceding six-month period
- for seven of the nine months from December 2012 to August 2013 the number of patients being referred to Spire Fylde Coast Hospital was lower than had been achieved for that same month in the preceding year
- referrals to Spire Fylde Coast Hospital were below the level implied by a continuation of the trend of growth experienced in 2012.

3.3. In summary, Spire told us the decline in patient referrals was both significant and sustained, and was the result of actions by the CCGs which had led to patients being directed away from its hospital.

3.4. The CCGs told us that:

- in their view the complaint was factually incorrect and not supported by evidence
- patient choice was taken seriously within their commissioning areas and they supported this through many mechanisms
- they were not aware of any attempt to direct patients away from Spire.[10]

3.5. The CCGs told us that they disagreed with the referral data provided in Spire's submissions, in particular the data on first outpatient attendances between September and December 2012. Using Secondary Uses Service (SUS)[11] data on first outpatient attendances as a proxy for patient referrals, the CCGs submitted evidence showing the average weekly referrals per GP practice to Spire Fylde Coast Hospital for each year from 2011 to 2013. After doubling between 2011 and 2012, the data shows that this average had increased from

[10] Letter from CCGs to Monitor, dated 13 November 2013.
[11] SUS data is the central repository of healthcare in England, providing activity data. Health Episode Statistics, used to remunerate providers of NHS services according to national prices, are derived from SUS data.

1.6 referrals per week per GP practice to 1.7 referrals between 2012 and 2013. On this basis, the CCGs told us that they did not consider the changes in referrals per GP practice over the past two years to be material.

3.6. Referral patterns can be affected by a number of factors. Changes in referral patterns can reflect relative changes in quality or patient perception at different hospitals. For example, a provider's waiting time initiatives or consultant leave patterns could change referral patterns. In this case, Spire submitted that a fall in activity at its hospital, from December 2012 onwards, was likely to have been the result of inappropriate actions by commissioners.

3.7. We analysed data on patient activity, including data provided by Spire and data from other sources,[12] to determine:

a) whether there had been a significant and sustained fall in the number of referrals to Spire Fylde Coast Hospital from December 2012 onwards

b) if so, whether Spire Fylde Coast Hospital's overall share of activity (as compared to other providers in the area) had decreased in the same period in a way that was out of line with fluctuations in the period up to December 2012

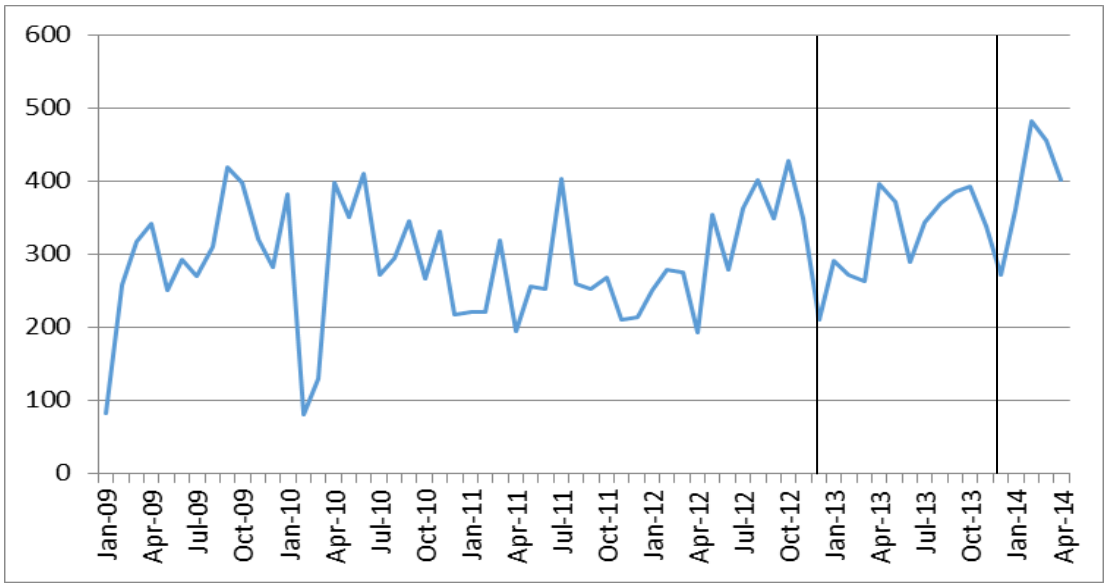
c) if so, whether there had been a simultaneous and corresponding increase in Blackpool Teaching Hospitals FT's share of activity from December 2012.

3.8. Figure 1 on the next page shows the activity (measured by the number of first outpatient attendances) at Spire Fylde Coast Hospital from January 2009.

3.9. It shows that activity fell considerably between October 2012 and December 2012 but recovered by April 2013 to levels similar to those prior to the decline. A similar pattern can be seen between October 2013 and April 2014. In addition, activity at Spire Fylde Coast Hospital seems to show a slight upward trend from January 2011.

[12] See Appendix 1 for further detail on our analysis.

Figure 1: First outpatient attendances for the nine specialties provided at Spire Fylde Coast Hospital, January 2009 to April 2014

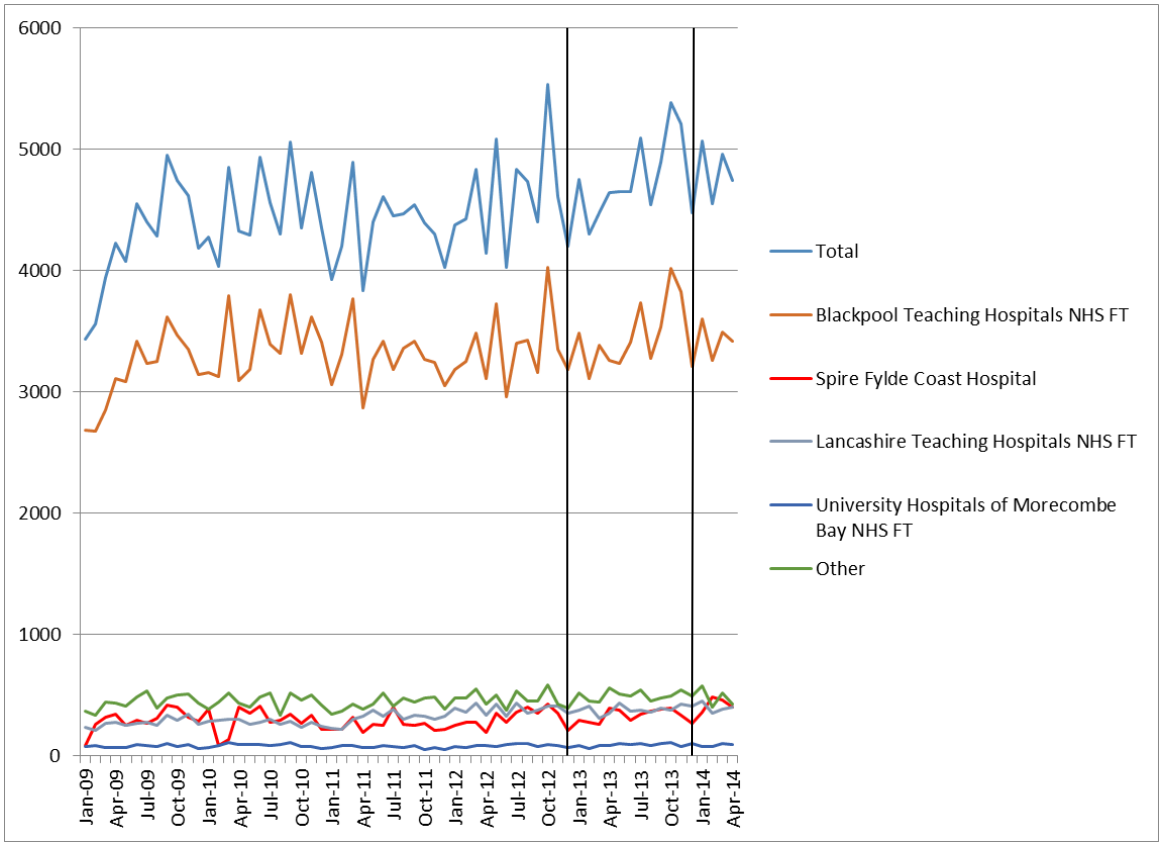


Source: Monitor analysis of Dr Foster outpatient attendance data, downloaded by specialty on PPM tool on 26/08/2014

Note: specialties are ENT, gastroenterology, general surgery, gynaecology, neurology, ophthalmology, trauma and orthopaedics, urology, and vascular surgery.

3.10. Figure 2 on the next page shows the overall activity across the CCGs' commissioning areas for the period January 2009 to April 2014. It shows that there is an increase in activity at Blackpool Teaching Hospitals FT and Spire Fylde Coast Hospital in October 2012. There is then a decrease in activity at both providers in the following two months. This pattern appears to be repeated the following year between October 2013 and December 2013.

