Wyoming Healthcare Commission

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INTERIM REPORT OF PRELIMINARY FINDINGS

Date: JUNE 30, 2004

To: Joint Labor, Health and Social Services Committee,
Senator Charles Scott, Chairman
Representative Doug Osborn, Chairman

From: Wyoming Healthcare Commission,
T. Chris Muirhead, Chairman

BACKGROUND

Created by the 2003 Legislature, the Wyoming Healthcare Commission (WHCC) was fully appointed by June 1, 2003. Diane Harrop was named Commission Director on May 30, 2003, and Emily (Quarterman) Genoff came on board as Executive Assistant on July 10, 2003.

Through the efforts of Wyoming Workforce Development Director Kathy Emmons, office space was secured on the third floor of the Department of Employment building at 100 West Midwest Avenue in Casper. This cooperative arrangement allows the WHCC to claim many operating efficiencies and to keep office expenses extremely low.

ASSIGNED SCOPE OF DUTIES

- Develop strategies to improve healthcare and reduce healthcare and medical liability insurance costs;
- Hold public meetings throughout Wyoming;
- Hear from experts and other interested parties;

- Research other states' actions with respect to healthcare and medical liability insurance reform;
- Study and use applicable Wyoming data;
- Consider past efforts, including the 1994-95 Wyoming Health Reform Commission report;
- Formulate future possibilities for decision-makers by addressing:
  1. Access to affordable, effective and quality healthcare for Wyoming people
  2. Access to affordable health insurance
  3. Wellness and personal responsibility issues
  4. Disease prevention and management
  5. Healthcare tort and medical liability insurance reform
  6. Workforce shortages
  7. Cost-shifting by providers as a result of low reimbursements
  8. Wyoming's aging demographics and the need for long-term care services
  9. Impacts of reforms in non-healthcare areas that might affect healthcare in Wyoming
  10. A system to investigate and reduce healthcare errors and compensate patients for errors due to negligence
  11. Other issues deemed important by the governor and the WHCC;
- Cooperate with the SPG (State Planning Grant) Task Force on issues relating to health insurance. Changing the structure of this group is within the power of the WHCC;
- Submit preliminary findings by June 30, 2004. Submit final recommendations by December 1, 2004.

SUNSET DATE

The original sunset date for the WHCC was June 30, 2005. However, the 2004 Legislature assigned studies to the WHCC that have deadlines after June 30, 2005. In addition, a budget amendment adding $477,000 to the initial $350,000 appropriation for WHCC operations was adopted in 2004, effectively extending the life of the WHCC to June 30, 2006.

JOINT UNDERWRITING ASSOCIATION STUDY

A separate piece of legislation – Enrolled Act 90 – required the WHCC to work with the Wyoming Insurance Department to examine the feasibility of establishing a Joint Underwriting Association (JUA) and other insurance mechanisms to provide medical liability insurance for Wyoming physicians in the event of an all-out medical malpractice insurance crisis. This study was completed and copies were sent to all Wyoming legislators. A complete copy of this report is posted on the WHCC website (www.wyominghealthcarecommission.org) and is available in print from the Wyoming State Library. The text of the Commission's recommendations follows:

BASED ON THE EIGHT SPECIFIC ELEMENTS REQUIRED BY ENROLLED ACT NO. 90:

1. WHCC members considered three possible JUA types and ultimately concluded that none of the three are acceptable options for Wyoming, given the legislative requirement that a JUA must be self-supporting and given the over-riding intention that a situation not be created that could force medical malpractice insurance carriers and/or physicians out of the state. Also, a separate administrative structure would have to be created and be responsible for operating the JUA, since it would be a clear conflict of interest to ask the Wyoming Insurance Department to operate and regulate a JUA or any of the other alternatives:

a. A **competitive JUA** that is self-supporting is possible, but not likely to be attractive to medical providers. Such a JUA would need to be actuarially sound, meaning it would probably have to set rates at, or above, the rates charged by current medical malpractice insurers. The Merlinos actuarial study estimated a rate of +30% of the 2003 market rate for a competitive JUA. Further, such a JUA would need to incorporate an assessment mechanism in case premiums are inadequate to cover claims. Medical providers might not wish to participate in a JUA that allowed them to be assessed over and above their premium rates. Finally, a competitive JUA might disrupt the current medical malpractice insurance market in Wyoming. For these reasons, the WHCC recommended against the creation of a competitive JUA.

b. The creation of a **JUA of last resort,** also dubbed a **cherry-picking JUA** by WHCC members would almost certainly invite disaster. Having such a mechanism in place might, in and of itself, encourage insurers to leave the state or, worse,—drop higher-risk physicians, and/or discontinue selected high-risk specialty areas such as OB, emergency medicine, or surgery. This would guarantee that the JUA premium and assessment rates would have to be set extremely high. Also, the likelihood of ever being able to sunset the JUA would be very low because these medical providers would have very limited options for other sources of insurance. The WHCC therefore recommended against adoption of a JUA of last resort.

c. An **emergency JUA**, activated in the event of a severe disruption of, or loss of, critical facets of the current medical malpractice market would appear to be prudent, but could actually precipitate this kind of crisis. The WHCC recommends against the creation of an emergency JUA at this time. However, if an all-out crisis develops, an emergency JUA is an appropriate option to consider. If an emergency JUA is created, the elements of section III-A of the JUA study narrative should be reviewed and used as guidelines.

