Maryland Health Care Commission

Public Notice
Expanding Opportunities for Delivery of Quality Home Health Agency Services in Maryland

Summary and Analysis of Public Comments with Staff Recommendations

Maryland National Capital Homecare Association (MNCHA) Comments

CMS HHA Quality Data

"Supports MHCC's move towards including quality measures in its CON application process but feels that there are some points to be addressed and taken into consideration."

1. "There has been a pause on the collection of quality data and therefore the most current CMS scores are based on 2019 (12 months) data. There have likely been many changes effecting (sic) scores since then."

Staff Analysis and Recommendation:

Commission staff recognize the challenges of picking a point in time and using the most recent and available CMS quality measures, when quality metrics continue to evolve. In Spring 2021, Commission staff initiated the process of updating HHA need consistent with the criteria defined in the HHA Chapter (COMAR 10.24.16.04). The decision was made to use consistent time frames for both HHA utilization and quality metrics to analyze which jurisdictions would qualify for consideration by MHCC for adding HHA service capacity. Therefore, the same time periods were chosen for analyzing the performance levels in qualifying Medicare-certified HHAs. Staff note the multiple ways in which the approved quality measures and performance requirements are used in the CON review process: (1) determining jurisdictional qualification (COMAR 10.24.16.04); (2) qualifying an applicant for inclusion in a review cycle (COMAR 10.24.16.07); and (3) determining preference, if necessary, among competing applicants (COMAR 10.24.16.09).

Staff will continue to monitor changes in CMS quality measures and performance levels, tied with HHA utilization, in future HHA need updates. At this time, staff recommend maintaining the use of the most recent and available October 2020 CMS data set to move forward with scheduling HHA review cycles.

2. "Using the CMS quality/service scores at a point in time may discourage high quality agencies from acquiring lower quality agencies…. Some consideration should be given in these instances so the higher quality acquiring agencies are not penalized for taking on a poorly performing agency."

Staff Analysis and Recommendation:

Commission staff understand that the current regulations do not address MNCHA's concern regarding the possible impact on the overall average performance scores of a high performing agency that has acquired a low performing agency. The update of the quality metrics is conducted outside the regulations, so any proposed changes in the HHA Chapter of the State Health Plan to address this issue will need to be considered in the next update.

Staff recommend no change to the proposed performance levels for use in qualifying Medicare-certified HHA CON applicants for the upcoming review cycle.

3. "Consider allowing agencies to voluntarily use data analytics such as those provided by Strategic Health Partners for more real-time quality and service data."

Staff Analysis and Recommendation:

The quality measures and performance levels recommended by Commission staff to be used to define a quality provider are based on the most recent, publicly available data on CMS data sets. This provides consistent and objective data as reported by a Medicare-certified HHA in its submission to CMS. Data analytics provided by a private health care consulting group, like Strategic Health Partners, is not public data.

Commission staff note that it is important for an HHA to monitor its own performance to assure provision of quality HHA services. However, for the Commission's purpose of qualifying good performing Maryland Medicare-certified HHAs, consistent public records and information should be used. Therefore, Commission staff recommend no change in the proposed method for qualifying HHAs using CMS data sets.

Lorien Health Services (Lorien) Comments

Qualifying Nursing Homes as HHA CON Applicants

1. Recommended Performance Levels

(a) Substitute the "70% standard" used to assess a nursing home's quality ratings, as defined in the Nursing Home Chapter (COMAR 10.24.20.05A(8)), instead of "all the nursing homes" as used in the Home Health Agency (HHA) Chapter (COMAR 10.24.16.07D(4)).

OR

(b) Allow explanations by the nursing home applicant to present evidence why the commonly owned nursing homes failed to meet the state average; use an average rating for all commonly owned facilities."

Staff Analysis and Recommendation:

Lorien's comments recommend incorporating an approach used by MHCC in qualifying nursing homes as eligible CON applicants in Maryland into our proposed approach for qualifying HHAs as CON applicants. Commission staff note that the HHA Chapter became effective in April 2016, before the Nursing Home Chapter (effective July 2019). The ability for the Commission to update the quality metrics by type of HHA CON applicant is a process conducted outside of the promulgation process, but within the HHA Chapter's regulatory framework, as described in COMAR 10.24.16.07A.

The intent of updating the quality metrics, as described in the public notice issued in July of this year, was to establish some common metrics for all types of applicants: HHAs, hospitals, nursing homes, and Residential Service Agencies (RSAs). Except in the case of RSAs (which are not Medicare-certified and do not report to CMS) there are common quality of patient care and experience of care measures applied to all applicant types. It is staff's intention to use state averages based on actual performance to provide consistency in assessing performance levels across all types of applicants.

The current HHA Chapter (COMAR 10.24.16.07D(4)) requires "*In the case of a Maryland nursing home applicant, it has for the three most recent years of operation achieved and maintained the minimum CMS Star Ratings required by the Commission for the applicable review cycle for its Maryland nursing home and, on average, for all of the Maryland nursing homes with which it has common ownership*." The underlined language within this regulation is the focus of the public notice in defining the quality metrics to be used for qualifying a nursing home applicant. The other phrases within this regulation, including "for the three most recent years of operation achieved and maintained" as well as "for its Maryland nursing home and, on average, for all of the Maryland nursing homes" are not a component of the quality metrics addressed for review and comment in the public notice. Any suggested changes beyond the quality measures and performance levels must be considered as a regulatory change, to be addressed in the next update of the HHA Chapter.