Figure 2: First outpatient attendances across Blackpool CCG's and Fylde and Wyre CCG's commissioning areas for the nine specialties provided at Spire Fylde Coast Hospital, January 2009 to April 2014



Source: Monitor analysis of Dr Foster first outpatient data, downloaded using PPM tool in CCG view on 26/08/2014
Notes: Specialties included are ENT, Gastroenterology, General Surgery, Gynaecology, Neurology, Ophthalmology, Trauma and Orthopaedics, Urology and Vascular Surgery.

3.11. In summary, our analysis showed that:

- the CCGs' local commissioning areas are characterised by regular month-on-month and seasonal fluctuations in both the level of patient activity and the share of activity between providers
- the drop in activity experienced by Spire from November to December 2012 represented a 40% drop in activity, but this was not sustained – the level of activity at Spire Fylde Coast Hospital recovered to similar levels to those prior to December 2012 by April 2013
- from November 2012 to December 2012, there was an overall drop in activity in the commissioning areas of 9% and a fall at Blackpool Teaching Hospitals FT of 5%
- reflecting the changes in the level of activity in Figure 1, the monthly changes in the share of activity at Spire Fylde Coast Hospital from December 2012 onwards were not out of line with fluctuations

which it had experienced over preceding periods in the CCGs' commissioning areas

- the share of activity overall, and in most cases at specialty and procedure level for Blackpool Teaching Hospitals FT, did not fluctuate from December 2012 in a way that was out of line with changes in the preceding period.

3.12. Spire also said that the fall in referrals to its hospital was linked to the introduction of the block contract. As set out further in Section 4, the CCGs told us that negotiations about introducing a block contract started in October 2012 and the form of the contract was agreed by April 2013.

3.13. Our analysis of the data did not show changes in activity for the period from December 2012 onwards which were out of line with previous fluctuations. We also note that by April 2013 (around the time the block contract was finalised), the volume of patients being referred to Spire Fylde Coast Hospital was similar to the level of activity prior to the decline from November to December 2012. We also note that the volume of referrals to Spire has gradually risen above that level since April 2013.

3.14. Given the above, we concluded that the evidence did not support Spire's submission that patients had been directed away from its hospital to Blackpool Teaching Hospitals FT.

4. The CCGs' approach to commissioning services from Blackpool Teaching Hospitals FT

4.1. In its complaint, Spire referred to media reports in May 2013 stating that the CCGs had entered into what Spire referred to as a 'block contract'[13] with Blackpool Teaching Hospitals FT for 2013/14.[14] This contract included a fixed value which would not change based on actual activity and was to be paid to Blackpool Teaching Hospitals FT for all services (including all elective and non-elective services).

4.2. Spire submitted that this contract was causing a distortion of GP referral behaviour and leading to patients being directed away from its hospital to Blackpool Teaching Hospitals FT.

4.3. Spire submitted that the contract would provide a clear incentive for GPs to refer patients to Blackpool Teaching Hospitals FT rather than Spire Fylde Coast Hospital (and other providers).[15] Spire told us that this was because a referral to Blackpool Teaching Hospitals FT would not incur any additional costs for the CCG compared to another provider. Spire told us that it thought GPs could be expected to be more responsive to this incentive under the new commissioning arrangements than under the previous commissioning arrangements led by primary care trusts (PCTs). Spire said this was because GP-led commissioning meant that GPs are responsible for ensuring that commissioners do not exceed their budgets.[16] Spire also submitted that the block contract would reduce the incentives for Blackpool Teaching Hospitals FT to improve the quality and efficiency of its services.

4.4. Spire submitted that this behaviour adversely affected those patients who would otherwise have chosen Spire Fylde Coast Hospital. These adverse effects could include, for example, having to wait longer for treatment or being unable to access preferred facilities at Spire Fylde Coast Hospital.[17] Spire also submitted that the existence of the block contract with Blackpool Teaching Hospitals FT was anti-competitive, as it would reduce the level of competition between providers to attract patient referrals to their services. Spire submitted that its Fylde Coast Hospital was the most important competitive constraint on Blackpool Teaching Hospitals FT for routine elective services.[18]

[13] This is the term adopted by Spire in its complaint to describe the approach taken by the CCGs to commission services from Blackpool Teaching Hospitals NHS FT.
[14] Pages 11, 14 of the Complaint.
[15] Page 12 of the Complaint.
[16] Page 12 of the Complaint.
[17] Page 15 of the Complaint.
[18] Page 16 of the Complaint.

4.5. Spire submitted that patients would be adversely affected by the reduction in service improvement incentives for as long as the actions by the CCGs continue. Spire told us that the effect on patients arising from this loss of competition could become permanent if it resulted in a withdrawal of capacity or exit of Spire Fylde Coast Hospital.[19]

4.6. Spire recognised that it would be difficult to estimate the number of patients that would otherwise have chosen Spire Fylde Coast Hospital but said that if the trend in referral growth observed in 2012 had continued, it would have expected to treat many more NHS patients in the nine months from December 2012, with referrals likely to have reached Spire Fylde Coast Hospital's maximum capacity of around 900 per month.[20]

4.7. In support of its complaint, Spire provided evidence on patient referrals, which we assess in Section 3. Spire also referred to previous reports by the Co-operation and Competition Panel[21] which it said had found that where NHS acute trusts do not expect to be paid for additional activity, the incentives to attract patients by improving quality are reduced.[22]

The CCGs' response

4.8. The CCGs told us that they had introduced what they described as an assured contract for elective services, non-elective services and community services for 2013/14.[23] They told us that an assured contract was a change from the commissioning approach in 2012/13, when the majority of elective services were paid for on the basis of Payment by Results and according to nationally mandated prices (where they had been available).

4.9. The CCGs told us that discussions with Blackpool Teaching Hospitals FT for the 2013/14 contracting round began in October 2012.[24] The CCGs told us that the thrust of their contractual discussions with Blackpool Teaching Hospitals FT was to contain funding at what they described as the right level of activity.

4.10. The CCGs provided us with communications between the CCGs and Blackpool Teaching Hospitals FT which appear to show that the decision to use an assured contract was made in early 2013.[25] The overall financial value

[19] Page 16 of the Complaint.
[20] Page 15 of the Complaint.
[21] Page 15 of the Complaint.
[22] For a copy of the report, please go to: http://webarchive.nationalarchives.gov.uk/20130513202829/http:/www.ccpanel.org.uk/cases/Operation_of_any_willing_provider_for_the_provision_of_routine_elective_care_under_free_choice.html.
[23] The CCGs told us that this started as Payment by Results for elective and assured for non-elective but that the end point was an assured contract for those services.
[24] Document from CCGs 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 32.
[25] Based on a review of documentary evidence provided to Monitor by the CCGs.

was agreed in April 2013.[26] The final contract was signed in September 2013.[27] The CCGs told us that they had chosen to contract in this way for 2013/14 on a temporary basis and intended to review their position for 2014/15.

4.11. The CCGs told us that determining the expected level of activity for 2013/14 was a matter of protracted discussion.[28] They told us that the difficulty in establishing the expected activity was a national problem arising from a lack of clarity as to whether CCGs or NHS England were responsible for commissioning certain services, including specialised services.[29]

4.12. The CCGs also told us that substantial progress had to be made by the local health economy in developing a transformational programme to reduce long-term running costs.[30] With Blackpool Teaching Hospitals FT, the CCGs had sought to develop a form of contract which would support reductions in non-elective admissions but leave sufficient flexibility to take account of any significant in-year changes to referral patterns as a result of the exercise of patient choice.[31] The CCGs told us that they continued to monitor activity, including by reference to the national tariff.

4.13. The CCGs told us that the intention was to free up funding for other projects designed to improve quality and cost effectiveness.[32] The CCGs told us that the contract allowed funding of approximately £3 million to be released for transformational schemes.[33] The CCGs told us that neither they nor the local GPs had sought to influence where patients chose to have treatment. The CCGs told us that they had systems, processes and contracts in place that support patient choice.[34] The CCGs' approach to patient choice is assessed further in Section 5.

4.14. The CCGs also told us that the assured contract did not amount to a suspension of Payment by Results. The CCGs told us that they sought to estimate the level of activity and cost in the contract at the outset and then identify the appropriate value of the services. The CCGs told us that although the contract was for an assured value, the CCGs still monitored activity and costs using nationally and locally determined prices.[35]

[26] Document from CCGs 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 17.
[27] Document from CCGs 'Detailed trail for Spire Complaint', dated 15 November 2014.
[28] 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 15.
[29] Email from CCGs to Monitor, dated 26 June 2014.
[30] 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 10.
[31] 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', paras 13, 16.
[32] 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 11.
[33] 'Blackpool, Fylde and Wyre and BTH contract round for 2013/14', para 18.
[34] Letter from the CCGs to Monitor, dated 13 November 2013.
[35] Email correspondence from CCGs with Monitor, dated 21 January 2014.

Our analysis of the complaint regarding the CCG's approach to commissioning

4.15. Spire's complaint regarding the effect of the block contract was linked to the data it provided on patient referrals, the existence of a locally negotiated assured contract, and copies of correspondence between the CCGs.