2. **Impacts on current markets has two parts**:

a. Obtaining sufficient funding to operate a JUA on a self-supporting basis is problematic. Rates would be from 30% to 75% above current market rates for premiums and assessments charged to participating medical providers to adequately self-fund a JUA. If, as Enrolled Act 90 suggests, all 619 insurance carriers licensed to underwrite casualty insurance in Wyoming were assessed additional amounts to provide a wider funding mechanism, these providers—most of whom do not sell medical malpractice insurance—might consider this a strong incentive to cease doing business with other lines in which they are active. There is also a question of whether the state can legally assess one group of insurers to cover the risks of another group.

b. WHCC research (*Appendix III)* supports the conclusion that Wyoming's current medical malpractice insurance crisis is not one of availability, but of affordability. Thus, any solution that potentially raises rates is counter-productive. Any approach that provides subsidies allowing a Wyoming JUA to unfairly compete with the major medical malpractice carriers currently writing medical malpractice policies in Wyoming is also counter-productive. For these reasons, the WHCC recommended great caution be used when considering any state-sponsored insurance mechanism affecting competitive markets.

3. **Rate and reserve fund requirements are addressed in-depth in Section III (A.) of the study narrative and in *Appendix IV*.** The WHCC concluded that an actuary should immediately be retained if any crisis measure were adopted, to determine exactly what rates and reserves might be required to support the insurance mechanism being created. These numbers will vary significantly depending upon a wide range of factors: the type of insurance mechanism being used, the potential number of participating policy-holders, current market conditions, the level of state subsidies available, etc. For most of the alternatives considered as part of this study, the amount for minimum start-up capital was estimated to be $1 million plus a surplus of $1 million. Rates for individual medical practitioners ranged from 30% to 75% above competitive market rates now being charged by
OHIC and The Doctors' Company. Also, additional assessments might be needed to cover losses if premiums are insufficient.

4. **Levels of policyholder participation necessary to guarantee that a new insurance entity would be self-sustaining are dependent on a variety of factors, including whether a company currently operating in the Wyoming market would be willing to administer the state's program.** In this case, a JUA could probably operate with as few as 25 policyholders. If no existing structure is available to administer a JUA, a minimum of 50 to 100 policyholders is likely to be required.

5. **Revising and using a medical liability compensation account as defined by W.S. 26-33-101 through 111 has some potential, but the WHCC concluded the existing statute would need major revisions and would be useless in an emergency situation where insurers have left the market.**

a. For medical liability compensation accounts to work, there must be insurance companies in the market willing and able to offer the first layer of coverage—usually with limits of $200,000/600,000 or $250,000/750,000—to medical providers, who can then turn to the state compensation account to reach total $1 million/$3 million or $2 million/$6 million levels of coverage that are common today. In the case of a crisis where major insurers have left the state or decline to write new policies, voluntary market options for obtaining this first insurance layer may not exist.

b. There are serious questions as to whether current major insurers would consider this an incentive, or disincentive, to doing business in Wyoming.

c. More research will be done on this option, since several other states have developed and are successfully using medical compensation accounts, including Nebraska, Kansas, and Indiana. As part of its on-going research, the WHCC will determine whether tort reforms in those states are instrumental in the success of medical liability compensation account mechanisms.

d. W.S. 26-33-101 to 111 did not work in Wyoming. This type of medical liability account may be no cheaper to physicians than a JUA or rates offered by insurers currently in the competitive market.

e. The law is administratively complex, adding to the costs of providing coverage. The fact that physicians must pay both premiums and a surcharge may be a disincentive to participation.

f. For now, the WHCC's consensus opinion is that this does not provide an effective emergency response. More research will be done to determine its value as an alternative mechanism if all-out crisis does not develop.

6. **Provider-owned medical malpractice mutual insurance companies can be formed now, so the fact that one has not been started causes the WHCC to believe that this option is not economically viable.**
   - **a.** One especially troubling requirement in the existing statutes is that these entities cannot undersell others in the market. There could be opportunities for state assistance in starting one of these, if current regulations are revised.
   - **b.** The state could provide initial surplus amounts, act as a re-insurer, devise and operate an assessment mechanism, or provide a loan for start-up costs. However, the WHCC does not see enough potential to recommend this approach as a solution to current problems and constitutional questions (Article 16, Section 6) would certainly arise.

7. **Provider risk retention groups are currently allowed under federal law, but there is very little regulatory authority by state insurance departments over them.**
   - **a.** Since risk retention groups are possible now without additional legislation, the WHCC determined that this approach would not be an effective response to a medical malpractice emergency in Wyoming.
   - **b.** Other states have more experience with risk retention groups, so it would be logical to look to them for help with developing and managing one. Ideally, Wyoming could join together with other states to form a risk retention group where risks would be spread over larger numbers of medical providers. It must be noted, however, that previous efforts to do this have already failed with COPIC in Colorado because of Wyoming's unlimited liability on noneconomic damages. States that do cap damages are not likely to invite states with unlimited risks into their actuarial risk pools.
   - **c.** The fact that these entities are not covered by the guarantee association that acts as a safety net if a company becomes insolvent was another cause for concern since that might lead to injured Wyoming people being denied appropriate compensation.

8. **Responding to a crisis situation is the main focus for all considerations for each of these alternatives.**
   - **a.** Considering that Wyoming's current problems are more with affordability than availability;
   - **b.** The WHCC has a high level of concern that creating and adopting a legislative response before an out-and-out crisis develops may, in fact, precipitate the very crisis we would all like to avoid;
   - **c.** The WHCC will be prepared to present a prioritized list of potential approaches that could be considered by the Wyoming Legislature if a medical malpractice insurance *access* crisis develops, but we recommend that these not be directly considered until a crisis-level

situation produces an urgent and compelling need for immediate action. This list will be produced following further discussions at the November 17 meeting of the WHCC.

The final observation of the WHCC is this: if the goal of the Legislature in directing this study was to identify effective mechanisms for providing cost-effective alternatives for medical malpractice insurance premiums for Wyoming physicians, none of the proposed insurance alternatives mentioned have the potential do this *on a self-supporting basis.* However, if the state is willing and able (Constitutionally and financially) to provide on-going subsidies, several of these alternatives could be made to work.

This study was completed in collaboration with Wyoming Insurance Commissioner Ken Vines. No appropriation was attached to this bill. The final cost for engaging an actuary to study the data was kept under $20,000 due to the time and effort expended by Mr. Vines and his staff in the Insurance Department.

To provide Wyoming data specific to the most immediate issues requiring WHCC attention, targeted in-house research was designed and completed. A physician survey of the availability and affordability of medical malpractice insurance and our comparative analysis of medical malpractice insurance base rates for Wyoming and surrounding states generated valuable information to be used as the basis for conclusions in our JUA Study.

OTHER WHCC STUDIES

The **Wyoming Physician Survey** indicated that Wyoming's medical malpractice insurance crisis is one of affordability rather than availability. Sixty percent of respondents told us their medical liability insurance rates increased by more than 25% in the past year. Of that 60%, 11% saw increases between 51%-100%; 6% had increases of 101%-200% and 4% saw increases of more than 200%. Also:

- Defensive medicine is built into physicians' practices, resulting in higher healthcare prices;
- Medicaid, Medicare and uninsured patients are the first to be dropped by physicians;
- Many "high risk" procedures are no longer available in Wyoming hospitals;
- "High risk" patients are transferred quickly to regional medical centers or out of state;
- Physicians providing obstetrics services, "high risk" procedures and emergency medicine report some of the sharpest insurance increases. Those are the physicians first to report they are limiting, dropping or are on the verge of dropping certain medical services to lower their premiums;
- Physicians can no longer consider opening private practices because of high insurance rates;
- Hospitals are subsidizing insurance costs for physicians doing obstetrics and covering emergency rooms to keep these services from disappearing.

WHCC's Comparative Study of Medical Malpractice Base Rates For Wyoming & Surrounding States showed that Wyoming physicians are paying higher rates than their peers in neighboring states. This study makes it obvious that

surrounding states dealt with the same kinds of problems Wyoming now faces, leaving Wyoming as the sole "American Medical Association Crisis State" in the region. Since Wyoming hospitals and Wyoming communities compete with neighboring states when recruiting physicians, this negative designation will undoubtedly result in diminished access to healthcare services for Wyoming people if we fail to improve the situation. As noted in the study, this analysis involved direct "snapshot" comparisons of base rates as published by The Doctors Company (TDC) which then insured 36.15% of Wyoming physicians. At the time of the study, TDC was the only major company that also wrote coverage in all seven surrounding states and covered all nine practice areas that were compared.