4.16. In Section 3, we set out our analysis of the data Spire provided on patient referrals. We found that the data did not show changes in referrals which were out of line with previous fluctuations. On this basis, we found that the data did not support the view that referral behaviour had changed in the period leading up to the agreement of the block contract and the period following the agreement. We found that, around the time that the contract was finalised (see paragraph 4.10), referrals to Spire Fylde Coast Hospital were at a similar level to referrals prior to the identified fall in November 2012.

4.17. The CCGs have since informed us that they intend to return to a contract based on Payment by Results and nationally mandated prices for the commissioning of elective services from Blackpool Teaching Hospitals FT in 2014/15.[36]

4.18. As a result of our analysis of the data and the CCGs' decision to change their approach to commissioning for 2014/15, we decided not to investigate the CCGs' previous commissioning approach further in this case. We took this decision on the basis that there would be limited value in continuing to examine an approach which is no longer being followed and that the greatest benefit to patients would be achieved by focusing our resources on investigating ongoing concerns relating to patient choice.

Future work on local payment arrangements

4.19. This investigation raises some wider issues relating to payment mechanisms for elective services.

4.20. Commissioning elective services on the basis of a fixed payment, agreed in advance between a commissioner and provider, risks reducing the incentives that may otherwise exist to improve quality. The risk to incentives is likely to be greater where patients have a choice of multiple providers and may therefore make decisions based on relative perceptions of quality (for example, by relying on indicators such as the friends and family test, waiting times, mortality rates, etc). The exercise of choice can encourage providers

[36] Email correspondence from CCGs with Monitor, dated 2 April 2014.

to improve their services relative to other providers if the payment follows the patient.[37]

4.21. The NHS Standard Contract contains provisions for forecasting expected activity and planned advance payments where these are necessary to assist a provider in transferring services or securing transformational funding. Use of the Standard Contract is mandatory and a failure to follow it is a breach of the Standing Rules enforced by NHS England.

4.22. The national tariff is mandatory and commissioners must follow a prescribed process if they plan to depart from it. The National Tariff Payment System now contains provisions which allow commissioners and providers to agree departures from the national tariff in certain circumstances. Departures from the national tariff could be appropriate in certain circumstances; for example, when seeking to manage non-elective activity as part of a transfer of services out of hospital. However, such departures are unlikely to be relevant to elective services.[38]

4.23. We will continue to analyse the circumstances and implications for provider and commissioner incentives where commissioners depart from the NHS Standard Contract and/or the National Tariff Payment System.

[37] http://webarchive.nationalarchives.gov.uk/20130513202829/http://www.ccpanel.org.uk/content/cases/Operation_of_any_willing_provider_for_the_provision_of_routine_elective_care_under_free_choice/280711_AWP_Review_Final_Report.pdf

[38] https://www.gov.uk/government/collections/the-nhs-payment-system-regulating-prices-for-nhs-funded-healthcare

5. Patient choice for routine elective care

The complaint

5.1. Spire's complaint said[39] that the CCGs had not met their obligations to ensure that GPs offered patients a choice of provider for first outpatient appointments (required by Standing Rule 39), nor publicised and promoted the availability of choice to patients (required by Standing Rule 42).[40]

The relevant rules

5.2. Standing Rule 39 requires commissioners, subject to certain exceptions,[41] to make arrangements to ensure that a patient requiring an elective referral for a first outpatient appointment with a consultant or a member of a consultant's team is offered a choice of any clinically appropriate provider. The patient must be able to choose any clinically appropriate provider or a named consultant-led team employed or engaged by that provider.[42]

5.3. Standing Rule 42 requires commissioners to make arrangements to ensure that the availability of the choice set out above is publicised and promoted to patients. This includes a requirement to make arrangements for publicising and promoting awareness of information about different healthcare providers and consultant-led teams to enable patients to exercise their rights to choice.

5.4. Spire said that it did not believe that there had been a meaningful effort by Blackpool CCG or Fylde and Wyre CCG to ensure that patients were aware of their right to choose their preferred provider of treatment for routine elective care.[43] Spire was also concerned that the CCGs had sent biased or incomplete promotional material to GPs about choice and the provision of care in the area, which favoured NHS providers.[44]

5.5. Spire provided us with a copy of the CCGs' Choose and Book newsletter from summer 2013, which was given to GPs in the local area. It contained information about Blackpool Teaching Hospitals FT and a number of NHS providers in other towns (Morecambe Bay, Preston) but did not include information about local

[39] Page 17 of the Complaint.
[40] Regulation 13 of the Regulations give Monitor the power to investigate a complaint received by it that a clinical commissioning group has failed to comply with a requirement imposed by regulations 39, 42 or 43 of the Standing Rules.
[41] The obligation does not apply to maternity services, cancer services subject to the two week maximum waiting time or any service for which it is necessary to provide urgent care (Regulation 40). It also does not apply to any person who is detained under the Mental Health Act 1983, detained or on temporary release from prison or serving as a member of the armed forces (Regulation 41).
[42] The only condition under Standing Rule 39 is that the provider has an existing contract with any commissioner. There is no requirement that that contract be with the commissioner with responsibility for the relevant patient.
[43] Page 12 of the Complaint.
[44] Pages 12, 13 of the Complaint.

independent sector providers of NHS services such as Spire Fylde Coast Hospital or Ramsay's Fulwood Hall Hospital.[45] Spire also told us that there was no information displayed in GP surgeries informing patients of their rights to choose their provider of routine elective care or advising them how to exercise this right.[46]

5.6. We considered that the sample of communications provided by Spire between the CCGs and GPs, which did not appear to include any non-NHS providers, justified closer scrutiny. We asked the CCGs to explain how they were ensuring the effective operation and promotion of patient choice in the local area.

The CCGs' response

5.7. We asked the CCGs a number of questions regarding the arrangements in place to ensure patients were offered choice under Standing Rule 39 and how the rights to choose were promoted to patients, as required by Standing Rule 42.

5.8. The CCGs told us that the primary means of offering patients choice in the local area is through the Choose and Book system. The CCGs told us that choice had been strongly supported in the area since 2004 and that this has resulted in high usage rates for Choose and Book, above the north west and national averages. The CCGs told us that the high use of Choose and Book has led them to focus less on renewing messages about patient choice in the area.[47]

5.9. The CCGs told us that since 2004 commissioners in the local area had run a Choose and Book Support Team which offers support, advice and training to GPs.[48] The CCGs told us that the Choose and Book Support Team also works closely with commissioners, referrers and providers, dealing with any issues or inappropriate use of the system and provides telephone support to providers and referrers.[49] Objectives for the Choose and Book Support Team included 90% of referrals being made through Choose and Book. The service specification noted that this objective relied on all local services being listed on Choose and Book.[50,51]

5.10. The CCGs told us that they have offered assistance to a number of independent providers in the area.[52] The CCGs also told us that the Choose

[45] Copy of Choose and Book newsletters from Summer 2013, provided to Monitor.
[46] Page 13 of the Complaint.
[47] Page 18 of initial CCG response.
[48] Paragraphs 2, 3 of CCG patient choice summary dated 21 January 2014
[49] Page 18 of initial CCG response.
[50] The specification required that at least 96% of appointment slots were available on Choose and Book.
[51] Choose and Book Project service specification.
[52] For example, Assura Dermatology; PDS Medical Audiology Services; InHealth Audiology; Specsavers Audiology Services; Marie Stopes; and Blackpool Pregnancy Advisory. Page 19 of initial CCG response.

and Book Support Team provided workshops, with invitations sent to all GPs (who usually send medical secretaries or practice managers) and providers (who usually send appointments office staff), GP training, and phone support.[53]

5.11. The CCGs told us that from June 2009 to June 2011 the previous commissioners operated a Booking and Choice Centre, which operated Choose and Book services, including a local appointments line, booking appointments, processing manual referrals and offering choice for GP, dental and optometrist referrals to consultant-led services.[54] When the Booking and Choice Centre was closed in 2011, the Director of Strategic Planning and Commissioning at NHS Blackpool PCT wrote to GPs stressing that Choose and Book remained the optimum way to refer patients. The CCGs told us that when the Choose and Book Centre closed, its manager met with Spire and outlined future processes for managing the use of Choose and Book in the local area.[55]

5.12. The CCGs told us that they receive reports of monthly utilisation rates of Choose and Book and slot issues. A monthly Choose and Book summary is sent to local GPs, detailing usage rates by practice. CCG information is taken from a range of national Choose and Book reports, highlighting local slot issues by speciality and named clinician services. The CCGs told us that all GPs in Fylde and Wyre CCG and 92% of GPs in Blackpool CCG use Choose and Book.[56] Blackpool Teaching Hospitals FT had 100% of its services included on the Directory of Services.