EVOLUTION OF WHCC SUBCOMMITTEE STRUCTURES

The first full WHCC meeting was July 28-29, 2003, in Cheyenne. The Commission divided into two subcommittees. Five Commissioners were appointed to the Tort and Medical Liability Insurance Reform Subcommittee. Five Commissioners comprised the Healthcare Access Subcommittee. The public and representatives of any interested organization, agency or group were invited to participate in subcommittee discussions. While the Reform Subcommittee was focused on tort reform and medical liability insurance issues, the Access Subcommittee inventoried and prioritized all other issues assigned to the WHCC.

In December 2003, after issuing its first recommendations to the Wyoming Legislature, the WHCC held an organizational retreat to refine the subcommittee structure and better manage the WHCC workload going forward into 2004. Four new subcommittees were formed to replace the original two. As before, anyone interested is included in subcommittee work.

The Healthcare Access and Affordability Subcommittee has been primarily focused on the completion of the Rural Healthcare Study Request for Proposals (RFP) and the selection process related to retaining a contractor to conduct the study. The RFP was released on April 9, 2004, and six bids were received and reviewed after the closing date. Through May, a selection committee composed of Commission members, staff and state employees conducted the formal state bid evaluation and ranking process. In June 2004, the Rural Healthcare Study project was awarded to Navigant Consulting. Although the original start date was delayed by approximately two weeks, it is still anticipated that the study will be completed by mid-October, 2004. The subcommittee's focus during the next quarter will be the oversight and timely completion of the Rural Healthcare Study content.

The Affordable Healthcare Coverage Subcommittee is intensively studying the implementation of WYO-CARE, an innovative health insurance delivery model intended to provide catastrophic and preventive care coverage to Wyoming citizens who are unable to obtain health insurance from employers and/or are ineligible for public assistance programs. WYO-CARE's components include efficient and cost effective administration by state government, electronic claims filing, a provider network, reinsurance to keep rates affordable and some public subsidy to allow for the purchase of employer-provided

health insurance for those unable to afford the premiums.

The largest groups identified as uninsured are part-time employees (who might have several different jobs simultaneously), employees of small businesses and young people. Studies indicate employers want to provide affordable quality benefits so we are trying to make the current system more efficient. The Wyoming Department of Employment is studying the health benefits provision picture in the state's workplaces by conducting employer focus groups. BE Well is researching the impact of health risk appraisals in an underserved population, PRES of Jackson is researching electronic claims processes.

A large gathering of potential stakeholders is planned in August to work out a plan for cost containment through a network of accessible care delivery systems. Studies indicate the biggest obstacle to having coverage is the cost of the coverage. The underlying cost of coverage is driven by the cost of care. The "retail cost" of care is impacted in great measure by Medicaid and Medicare payment policies and by non-payment practices of indigent or uninsured people who decide not to pay after receiving

treatment. This cost shifting problem must be solved or the pricing spiral of care and coverage will bankrupt the healthcare delivery system. Both subcommittee and WHCC staff members are presenting this idea across the state and nationally as a model for capitalizing on available health insurance coverage within the private sector through expansion of, or maximizations of, existing programs intended to reach lower income populations.

Committee members will meet with Wyoming's U.S. Senators and Representative to encourage adoption of simplified "Health Care Accounts" which maximize the best features of Flexible Spending Accounts (Sec. 125), employer Health Reimbursement Arrangements (Sec. 105) and the new Health Savings Accounts so as to allow for multiple payers to fund an account to help families afford premiums and tax-smart benefit reimbursements (Sec. 213).

<u>The Healthcare Information Technology (HCIT) and Disease Management</u> Subcommittee is organizing and overseeing the study mandated by SF 029. A separate committee, chaired by Dr. Geoffrey Smith of Casper, met via conference call, on June 3, to launch a healthcare information management technology study. The HCIT & Disease Management subcommittee is working closely with the Wyoming Department of Health to study chronic disease resulting from tobacco use and obesity. A comprehensive, coordinated approach to addictive diseases is emerging. It is clear a multi-dimensional approach for decreasing these disorders is required. Prevention is the focus and is centered on elementary school children. Evidence-based guidelines for providers are the preferred method for introducing disease management strategies into provider practices. Community-based programs and environmental strategies can change the culture of addiction and substance abuse and are necessary. The HCIT & Disease Management subcommittee also introduced the idea of a Wyoming/Duke School of Business partnership to measure and encourage consumer demand for Electronic Medical Records. This partnership was approved by the WHCC and a viable Wyoming partnering organization is being sought. Duke and the WHCC are pursuing potential sources for

pilot project funding.