5.13. The CCGs told us that Spire had received significant assistance regarding its Choose and Book functions.[57] The CCGs gave an example that Spire started to include the name of the consultant in November 2012, more than a year after Blackpool Teaching Hospitals FT.[58] The CCGs told us that delays in including named clinicians on Choose and Book resulted in 23 months in which Spire services would not show to a referrer who searched using the 'named clinician' functionality.[59]

5.14. The CCGs told us that leaflets and posters promoting patient choice were circulated to GPs in 2009 and 2010.[60] The CCGs also provided us with details of a number of workshops and presentations aimed at GPs that

[53] Page 19 of initial CCG response.
[54] Page 18 of initial CCG response.
[55] Page 18 of initial CCG response.
[56] Page 19 of initial CCG response.
[57] Page 19 of initial CCG response.
[58] Page 2 of Blackpool CCG and Fylde and Wyre CCG initial response letter to Monitor.
[59] Page 2 of Blackpool CCG and Fylde and Wyre CCG initial response letter to Monitor.
[60] Page 18 of initial CCG response.

addressed the use of Choose and Book, which the CCGs said demonstrated the promotion of Choose and Book to GPs.[61]

5.15. In relation to patients being able to raise concerns with the CCGs when choice may not have been offered effectively, both CCGs noted that their websites have clearly signposted pages where patients can make complaints.[62]

Choose and Book newsletters

5.16. The CCGs told us that they had promoted the use of Choose and Book through a newsletter. This was first sent to GPs in winter 2009, when it included information about the Choose and Book Directory of Services, new services in the area (including a new urology service at Spire Fylde Coast Hospital) and hints on troubleshooting when using the system. The CCGs have provided us with copies of their Choose and Book newsletters, which are now sent to all local GPs on a quarterly basis.[63] These newsletters contain information about new services (including new services provided by non-NHS organisations) and information about waiting times for first outpatient appointments for Blackpool Teaching Hospitals FT, University Hospitals of Morecambe Bay FT and Lancashire Teaching Hospitals FT.

5.17. The CCGs told us that waiting time information regarding independent sector providers of NHS services such as Spire had not been included as the CCGs had not identified concerns with independent sector waiting times and slot availability for their services.

5.18. The CCGs told us that they have a target of 90% of first outpatient appointments being booked through Choose and Book.[64] In February 2014, 75% of outpatient appointments for patients that were the responsibility of Blackpool CCG and 79% of outpatient appointments for patients that were the responsibility of Fylde and Wyre CCG were booked through Choose and Book. Of the 211 clinical commissioning groups in England, Blackpool CCG had the 47th highest usage of Choose and Book and Fylde and Wyre CCG had the 41st highest usage of Choose and Book. Nationally, 55% of outpatient appointments were booked through Choose and Book in February 2014.[65]

[61] Documents entitled 'C&B workshop practices Nov 12', 'C&B Best practice & 18 weeks presentation' and 'Blackpool C&B workshop Feb12' provided in initial CCG response.
[62] Page 2 of CCGs' response to further working paper.
[63] Winter 2009, summer 2010, autumn 2010, summer 2011, summer 2012, winter 2012, and summer 2013.
[64] Document entitled 'Fylde and Wyre CCG Integrated Business report Quality & performance only (Jan 13)'
[65] Choose and Book weekly report, available at: http://www.chooseandbook.nhs.uk/staff/bau/reports

Our assessment of compliance with Standing Rule 39

5.19. Standing Rule 39 requires CCGs to make arrangements to ensure that patients requiring an elective referral are given a choice of any clinically appropriate provider for their first outpatient appointment.

5.20. To comply with this requirement, commissioners need to be satisfied that GPs (or other healthcare professionals, where relevant) are offering this choice to patients. We would therefore expect commissioners to proactively monitor whether choice is being offered and take appropriate action where it is not. This could include: using patient and/or GP surveys; monitoring referral patterns from individual GP practices; directly promoting the value of patient choice to GPs; and publishing information about which GPs routinely offer more or less choice.

5.21. In this case, we assessed what arrangements the CCGs had put in place to ensure that patients requiring an elective referral for a first outpatient appointment were offered and able to exercise their choice of provider.

5.22. Choose and Book is the main service which allows patients to choose providers in relation to first outpatient appointments for elective care in England, so the extent to which it works effectively will affect the ability of GPs to offer effective choice.[66,67]

5.23. For GPs to use Choose and Book, they require the services to which their patients might be referred to be available on the system's Directory of Services. The Directory of Services relies on providers making relevant information (services and appointment slots) available. The provision of this information is variable, with some providers failing to include appointment slots and some services in the Directory of Services. Although it would appear to be in the interests of providers to include all their appointments in the Directory of Services, it is apparent that some organisations do not do this. For example, in north west England, one trust had less than 50% of its services on the Directory of Services in January 2014.[68]

5.24. It appears to us that the CCGs took a number of steps to promote the use of Choose and Book in their areas. These include the initiatives set out at paragraphs 5.8 to 5.13 above. It appears to us that these measures have

[66] When a GP has established the need for a patient to be referred for routine elective care, the GP must discuss with the patient the options available. The patient, often together with the GP, chooses a provider and the patient is referred to that provider.
[67] Choose and Book will be replaced by a new NHS e-Referral service in 2014.
[68] February Directory of Services dashboard, available at: www.chooseandbook.nhs.uk/staff/bau/reports

resulted in an effectively populated Directory of Services and relatively high use of Choose and Book for booking outpatient appointments.[69]

5.25. The CCGs told us that they have also taken steps to monitor the extent to which individual GPs use Choose and Book when making referrals.[70] However, the CCGs have not provided us with evidence to demonstrate that the Choose and Book usage rates by individual GPs have been used by commissioners to ensure that patients are being offered effective choice.

5.26. Standing Rule 39 requires commissioners to be proactive in ensuring that patients are offered choice. The fact that the tools exist for choice to be offered (in this case, Choose and Book) is not sufficient. Although Choose and Book can provide an effective tool for offering choice, high utilisation of that service does not in itself demonstrate whether or not patients are being offered a choice of provider. This is because Choose and Book can be used by GPs or other practice employees to make a referral on a patient's behalf, but does not require the patient to be offered a choice of provider.

5.27. Standing Rule 39 requires positive action to ensure that choice is being offered. There are different ways in which CCGs can do this; actions are likely to include direct engagement with GPs and/or patients to determine how choice is operating in a local area. We did not receive information which demonstrated that either of the CCGs had taken steps to comply with this requirement in the relevant period.

5.28. In this case, while we welcome the steps the CCGs have taken to increase the use of Choose and Book, we are not satisfied that they have ensured that patients were being offered choice in this local area. This means that the CCGs did not comply with their obligations under Standing Rule 39.

Our assessment of compliance with Standing Rule 42

5.29. Standing Rule 42 requires commissioners to make arrangements to ensure that the availability of choice under Standing Rule 39 (that is, in relation to choice of first outpatient appointment) is publicised and promoted. This should include arrangements for publicising information relevant to a patient's choice of provider or consultant-led team and publicising details and promoting awareness of where that information may be found.

5.30. Our view is that CCGs must be proactive in ensuring that patients are fully aware of their rights, by implementing measures to inform patients directly of their rights, as well as through working with local GPs. The steps required are likely to vary between commissioning areas depending on local

[69] See paragraph 5.18
[70] See paragraph 5.12

circumstances. However, these steps could include providing information about patient choice on the CCGs' websites, programmes to promote patient choice in GP surgeries (for example through posters and leaflets), and wider programmes in the local area (such as publicity in newspapers or newsletters to patients about patient choice).

5.31. The CCGs did not provide us with evidence that they had raised patients' awareness of patient choice, or that they had used any of the above methods to promote patient choice.

5.32. We found that there was limited information about patient choice on Blackpool CCG's website: it did not seek to explain to patients when they had a right to choose, nor what to do if they were not offered choice.[71] Fylde and Wyre CCG now has a more detailed webpage about patient choice. Neither CCG home page promoted the choice information page in the relevant period. Should a patient have wished to make a complaint about not being offered a choice of provider, they would not have found specific information on the complaint pages about patient choice, such as information on steps to take if they wished to complain about a failure of the patient choice process. We also asked the CCGs to provide us with copies of all correspondence with local GP surgeries over the last 12 to 18 months. This is because in many cases patient choice of provider for routine elective care will occur at a GP surgery where the patient seeks or is given advice by their GP as to which provider they should be referred to. By providing GPs with information about providers, CCGs will, in many cases, assist GPs in providing better advice to patients.

5.33. In our view, the way CCGs promote local patient choices to GPs is part of the obligations under Standing Rule 42. This is because such communications are likely to have an impact on which providers GPs refer patients to, particularly where the communications include information specific to patient choice (for example, waiting times or other quality indicators).

5.34. Paragraphs 5.16 and 5.17 describe the Choose and Book newsletters. We found there was little mention of providers other than regional NHS foundation trusts in the correspondence given to us by the CCGs. This was despite the fact that Spire Fylde Coast Hospital is in the immediate vicinity of the CCGs. The CCGs told us that they only included information about NHS provider waiting times in the Choose and Book newsletters as these providers had longer waiting lists. This implies that GPs would use the information to refer patients to other providers. However, many of the services listed in the newsletters had relatively short waiting times of two or three weeks.