The Medical Liability Insurance and Uncompensated Catastrophic Care Subcommittee is working with the Joint Judiciary and Labor, Health, and Social Services committees to formulate workable options for the Legislature to consider if Constitutional Amendment C passes. Constitutional Amendment C will allow for mandatory pre-trial screening panels or alternative dispute resolution when claims are made against healthcare providers. This Subcommittee is managing the SF34 study of un-reimbursed hospital care in Wyoming. Through a Memorandum of Understanding with the Wyoming Department of Health, Tucker Alan/Navigant Consultants are working as a sole-source vendor to gather relevant data through existing sources such as the Wyoming Department of Health, the Wyoming Hospital Association, the Wyoming Trauma Network, and the Wyoming County Commissioners Association. Working closely with subcommittee members, these consultants will generate additional data themselves and help with the formulation of specific recommendations, as required, for the Wyoming Legislature. No delay is anticipated in sending recommendations to the Wyoming Legislature by the October 1 deadline.

RECOMMENDATIONS

In November, 2003, the WHCC issued nine recommendations. Two came forward from the Reform Committee. The third included the SPG Task Force's nine recommendations. Six were generated through the work of the Access Subcommittee. Full drafts of these recommendations are on the WHCC website under "Reports". A summary follows:

1. Amending the Wyoming Constitution is a necessary prerequisite to effectively addressing the medical malpractice insurance crisis. Two specific elements included in the proposed amendment were caps on non-economic damages and requiring pre-trial review panels or alternative dispute resolutions for malpractice claims against healthcare providers. This recommendation garnered more comment and controversy than the others. To explain the extensive research that supported this conclusion, a short document was created and presented to members of the Wyoming House of Representatives prior to their debate on this topic (HJR0002). The text of this document follows this list of the WHCC's recommendations.
2. Further study of Sen. Charles Scott's administrative errors commission system for improving healthcare quality and patient safety and compensating patients injured through avoidable medical errors.
3. Adoption of the full set of recommendations coming forward from the SPG Task Force.
4. Study of healthcare information technology deployment via an electronic personal health record.
5. Programmatic additions to the Wyoming Department of Health including expansion of the Medicaid disease management programs and the Prescription Drug Assistance Program (P-DAP)
6. Increased funding for recruitment and retention of physicians and allied health professionals.
7. Additional funding for the Wyoming Investment in Nursing (WIN) loan and grant program

8. Continued funding for the nursing workforce study by the Wyoming Board of Nursing and Commission of Nurse Educators
9. Revisions for W.S. 21-17-107 to support additional entry-level nurse educator positions.

* NEW Article 10, Section 4A:

Any section of this Constitution to the contrary notwithstanding, the Legislature shall, in any civil action where the act or omission of a health care provider has been alleged to have resulted in death or injury to any person, have the right to:

(a) Limit the amount to be recovered for noneconomic loss arising from the death or injury;

(b) Mandate an alternate dispute resolution process or other review of the matter by a medical review panel prior to the filing of a civil action against a health care provider.

On November 17, 2003, the WHCC formally adopted a recommendation in support of this amendment to the Wyoming Constitution. Extensive research and the collection of Wyoming-specific data support the following conclusions:

- WHCC's intensive research indicates that any meaningful solutions to Wyoming's medical malpractice insurance crisis will require that the Wyoming Constitution be changed.
- The proposed amendment does not mandate any specific reform, but provides the Wyoming Legislature with valuable new tools for addressing Wyoming's medical malpractice insurance problems.

- This amendment only applies to "non-economic" or "pain and suffering" awards and only to medical tort actions.
- WHCC's study, "Medical Malpractice Insurance: Comparisons of Rates in Wyoming and Surrounding States" (October, 2003) showed Wyoming physicians are paying higher medical malpractice rates than their counterparts in neighboring states.
- AMA Advocacy Resource Center State Laws Charts (July 11, 2003) document that Wyoming is the *only* AMA-designated medical liability "crisis state" in this region.
- WHCC's Hospital Survey (November, 2003) indicated Wyoming competes directly with surrounding states when recruiting physicians. Higher medical malpractice rates and smaller patient bases limit Wyoming's ability to attract and retain physicians.
- Wyoming Insurance Department records (through December, 2002) show that, for the past several years, medical malpractice insurance companies have been paying out more than they are charging in premiums in Wyoming.
- General Accounting Office (GAO-04-128T) research concluded that states with effective caps on non-economic damages are experiencing slower rates of increases in medical malpractice insurance premiums.
- Reliable studies – including one by The American Enterprise Institute – "Does Medical Malpractice Reform Help States Retain Physicians?" (September 11, 2003), conclude that states with effective tort reforms do attract and retain larger numbers of physicians per capita.
- WHCC's Physician Survey (October, 2003) showed access to basic healthcare services is in jeopardy in Wyoming communities and the situation is likely to worsen quickly.
- WHCC's Physician and Hospital Surveys (Fall 2003) indicated that obstetrics, emergency medicine, and general surgery medical malpractice insurance rates are unaffordable in Wyoming communities. Hospitals are subsidizing doctors' medical malpractice insurance premiums to keep basic services from disappearing.
- Governor Freudenthal (December 2003 remarks to the SPG Task Force) noted people and businesses move to and visit rural areas in Wyoming to enjoy our unique quality of life, but will not stay in areas where basic healthcare services are not available. Wyoming communities cannot thrive without basic healthcare services.
- WHCC's Physician Survey (October 2003) indicated the threat of litigation leads to

"defensive medicine" and higher healthcare costs.