[71] http://blackpoolccg.nhs.uk/about-blackpool-ccg/what-we-do/patient-choice/

5.35. It is essential that information provided in such communications is balanced and impartial and that it supports patient choice. For example, if a provider had long waiting lists or poor quality service provision, it would appear to be in patients' interests to provide information on the availability of alternative providers with shorter waiting times. Excluding details or references to a potentially appropriate alternative provider for certain patients in communications with GPs risks distorting the operation of patient choice and is inconsistent with the CCGs' obligations under Standing Rule 42.

5.36. In light of the above, we are not satisfied that the CCGs had ensured that the availability of choice was publicised and promoted to patients. This means that the CCGs did not comply with their obligations under Standing Rule 42.

Conclusion

5.37. We assessed whether commissioners had made arrangements to ensure that patients requiring an elective referral were offered a choice of any clinically appropriate provider for their first outpatient appointment, in accordance with Standing Rule 39. We found that the commissioners had not ensured that GPs had offered this choice to patients. We therefore found that the CCGs did not comply with their obligations under Standing Rule 39.

5.38. We assessed whether commissioners had made arrangements to ensure that patient choice was publicised and promoted to patients, in accordance with Standing Rule 42. We found that the commissioners had not publicised and promoted the right of choice to patients. We therefore found that the CCGs did not comply with their obligations under Standing Rule 42.

6. Choice of alternative provider for patients waiting 18 weeks or more

The complaint

6.1. In its complaint, Spire said that patients waiting or likely to wait longer than 18 weeks for treatment at Blackpool Teaching Hospitals FT were not being given the opportunity to choose a suitable alternative provider who could treat them sooner.[72] Spire submitted that this amounted to a breach of Standing Rule 48.

6.2. To support this, Spire told us that in June 2013 there were 810 patients waiting longer than 18 weeks for treatment at Blackpool Teaching Hospitals FT. Despite this, Spire told us that it was not aware of any instances where patients waiting longer than 18 weeks had been offered a choice of provider and subsequently referred to Spire Fylde Coast Hospital.

The relevant rules

6.3. The NHS constitution sets out the right of patients to access certain services commissioned by NHS bodies within maximum waiting times, or for the NHS to take all reasonable steps to offer that patient a range of suitable alternative providers if this is not possible. Responsibility for ensuring a choice of suitable alternative provider is offered effectively to patients likely to wait longer than 18 weeks is shared between commissioners and providers.

6.4. Regulation 12 requires that, where Standing Rule 48 applies, commissioners must offer a patient a choice of suitable alternative provider in accordance with Standing Rule 48(4). Standing Rule 48 applies where a patient has been referred for elective care and the commissioner has been notified that the patient has not commenced, or will not commence, appropriate treatment within 18 weeks.[73] This notification must be provided to the CCG by the patient or a person acting lawfully on their behalf.[74]

6.5. Standing Rule 48 imposes a duty on the commissioner, subject to certain exceptions, to take all reasonable steps to ensure that a patient is offered an appointment with a suitable alternative provider. The appointment must allow treatment to commence earlier than the patient would have been treated at the original provider. Where there is more than one suitable provider, the patient must be offered a choice of appointment with two or more alternative suitable providers.[75]

[72] Pages 11, 12 of the Complaint.
[73] Standing Rule 47(4).
[74] Standing Rule 47(5).
[75] Standing Rule 48(4).

6.6. Providers must ensure that patients are able to exercise choice where that is available. The provider to whom the patient is referred should notify the patient of their rights and tell the patient where information about that choice can be found.[76]

6.7. In practice, if a provider becomes aware at any stage that a patient will wait longer than 18 weeks, the provider should notify the patient about this as soon as possible. When doing so the provider should provide contact details for the patient's commissioner and remind the patient that the commissioner is required to take all reasonable steps to ensure that they are offered an appointment at a suitable alternative provider (and a choice of providers where this is available).

The CCGs' response

6.8. The CCGs told us that they monitor the 18-week information reports provided by Staffordshire and Lancashire Commissioning Support Unit (the CSU) on a monthly basis. These reports included information about the number and proportion of patients who were treated each month within 18 weeks, and the number of patients who were waiting over 18 weeks.[77]

6.9. By way of example, a copy of a report we received for September 2013 showed that there were 578 patients from Blackpool CCG who had been waiting more than 18 weeks for treatment. Of these, 394 patients were waiting for treatment at Blackpool Teaching Hospitals FT and 150 were waiting for treatment at Lancashire Teaching Hospitals NHS Foundation Trust (Lancashire Teaching Hospitals FT). In September 2013, there were 522 patients from Fylde and Wyre CCG who had been waiting more than 18 weeks for treatment. Of these, 329 were waiting for treatment at Blackpool Teaching Hospitals FT and 139 were waiting for treatment at Lancashire Teaching Hospitals FT.[78]

6.10. The CCGs told us that Spire did not provide data that allowed them to see how long patients were waiting for treatment at Spire Fylde Coast Hospital until winter 2013.[79]

6.11. The CCGs told us that if a significant number of patients were at risk of breaching 18 weeks for any service line, the issue would be raised with the

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Providers of NHS funded healthcare services are licensed by Monitor through the provider licence. Licence condition C1 of the provider licence states that, subsequent to a person becoming a patient of the Licensee and for as long as he or she remains such a patient, the Licensee shall ensure that at every point where that person has a choice of provider under the NHS Constitution or a choice of provider conferred locally by Commissioners, he or she is notified of that choice and told where information about that choice [76] can be found.

[77] Page 24 initial CCG response.

[78] Documents 'Blackpool 18 week analysis & monitoring' and 'F&W 18 week analysis & monitoring' from initial CCG response.

[79] Page 24 initial CCG response.

provider at a Contract Review Board meeting.[80] Since 1 April 2013, contracts with local providers set out obligations to offer patients a suitable alternative provider if they will not be treated within 18 weeks.[81] The CCGs told us that all patients who arrange an outpatient appointment at Blackpool Teaching Hospitals FT are sent a leaflet which includes information about patients' right to be treated within 18 weeks of referral and their right to a choice of suitable alternative provider if they are not treated within that time.[82]

6.12. The CCGs told us that since 1 April 2013, six patients from Fylde and Wyre CCG requiring hip arthroscopies had been transferred out of Blackpool Teaching Hospitals FT due to concern they would not be treated within 18 weeks.[83]

6.13. The CCGs told us that they have adopted the complaints policies of the former PCTs and that these are currently under review. Both CCGs have appointed the CSU to support their complaints handling procedure and the CSU has developed a process for this. The CCGs told us that they had received two complaints from patients who were concerned that they would not be treated within 18 weeks. The CCGs told us that both of these patients were assisted according to CCG procedures for offering patients a suitable alternative provider where appropriate.

Our assessment

6.14. The CCGs told us that they received two notifications from patients who were concerned about the length of time they were waiting to receive treatment.

6.15. In contrast to the very small number of patients contacting the CCGs, a substantial number of patients were waiting more than 18 weeks for treatment in this local area (see paragraph 6.9). We recognise that a proportion of those patients may not have been suitable for referral to a suitable alternative provider to commence treatment. However, there was likely to be a significant proportion of patients who could have benefited from exercising their right to commence treatment at a suitable alternative provider.

6.16. One reason for the very small number of patients seeking to exercise their rights in this respect could be that patients are simply not aware of their right to be offered a suitable alternative provider or, if they are aware, they do not know how to exercise that right effectively.

[80] Meetings held for contract management.
[81] Page 26, initial CCG response.
[82] Page 26, initial CCG response.
[83] Page 29, initial CCG response.

6.17. We note that Blackpool Teaching Hospitals FT provides each patient with a leaflet when they are referred. On the final page patients are informed of their right to a choice of suitable alternative provider. However, there is little information about what patients should do if they are concerned that they may not be treated quickly enough, other than to ask about this right at their outpatient appointment. There is also little information on the CCGs' websites for patients about how to make a complaint and no information about what a patient should do if they are not likely to be treated within 18 weeks.

6.18. The CCGs told us that there are forms on their websites that patients can use to submit complaints themselves and separate pages on patient choice.[84] We do not think it is appropriate to treat a request by a patient to exercise their legal right as a complaint. We expect providers to make specific arrangements to enable patients wishing to exercise their rights to do so.

6.19. We have not found evidence that either CCG has failed to offer, when contacted by a patient, treatment at a suitable alternative provider (as required by Standing Rule 48). However, it appears to us that current arrangements in this local area would not enable patients to exercise their right to choose a suitable alternative provider effectively where they are likely to or are waiting more than 18 weeks for treatment.

6.20. In our view, local commissioners need to do more to ensure that patients are able to exercise their right to choose a suitable alternative provider where maximum waiting times are likely to be breached or have already been breached. Commissioners should work with providers to ensure patients are able to exercise this right. This could involve monitoring waiting times, reporting on waiting times, providing information to patients and providing support if patients want or need it.

6.21. The CCGs have now produced and are distributing an 18-week referral to treatment policy document[85] which refers to a number of actions providers need to take. These actions include raising awareness with patients, reporting referral to treatment times which are likely to exceed 18 weeks, offering patients the choice of a different provider, reporting back to the CCG.

6.22. We understand that the CCGs also intend to incorporate this policy into the 2014/15 contracting round, with assurances sought from providers prior to contract signing.[86]

6.23. We intend to work with the CCGs to help ensure that patient choice at 18 weeks is implemented effectively.

[84] Letter from CCGs dated 11 July 2014.
[85] Policy document provided 27 January 2014.
[86] Email from CCGs, dated 27 January 2014.

7. Conclusions

7.1. We assessed whether the evidence supported Spire's submission that patients had been directed away from Spire Fylde Coast Hospital to Blackpool Teaching Hospitals FT. We concluded that the evidence did not support Spire's submission.

7.2. We assessed whether the commissioners had made arrangements to ensure that patients requiring an elective referral were offered a choice of any clinically appropriate provider for their first outpatient appointment, in accordance with Standing Rule 39. We found that the commissioners had not ensured that GPs had offered this choice to patients. We therefore found that the CCGs did not comply with their obligations under Standing Rule 39.

7.3. We assessed whether the commissioners had made arrangements to ensure that patient choice was publicised and promoted to patients, in accordance with Standing Rule 42. We found that the commissioners had not publicised and promoted the right of choice to patients. We therefore found that the CCGs did not comply with their obligations under Standing Rule 42.

7.4. We assessed whether the commissioners had offered a choice of suitable alternative provider for patients waiting or likely to wait more than 18 weeks to commence treatment, in accordance with Standing Rule 48. We did not find evidence that either CCG had failed to offer, when contacted by a patient, treatment at a suitable alternative provider (as required by Standing Rule 48). We therefore found that the CCGs were compliant with their obligations under Standing Rule 48.

Appendix 1: Analysis of patient activity data

A.1 In this appendix, we set out our analysis of the evidence provided by Spire in support of its complaint (that there had been a reduction in referrals of patients requiring routine elective care to Spire Fylde Coast Hospital due to a direction of patients towards Blackpool Teaching Hospitals FT).[87] This evidence underpinned Spire's complaint in a number of respects.

A.2 Spire provided Monitor with patient referrals data,[88] which it said demonstrated that it had experienced a decline in referrals to its Spire Fylde Coast Hospital in December 2012 and that the number of referrals received between December 2012 and May 2013 was 30% lower than the number received in the preceding six-month period. It considered this decline in patient referrals to be both significant and sustained.[89]

A.3 Specifically, in its complaint, Spire submitted that:

- in December 2012, there had been a significant decline in referrals by GPs in the CCGs' commissioning areas to Spire Fylde Coast Hospital[90, 91]
- the number of referrals between December 2012 and May 2013 was 30% lower than the number of referrals in the preceding six-month period[92]

[87] We analysed patient activity for Blackpool Teaching Hospitals NHS FT at trust level. Blackpool Teaching Hospitals NHS FT operates four sites and Blackpool Victoria Hospital undertook 99.8% of the total number of first outpatient attendances undertaken by the trust between January 2009 and October 2013. It is unlikely that the results would be very different if the analysis were undertaken at site level.

[88] Pages 4–10 of the Complaint; first (25 October 2013) and follow-up (21 November 2013) responses to Monitor's 10 October 2013 information request; Spire letter to Monitor in April 2014 in response to economics working paper. We also received a submission from the CCGs on 13 November 2013.

[89] Spire characterises the change in referral patterns in various ways. It is referred to in the Complaint as a "dramatic decline" (page 5), a "significant decline" (page 5) and a "sharp decline" (page 13). In later correspondence it is also referred to as a "decline in patient numbers…of a significant and sustained quantum" (letter of 9 April 2014 from Martin Rennison to Monitor). We consider that, for the referrals data to support the claim that patients had been directed, such data would need to reflect not only a significant change but one which was also sustained. This is consistent with Spire's argument that referrals remained 30% lower in the six months from December 2012 when compared to the preceding six month period.

[90] Page 5 of the Complaint.

[91] Spire subsequently submitted evidence that referrals changed differently over time at Spire Fylde Coast Hospital than at two other sites it deemed similar in the Spire Healthcare group. We do not believe we can draw robust conclusions from the submission made by Spire with respect to referrals received by Spire at these other two sites in its network. Notwithstanding that, to the extent that these comparators could be relevant, we are of the view that they do not support Spire's submission that Fylde Coast Hospital experienced a step-change in the form of a lower activity level or that Fylde Coast Hospital exhibits unusual growth patterns compared to its two other sites.

[92] Spire initially submitted that there had been a decrease of 40% in the average number of referrals per month in the six months from December 2012, compared to the preceding six months. This was subsequently revised to 30% in correspondence.

- for seven of the nine months from December 2012 to August 2013, the number of patients being referred to Spire Fylde Coast Hospital was lower than had been achieved for that same month in the preceding year[93] and

- referrals to Spire Fylde Coast Hospital were below the level implied by a continuation of the trend of growth experienced in 2012.[94]

A.4 Spire said that it did not consider that factors such as a fall in the total number of patients requiring routine elective care[95] or changes in patient preferences[96] could readily explain this change in referrals.

A.5 Specifically, Spire submitted that an overall reduction in patient demand was only likely to have occurred where the CCGs were undertaking a number of initiatives in out-of-hospital care over a period of time. Spire told us that it was not aware of any such initiatives.[97] Spire referred to some data which it said supported its view that referrals to Blackpool Teaching Hospitals FT had not declined.[98] Spire also noted that there had been a decline in some services (for example joint replacement procedures), which had led to lower patient numbers for those services at both Spire Fylde Coast Hospital and at Blackpool Teaching Hospitals FT. Spire recognised that it did not have access to the data on GP referrals for all the providers in the CCGs' commissioning areas that would allow it to assess whether the fall in referrals at its hospital was consistent with overall changes in patient referral trends.[99]

A.6 Spire submitted that changes in patient preferences in response to differences or changes in relative quality of care could not readily explain the decline in referrals to Spire Fylde Coast Hospital and apparent switching to Blackpool Teaching Hospitals FT. Spire provided some information on the comparative level of care, patient feedback and waiting times at both hospitals, which it said showed that Spire Fylde Coast Hospital had significantly better results than Blackpool Teaching Hospitals FT.[100]

A.7 Spire did recognise that one additional interpretation of the decline in referrals was that it was "a temporary interruption that was now coming to an end".[101] However, Spire argued that even if this were the case, patient choice was still

[93] Page 5 of the Complaint.
[94] Page 5 of the Complaint.
[95] Pages 6−9 of the Complaint.
[96] Pages 9−11 of the Complaint.
[97] Page 6 of the Complaint.
[98] Spire referred to data showing that in June 2012 a total of 16,000 patients were referred for treatment at Blackpool Teaching Hospitals FT and that this figure had increased to 18,000 patients in June 2013 (Page 6 of the Complaint). However, Spire noted that this data could include referrals other than for elective treatment and for treatments not provided by Spire Fylde Coast Hospital and could also be affected by changes in waiting times.
[99] Page 6 of the Complaint.
[100] Pages 9–11 of the Complaint.
[101] Page 5 of the Complaint.

being distorted and referrals to Spire Fylde Coast Hospital were therefore less than they would otherwise be. Spire raised concerns about the future viability of some services at its hospital if this alleged behaviour continued.

A.8 Spire submitted that the decline in referrals to Spire Fylde Coast Hospital could only feasibly be explained by actions by the CCGs to encourage the referral of patients away from Spire Fylde Coast Hospital and towards Blackpool Teaching Hospitals FT.[102]

A.9 Spire referred to three specific actions which it said demonstrated this: (i) the block contract[103] between the CCGs and Blackpool Teaching Hospitals FT for routine elective care, (ii) denial of choice for patients waiting longer than 18 weeks and (iii) absent or biased communications about patient choice for routine elective care.[104]

A.10 In response, the CCGs told us that the complaint was factually incorrect and not supported by evidence. The CCGs told us that the complaint that the CCGs were directing or influencing GPs to refer away from Spire was incorrect. The CCGs told us that within the local health economy patient choice was taken seriously and supported through many mechanisms by the CCGs and the CCGs were not aware of any attempt to direct patients away from Spire.[105]

A.11 The CCGs told us that the data behind the complaint's assertions was not robust. The CCGs told us that they did not consider the changing nature of referrals on a weekly or monthly basis to be material. The CCGs provided some data, which they said showed that patient referrals to Spire had only changed from an average of 1.6 referrals per GP practice per week to 1.7 per GP practice per week over the last two years.[106]

Why we analysed patient activity

A.12 Spire's complaint, as set out in paragraph A.3 above, is based on the observation that referrals had fallen in December 2012 and had remained below the level implied by previous trends in that local area.

A.13 Furthermore, in stating that the CCGs were attempting to direct patients away from Spire Fylde Coast Hospital to Blackpool Teaching Hospitals FT (and not simply to reduce overall referrals), Spire implied that the referrals data would show that (i) its share of relevant referrals had fallen since December 2012 and (ii) that Blackpool Teaching Hospitals FT's share of the relevant referrals would

[102] Page 13 of the Complaint.
[103] This term is used here to describe the commissioning arrangements in place between the CCGs and Blackpool Teaching Hospitals FT for the 2013/14 financial year.
[104] Pages 11–13 of the Complaint.
[105] Letter from CCGs to Monitor, dated 13 November 2013.
[106] Letter from CCGs to Monitor, dated 13 November 2013.

correspondingly have increased.