2004 LEGISLATIVE OUTCOMES

Several WHCC recommendations resulted in successful legislation:

- HJR011 – The WHCC is working with the Joint Interim Judiciary and Labor, Health, and Social Services Committees on recommendations for an effective mandatory arbitration mechanism or pre-trial medical review panel in the event the constitutional amendment is approved by voters on November 2, 2004. This was half of the WHCC recommendation and was adopted after a separate House bill allowing the Legislature to enact future caps on non-economic damages was defeated.
- SF0045 – This bill that amended an existing Healthcare Provider Loan Repayments statute that was never funded and provides school loan repayment assistance to healthcare providers in exchange for medical service in designated shortage areas. SF0045 amended the statute to add dentists to the list of healthcare professionals who qualify for loan repayment, reduced local matches to 25% from 100%, amended repayment provisions and provided funding for program administration

- SF0057 – Amended the WWAMI program for professional health education in cooperation with University of Washington to encourage greater and longer participation by healthcare professionals.
- SF0029 – Authorized a Healthcare Information Technology Study ($400,000) as recommended by the WHCC. The study will:
    - Assess current IT levels/capacities and develop a plan for the implementation of a new statewide interoperable system;
    - Determine the feasibility of secure, portable electronic medical records;
    - Identify funding sources, including grants and future state appropriations, to complete the study and implement recommendations.
- SF0034 – The $150,000 Hospital Catastrophic Uncompensated Care Study was legislatively mandated in response to an SPG Task Force recommendation and asks the WHCC to:
    - Quantify the magnitude of unreimbursed catastrophic and trauma care and the problems this creates for Wyoming hospitals;
    - Determine the level of cost-shifting to private payers resulting from uncompensated care;
    - Consider alternatives for reimbursing hospitals and other healthcare providers for uncompensated care;
    - Suggest appropriate and reliable continuing funding streams/mechanisms to prevent uncompensated care from reducing the availability and accessibility of healthcare in Wyoming.

OTHER WHCC STUDIES

The WHCC is also studying:

- Development of an innovative mechanism to provide health insurance for many of Wyoming's 70,000 uninsured people;
- Healthcare services delivery systems in other states as a basis for future

recommendations about how the Wyoming's healthcare resources can best be distributed;

- Other opportunities to increase collaboration among state agencies to maximize available resources and increase the potential for redirecting healthcare dollars in order to shift state policies to optimize efficiencies;
- The legislatively mandated pre-trial medical malpractice review panels and alternative dispute resolution mechanisms in the 12 states currently using them were compared and a report was written by WHCC staff. Copies were sent to the Wyoming Legislative Service Office and distributed to the Joint Interim Judiciary and Labor, Health, and Social Services Committees;
- An analysis of the history of and potential for reintroduction of healthcare facility Certificates of Need has been drafted and will be used as supporting documentation in the final rural health study;
- A study of some of the special challenges faced by regional trauma center hospitals within Wyoming's trauma network will be included in the final version of the study examining unreimbursed catastrophic and trauma care.

The four new subcommittees were structured so that each one would be responsible for oversight and management of a major study:

1. Healthcare Access & Affordability – Rural healthcare delivery system models;
2. Affordable Healthcare Coverage – Innovative WYO-CARE insurance mechanism;
3. Healthcare Information Technology & Disease Management – Healthcare information technology (SF0029);
4. Medical Liability Insurance & Uncompensated Catastrophic Care – Uncompensated catastrophic care study (SF0034).

2004 SPECIAL SESSION RECOMMENDATIONS

After the announcement that a special session of the Wyoming Legislature would be held July 12-17, 2004, a three-part package of WHCC crisis-response recommendations was sent to all legislators. The first two recommendations were restatements of the top two recommendations sent to the legislature last fall, reinforcing the WHCC's overriding conclusion that Constitutional barriers must be removed prior to considerations of medical liability insurance reforms that have proven affective in other states. The third is based on conclusions reached by the WHCC as a part of the JUA study completed in November. ***It was further and strongly recommended that attempts NOT be made to adopt legislative long-term solutions until after the WHCC transmits its full recommendations to the Legislature prior to the 2005 session. The current crisis situation has developed over a 15+ year period and quickly formulating permanent, long-range responses will not be in the best interest of the state.***

The Wyoming Healthcare Commission recommends adoption of the following Constitutional Amendment:

NEW Article 10, Section 4A:

Any section of this Constitution to the contrary notwithstanding, the Legislature shall, in any civil action where the act or omission of a health care provider has been alleged to have resulted in death or injury to any person, have the right to:

(a) Limit the amount to be recovered for non-economic loss arising from the death or injury;

(b) Mandate an alternate dispute resolution process or other review of the matter by a medical review panel prior to the filing of a civil action against a health care provider.