A.14 As noted at paragraph A.5 above, Spire did not have access to a complete set of data which would allow it to determine categorically whether this was the case. However, the information it did provide to Monitor appeared to suggest that a significant change had occurred in the local area, which on the facts of this case we determined warranted closer scrutiny.

A.15 We considered that this analysis could form a useful part of our assessment of the specific actions by the CCGs which had been identified in the complaint (as set out at paragraph A.3 above). Once we had a clearer understanding of whether or not something unusual had occurred, we could then consider the potential reasons for this.[107]

Our analysis

A.16 We analysed data on patient activity, including data provided by Spire and data from other sources, to determine:

- whether there had been a significant and sustained fall in the number of referrals to Spire Fylde Coast Hospital from December 2012 onwards
- if so, whether Spire Fylde Coast Hospital's overall share of activity (as compared to other providers in the area) had decreased in the same period in a way that was out of line with fluctuations in the period up to December 2012 and
- if so, whether there had been a contemporaneous and corresponding increase in Blackpool Teaching Hospitals FT's share of activity from December 2012.

A.17 In undertaking this analysis, we examined both the referrals data provided by Spire and activity data on first outpatient attendances available through the Dr Foster platform.[108] To allow us to compare across the other providers in the area, we focused our analysis on activity data.[109] We shared a working paper

[107] Many potential factors can influence referral patterns and activity, such as seasonality, exercise of patient choice, changes to procedures which providers undertake, changes in requirements for particular services and changes in waiting times at different providers. It may not therefore always be possible or practicable to link individual actions, events or behaviour with changes in referral patterns across a commissioning area. However, examining potential causes for certain fluctuations was not within the scope of our analysis.

[108] We also considered admitted patient activity data, which, unlike first outpatient attendances, can be linked to specific procedures. This was done to address Spire's concern that first outpatient attendance data at specialty level might include some procedures that Spire could not have undertaken. The results of the analysis were consistent with those of the first outpatient data analysis.

[109] The difference between referral and activity data is that referral data include the number of patients for which a first outpatient appointment was requested while the activity data records the appointments that were actually attended, and the activity for which providers were remunerated.

with the parties,[110] which set out our methodology and preliminary analysis of patient activity and our initial view on how that analysis might relate to the complaint more widely.

A.18 We consider each of the above questions in the following paragraphs.

A.19 Firstly, in relation to the number of patients referred to Spire Fylde Coast Hospital, we found that there was a substantial drop in activity and referrals in December 2012 to Spire Fylde Coast Hospital, but that it began to recover from January 2013 onwards. Specifically:[111]

- in December 2012, Spire Fylde Coast Hospital experienced a 40% drop in activity compared with its November 2012 activity, reflecting a fall from approximately 360 to 220 first outpatient attendances
- from January 2013 activity at Spire Fylde Coast Hospital began to return to levels similar to those prior to November 2012, increasing from approximately 220 in December 2012 to 300 first outpatient attendances in January 2013
- by April 2013 the level of activity at Spire Fylde Coast Hospital had reached a level (approximately 430 first outpatient attendances) slightly below the peak in activity of 460 first outpatient attendances it experienced in October 2012 and
- from May 2013 to October 2013 the level of activity at Spire Fylde Coast Hospital continued to exhibit a gradual overall increase, with a six-month average of approximately 385 monthly first outpatient attendances during that period which was approximately 2.5% higher than the average of approximately 375 monthly first outpatient attendances for the six months to November 2012.

A.20 We also note that, in December 2012:

- overall activity across the CCGs' commissioning areas for the routine elective care in specialties provided by Spire Fylde Coast Hospital fell by approximately 9% compared to November 2012, reflecting a fall from approximately 4,609 to 4,198 first outpatient attendances; and

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Activity data is therefore available across all NHS providers of elective care services. In our economics working paper, we also considered admitted patient data where appropriate.

[110] March 2014 economics working paper, shared with parties on 17 March 2014.

[111] These figures include all specialties provided at Spire Fylde Coast Hospital between January 2009 and April 2014, some of which had been discontinued before or commenced after April 2013. See Table A1 on p.40 for more detail.

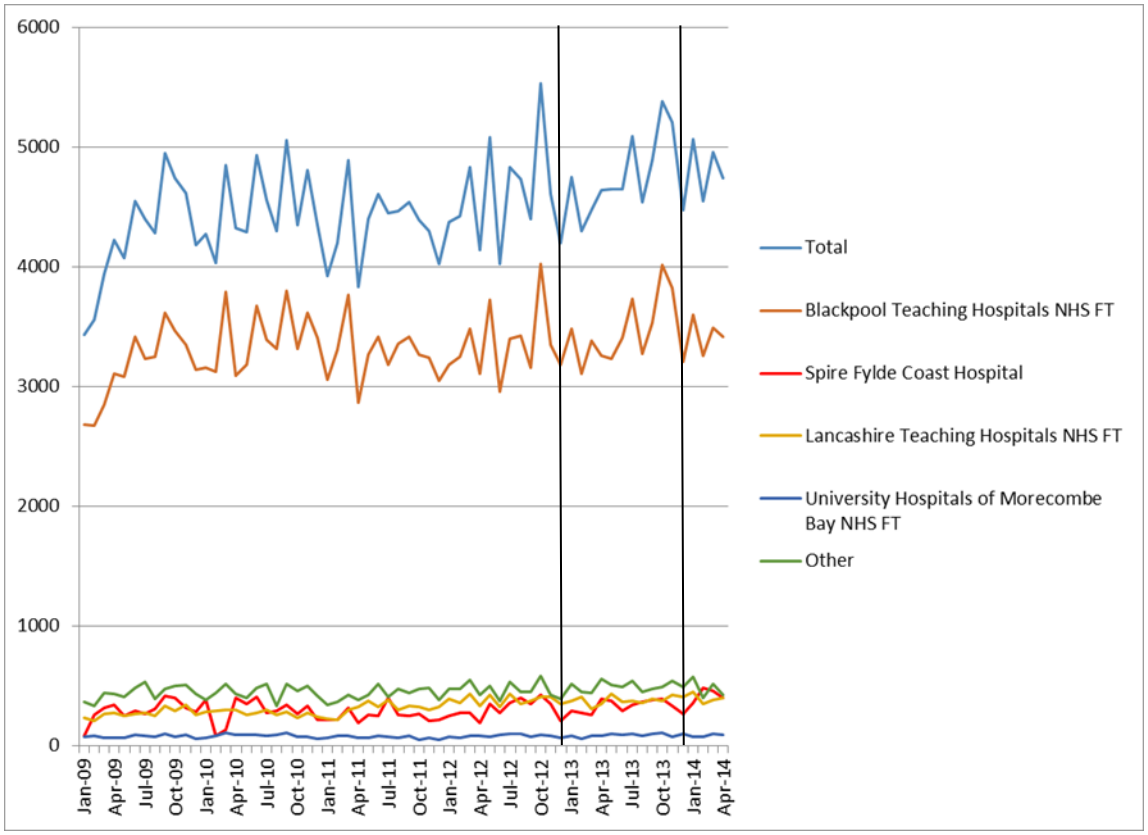
- Blackpool Teaching Hospitals FT experienced a 5% drop in activity compared with its November 2012 activity for the specialties where its provision overlaps with Spire Fylde Coast Hospital, reflecting a fall from approximately 3,345 to 3,180 first outpatient attendances.

A.21 We also reviewed changes in the number of patients referred to Spire's Fylde Coast Hospital for routine elective care over a longer period. We found that patient numbers remained relatively flat in 2009 and 2010 (approximately 290 on average each month in each year) and fell in 2011 to an average of 255 per month. Overall activity increased in 2012 to a monthly average of approximately 310 and reached a monthly average of approximately 355 for between January 2013 and April 2014.[112]

A.22 For illustration, the graph below shows the overall activity across the CCGs' commissioning areas for the period January 2009 to April 2014. It shows that there is an increase in activity at Blackpool Teaching Hospitals FT and Spire Fylde Coast Hospital in October 2012. There is then a decrease in activity at both providers in the following two months. This appears to be repeated the following year between October 2013 and December 2013 for both providers.

[112] This is based on activity data from January 2013 to October 2013.

Figure A1: First outpatient attendances across Blackpool CCG's and Fylde and Wyre CCG's commissioning areas for the nine specialties provided at Spire Fylde Coast Hospital, January 2009 to April 2014



Source: Monitor analysis of Dr Foster first outpatient data

Notes: Specialties included are ENT, gastroenterology, general surgery, gynaecology, neurology, ophthalmology, trauma and orthopaedics, urology and vascular surgery.

A.23 We found that when the fluctuations observed in December 2012 were placed in a wider context, they do not appear to be out of line with overall trends in activity in this local area.