This allows Wyoming voters to decide whether the Wyoming Constitution should be amended to remove constitutional barriers to reforms.

The Wyoming Legislature needs to be given "tools" that will allow the state to begin to address the malpractice issue. This would first include the power to set limits on non-economic damages (caps), if appropriate, in medical liability cases. A Constitutional Amendment would give the Wyoming Legislature the flexibility to set and change non-economic cap levels according to current market conditions, but this amendment alone would not require that caps be adopted.

The second tool the Wyoming Legislature needs is the legislative power to create a mandatory medical review panel or another similar mechanism for determining the validity of a medical malpractice complaint prior to the filing of a civil action against a healthcare provider.

It is important to ask Wyoming voters for permission to give the Wyoming Legislature a full range of Constitutionally-allowable long-term remedies, so 2004 HJR 11 (now known as Constitutional Amendment C) should be repealed if this combined amendment is adopted in the special session.

2.

The WHCC continues to recommend adequate funding of a study of the feasibility and affordability of a proposal to create an innovative administrative model to address healthcare errors, improve the quality of healthcare in Wyoming, and compensate patients injured through avoidable medical errors. Further, the WHCC can facilitate this study if it is mandated and funded by the Wyoming Legislature.

This proposal (as described in 2004 SF 028) aims to identify healthcare errors and the general causes of healthcare errors, pinpoint and address systemic causes of errors, prevent

future errors through system improvements, improve the delivery of healthcare services through enhanced patient safety, and consistently compensate individuals injured as a result of avoidable medical errors.

The WHCC recognizes that this is an untested innovative idea. We see enough potential in the concept as a long-term solution to Wyoming's medical liability crisis to recommend that immediate and focused analysis be started prior to the 2005 Legislative session.

3.

OHIC WITHDRAWAL CRISIS-RESPONSE PACKAGE:

The WHCC recommends consideration of the emergency crisis-level package spelled out below as a response to Wyoming's heightened medical malpractice liability insurance crisis. Our recommendation contains three separate elements designed to protect patients' access to healthcare in the short term while also providing immediate, but not permanent, relief to Wyoming physicians. <u>These measures should be adopted and continue for two to three years to give physicians the security of knowing that relief will not disappear before long-term solutions can be adopted and fully implemented.</u> <u>However, these crisis-response subsidies should be sunsetted as quickly as possible in favor of long-range permanent solutions to systemic medical liability problems in Wyoming.</u>

A. <u>Medical malpractice premium subsidies based on regional averages</u> should be provided to Wyoming physicians to address the growing gap between medical liability rates paid by Wyoming physicians and those paid by physicians in surrounding states. This type of plan is often called a "Premium Assistance Plan".

A subsidy plan similar to 2004 HB 173 could provide the most immediate and effective relief by providing state subsidies to cover the differences between medical malpractice rates being paid by Wyoming physicians and those paid by counterparts in surrounding states. It has been well documented that medical liability insurance premium base rates for Wyoming physicians are significantly higher than base rates in neighboring states. Wyoming competes directly with these same states when recruiting physicians — creating a double disadvantage. Although an actuarial study has not been undertaken to estimate an exact price tag for this plan, we believe this kind of premium assistance plan could cost the state between $9 million and $11 million per year for each of the next three years.

B. <u>State subsidies should be made available in some way to assist Wyoming physicians</u>

with the cost of prior acts or "tail" coverage. A subsidy of this type should only apply to those physicians being forced to seek medical liability coverage from a new company as a result of OHIC's decision to cease doing business in Wyoming.
Some Wyoming physicians formerly covered by OHIC may be forced to buy additional tail coverage (estimated to be 120% to 150% of their mature premium amount) from OHIC or to a new insurer as part of their new coverage. The cost of adding this tail coverage to a yearly premium may force older physicians into early retirement. Other physicians may opt to leave Wyoming, restrict higher-risk areas of their practices such as covering emergency rooms or delivering babies, or choose to practice without insurance coverage for past acts and leave some patients inured through medical negligence without access to appropriate compensation. Based on an estimate of 150% of total OHIC premiums paid by Wyoming physicians for the previous policy year and assuming the state elected to pay 100%, it is conceivable the state could incur a one-time cost of no more than $13 million. The goal would be to keep physicians from exiting our healthcare delivery system early by either retiring or leaving the state in search of lower premiums.