A.24 Secondly, in relation to the Spire Fylde Coast Hospital's overall share of activity (as compared to other providers), from December 2012, we found that overall this did not exhibit fluctuations which were out of line with previous periods.[113,114] For example:

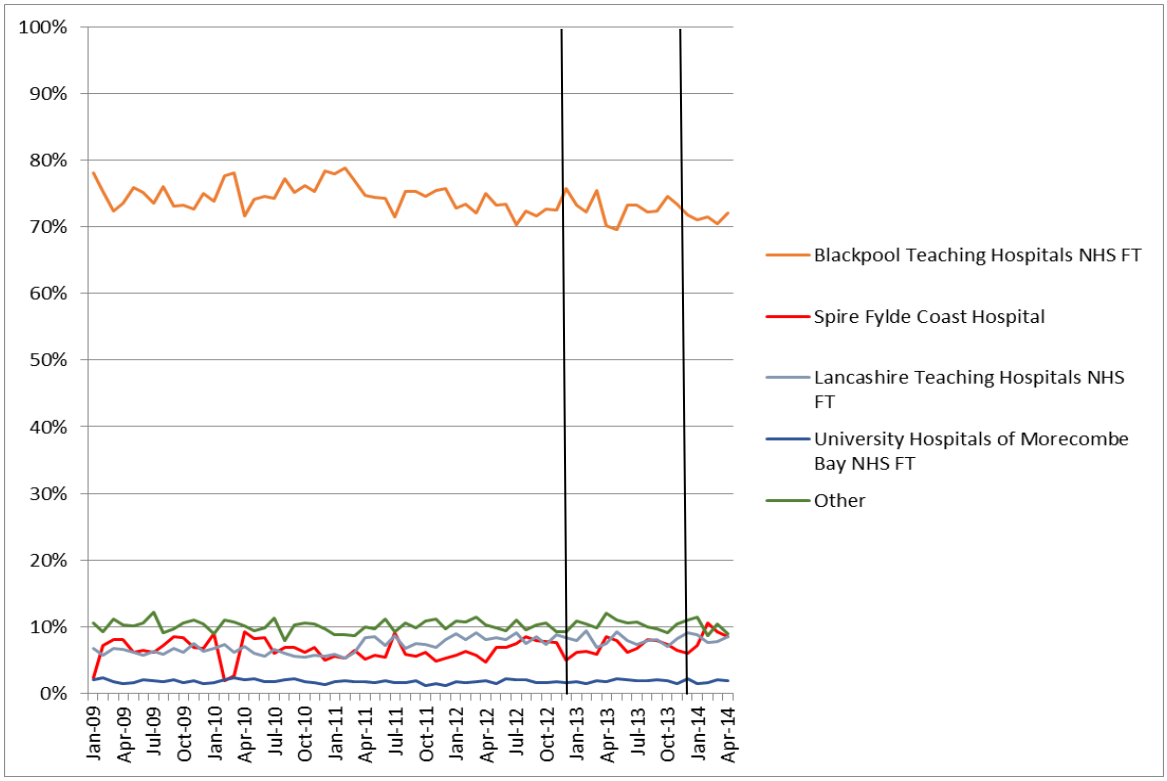
[113] In April 2014, Spire submitted that our analysis makes the implicit assumption of an underlying stable average share of activity against which we compare the fluctuations from December 2012 onwards that are the subject of Spire's complaint. We accept Spire's argument that we assume in this analysis that the fluctuations in provider shares between January 2009 and April 2014 are normal. Nevertheless, we believe that is a relevant and proportionate measure when attempting to identify unusual fluctuations in the referrals received by Spire Fylde Coast Hospital.

[114] In April 2014, Spire stated its concern that we did not consider the relevant counterfactual situation in our March 2014 economics working paper. In this working paper, we implicitly assumed that the status quo is the appropriate counterfactual situation, as opposed to a situation where Spire's activity would have substantially grown.

- for the six months from June to November 2012 (the period prior to the drop in referrals), Spire's share of activity fluctuated between 7% and 8%
- for the six months from December 2012 to May 2013 (the period after the drop in referrals), Spire's share of activity fluctuated between 5% and 8%
- for the six months from May to October 2013, Spire's share of activity fluctuated between 6% and 7%.

A.25 Figure A2 illustrates the changes in shares at an overall level for the various providers in the commissioning areas of Blackpool and Fylde and Wyre CCGs. As can be seen, the changes in shares of provision for Spire Fylde Coast Hospital and Blackpool Teaching Hospitals NHS FT in December 2012 do not appear to be out of line with other changes in share between January 2009 and April 2014.

Figure A2: Shares of activity for the nine specialties provided at Spire Fylde Coast Hospital in the Blackpool CCG and Fylde and Wyre CCG commissioning areas, January 2009-April 2014



Source: Monitor analysis of Dr Foster first outpatient attendance data, downloaded from PPM tool in CCG view on 26/08/2014
Note: specialties at ENT, gastroenterology, general surgery, gynaecology, ophthalmology, trauma and orthopaedics, urology and vascular surgery. See annex 1 for more details.

A.26 We also reviewed changes in Spire's share of activity for the relevant specialties over a longer period from January 2009 to April 2014. We found that in each year Spire's overall share of activity fluctuated between highs of 9%

(with the highest share of 10% in February 2014) to lows of between 3% and 8%.

A.27 We also looked at changes in share of activity at an individual speciality level and for three of the largest procedures (healthcare resource groups, HRGs), as we were concerned that overall first outpatient attendance data might reflect activity at Blackpool Teaching Hospitals FT that could not be provided at Spire Fylde Coast Hospital and that this could have potentially distorted the analysis of provider shares. While some specialties and HRGs showed wider variations month to month, we do not consider these fluctuations in provider shares to be out of line with the overall trends summarised above.

A.28 Spire also submitted that the CCGs had engaged in deliberate attempts to direct patients towards Blackpool Teaching Hospitals FT. Given these allegations, we also looked at what changes there had been from December 2012, to Blackpool Teaching Hospitals FT's share of activity (compared to other providers). We wanted to understand whether the monthly changes in providers' share of activity for the period covered by Spire's submission were out of line with the period prior to December 2012. We found that Blackpool Teaching Hospitals FT's share of activity overall and in most cases at specialty and procedure level did not fluctuate from December 2012 in a way that was out of line with changes in the preceding period.

Our observations

A.29 Following our analysis of the evidence submitted by Spire and our analysis of other data sources, we make the following observations:

- the CCGs' local commissioning areas are characterised by regular month-on-month and seasonal fluctuations in both the level of patient activity and the share of activity between providers
- the drop in activity experienced by Spire from November to December 2012 represented a 40% drop in activity
- this drop in activity was not sustained and the level of activity to Spire Fylde Coast Hospital recovered to similar levels to those prior to December 2012 by April 2013
- from November 2012 to December 2012, there was an overall drop in activity in the commissioning area of 10% and a fall at Blackpool Teaching Hospitals FT of 5%
- the monthly changes in the share of activity at Spire Fylde Coast Hospital from December 2012 onwards were not out of line with fluctuations

which it had experienced over preceding periods in the CCGs' commissioning areas

- the share of activity overall and in most cases at specialty and procedure level for Blackpool Teaching Hospitals FT did not fluctuate from December 2012 in a way that was out of line with changes in the preceding period.

A.30 We refer to our analysis of patient activity data elsewhere in our report where relevant to our investigation.

Table A1: Elective acute care specialties provided at Spire Fylde Coast Hospital, January 2009 to September 2013[115]

Specialty	Outpatient/admissions	Date range
Cardiology	Outpatient only	2009−ongoing
ENT	Outpatient and admissions	2009−ongoing
Gastroenterology	Outpatient and admissions	2010−ongoing
General medicine	Outpatient and admissions	Small number of observations in late 2012 and early 2013. Spire told us that this might include patients that are admitted to hospital but where no surgical intervention occurs, eg where a patient is readmitted following a discharge.
General surgery	Outpatient and admissions	2009−ongoing
Gynaecology	Outpatient and admissions	2010−ongoing
Maxillo-facial/oral surgery	Outpatient and admissions	July 2013 onwards
Neurology	Outpatient only	2009−April 2013
Ophthalmology	Outpatient and admissions	2009−ongoing
Physiotherapy	Outpatient only	2010−October 2012
Radiology	Outpatient only	2009−April 2013
Trauma and orthopaedics	Outpatient and admissions	2009−ongoing
Urology	Outpatient and admissions	2009−ongoing
Vascular surgery	Outpatient and admissions	2010−ongoing

Source: Spire response to data information request received 21/11/2013 and Monitor analysis of Spire revised referral data

[115] This list reflects the evidence submitted by Spire in response to our information request and subsequent elucidations, and departs somewhat from the original list of specialties listed in Spire's initial submission.

Monitor

Making the health sector work for patients

Contact us

Monitor, Wellington House,
133-155 Waterloo Road,
London, SE1 8UG

Telephone: 020 3747 0000
Email: enquiries@monitor.gov.uk
Website: www.gov.uk/monitor

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