C. A temporary state-sponsored or state-supported mechanism may have to be created to provide medical liability insurance coverage for Wyoming physicians who cannot obtain coverage in the commercial market because they practice in high-risk but essential specialties.
The WHCC is hesitant to put the state government into the medical liability insurance business. A "safety net" may be needed, however, to help a number of deserving physicians unable to obtain malpractice coverage from either the primary or secondary commercial malpractice markets. This mechanism must be in place if large numbers of physicians or some physicians practicing in higher-risk medical specialties are unable to independently obtain coverage.

As we concluded in our Joint Underwriting Association study (complete JUA Study is listed under "Reports" at www.wyominghealthcarecommission.org or available by calling (307) 235-3227 for a print copy) last fall, an emergency JUA is a viable but short-term option. The best scenario would be for state government to negotiate an agreement to work with a medical malpractice insurer already doing business in Wyoming to provide administrative and actuarial structures necessary to operate such a mechanism on a *temporary* basis.

Since an additional conclusion of the JUA Study was that premiums offered by a joint underwriting association would be at least 30% higher than rates offered by the voluntary market, the subsidy estimates described in #1 above may have to be revised upward for physicians covered by a JUA.

THE SPG (State Planning Grant) TASK FORCE LEGACY

On December 19, 2003, the SPG Task Force on the Uninsured concluded its work with a presentation to Gov. Freudenthal by former U.S. Ambassador and Wyoming legislator Tom

Stroock, Chairman, and other Task Force members. The SPG Task Force's study and recommendations can be found on a website maintained by the Wyoming Department of Health: http://wyominguninsured.state.wy.us/reports.asp. The baton was passed from the Wyoming Department of Health (WDH) to the WHCC, with responsibility for completion of efforts to reduce the number of uninsured in the state. About $174,000 in SPG supplemental funds is available to the WHCC to use to create and promote an innovative health insurance mechanism with the potential to provide affordable coverage for Wyoming's uninsured population. WDH is applying for 2005 State Planning Grant funding to further a partnership led by the WHCC aimed at exploring creative public-private funding mixes for paying health insurance premiums. SPG money is now being used to study means of influencing healthcare consumer responsibility through health risk appraisals, employer health benefit provisions and employee health benefit enrollment patterns, applicability of new legislation enabling health savings accounts (HSAs) in Wyoming and the potential for using Medicaid money to purchase private insurance coverage for families.

PRESENTATIONS TO WYOMING GROUPS

An important part of the WHCC's mandate is a willingness to travel to different communities in the state to present information about our legislatively defined mission and ongoing work and to hear citizens' ideas and comments. During our first year, Commissioners and staff spoke with hundreds of Wyomingites, individually and in groups. Our audiences included:

- Wyoming Patient's Advocacy Association
- Wyoming Hospital Association
- Wyoming Business Alliance
- Wyoming Public Health Association's Healthcare Education Conference
- Wyoming Public Television
- Wyoming Public Radio
- SPG (State Planning Grant) Task Force
- Wyoming Stockgrowers Association
- Wyoming Covering Kids Outreach Coalition

- Joint Interim Labor, Health, and Social Services Committee
- Cheyenne Chamber of Commerce
- House Judiciary Committee
- Business Day at the Legislature
- Wyoming Community Foundation
- Healthcare Financial Managers Association
- Leadership Wyoming
- University of Wyoming College of Health Sciences School of Pharmacy
- Wyoming Rural Health Conference
- Casper Area Chamber of Commerce Healthcare Issues Forum
- Wyoming Workforce Development Council

- Wyoming Equipment Dealers Association
- A group from Wyoming hosting Jerome Watters, the new BLS Dallas Regional Office Branch Chief for the Occupational Safety and Health Statistical programs (e.g., the Annual Survey of Occupational Injuries and Illnesses and the Census of Occupational Injuries and Illnesses).

PARTICIPATION AT NATIONAL AND INTERNATIONAL HEALTHCARE CONFERENCES

As part of our mandate to learn how other states are addressing similar healthcare problems, WHCC members and staff have attended a small number of conferences held outside of Wyoming.

- State Coverage Initiative Summer Workshop for State Officials "Pressing Forward: Cuts, Coverage and Creativity" in Chicago, IL.
- NCSL (National Conference of State Legislatures) "Using Limited Health Dollars Wisely: What States Can Do to Create the Health System They Want" in Denver, CO.
- HRSA (U.S. Health and Human Services Health Resource and Services Administration) Special Programs Bureau State Planning Grant quarterly national programs meeting in Washington D.C. WHCC staff also gave a presentation.
- National FLEX Healthcare Conference "FlexAbility'04" in Chicago, IL.
- Reforming States Group meeting on Healthcare Information Technology sponsored by the Milbank Foundation; in Alberta, Canada