In comparison, the regulatory language in the Nursing Home Chapter (COMAR 10.24.20.05A(8)), as referenced by Lorien, requires that "*…at least 70 percent of all the comprehensive care facilities owned or operated by the applicant or a related or affiliated entity for three years or more had an average overall CMS star rating of three or more stars in CMS's most recent five quarterly refreshes for which CMS data is reported*." To summarize the differences in the regulatory language used in both the HHA and Nursing Home Chapters, the HHA Chapter requires "for **ALL** of the Maryland nursing homes with which it has common ownership" (emphasis added) compared to the "70 percent standard" in the Nursing Home Chapter, and as referenced by Lorien comments. As noted above, regulatory changes may be addressed in the next HHA Chapter update, and not within the scope of the public notice which focuses on the specific quality measures and performance levels to be attained.

Within the scope of the public notice, staff recommend defining the "minimum CMS star ratings required by the Commission for the applicable review cycle" as using the historical nursing home state averages on the CMS Overall star ratings based on the October CMS data sets for all

three years for consistency. As described in the public notice, the CMS Overall star ratings for nursing homes varied for the three most recent years of operation (4 Stars in CY 2017; 3 Stars in CY 2018; and 3 Stars in CY 2019). Alternatively, Lorien suggests using "an average overall CMS star rating of 3 or more Stars in CMS's most recent five quarterly refreshes" to define the minimum CMS Star ratings for a quality performing nursing home.

Staff recommend using state averages of actual performance scores not just for nursing homes, but across all applicant types, to uniformly define the quality metric of all provider types with CMS star ratings. Furthermore, staff note that in the next update in the HHA Chapter, regulatory changes suggested by Lorien can be considered.

Lorien further notes that should its first suggestion of changing the regulatory language in the HHA Chapter to be consistent with that of the Nursing Home Chapter is not accepted, then Lorien proposes that a nursing home applicant should be provided the ability to "present evidence why the commonly owned nursing home failed to meet the state average, what steps have been taken to address the problems, what more recent ratings are, and whether the **combined average 5 Star Overall Rating for all the commonly owned nursing homes meets or exceeds the required state average**."

In response to Lorien and to clarify the process, for a Maryland nursing home to be considered, both its CMS Overall Star Rating and Maryland-specific EOC Survey satisfaction score, must meet or exceed the Maryland state average for each of the three applicable years, consistent with current regulations (COMAR 10.24.16.07D(4)). More specifically, if the Maryland nursing home qualifies, the CMS Overall Star Rating will be mathematically averaged with all Maryland nursing homes with which it has common ownership. If the resulting average meets or exceeds the Maryland state average for each of the three years (2017, 2018, and 2019), that nursing home may qualify to apply for a CON. (Other requirements, such as those in COMAR 10.24.16.06C, must be met by every applicant.)

Commission staff recommend no change be made to the proposed use of the Maryland state average on the CMS Overall Star Ratings in defining a quality performing Maryland nursing home, as described in the public notice, consistent with current HHA Chapter regulations.

2. Disqualification for Abuse

Lorien notes "that an otherwise qualified nursing home applicant should not be automatically disqualified from applying for an HHA CON as a result of an incident of abuse." Rather, Lorien suggests that such a nursing home applicant be provided the opportunity to explain "the circumstances surrounding the incident, the steps it has taken to address the root cause, any applicable plans of correction, and reasons why the nursing home should not be disqualified."

Staff Analysis and Recommendation:

Nursing home citations for resident abuse have recently been included on CMS Care Compare, a consumer-based website**.** Additionally, abuse citations are noted in the publicly available

data.cms.gov downloadable data sets. CMS's greater transparency of such resident abuse in nursing homes highlights the significance of concern. Resident abuse citations are not common for Maryland nursing homes, but it is noteworthy. Only three Maryland nursing homes, which would have otherwise qualified, were excluded from eligible applicants. This is a feature that was recently added and is not specifically cited in the HHA regulations. Commission staff believe that this is an important measure of quality. Staff recommend no change be made in excluding a quality performing nursing home with resident abuse citations as a qualifying nursing home applicant.

3. Maryland Nursing Home Experience of Care

"Lorien disagrees with staff's recommendation requiring nursing home applicants to meet the Maryland average results on the EOC Survey. Typically, these surveys have low return rates and may not be an appropriate measure of quality."

Lorien further proposes that if the Maryland EOC is to be retained, there should be changes to the regulatory language in the HHA Chapter "to prevent a nursing home HHA applicant from being disqualified as a result of the failure of another non-applicant nursing home under common ownership to meet or exceed the required average EOC rating." Lorien suggests that the "Commission should allow the Nursing Home HHA applicant to present evidence as to why this requirement should be waived including but not limited to evidence explaining why the commonly owned nursing home(s) failed to meet the state average, what steps have been taken to address the problem(s), any other extenuating circumstances that affected the survey results, what historic or more recent scores have been, and **whether the combined average EOC score for all the commonly owned nursing homes meets or exceeds the required state average."**

Staff Analysis and Recommendation:

Commission staff believe that patient/family satisfaction surveys are an important measure of quality. In the case of other CON-regulated applicants (HHA, hospital) experience of care measures, based on the consumer's/family's perspectives regarding their experiences with the services/care received, are collected using the national Consumer Assessment of Healthcare Providers and Systems (CAHPS) surveys. Such experience of care measures are available and are included in the recommended metrics for HHAs and hospitals. Since CAHPS measures do not exist for nursing homes, the Maryland Experience of Care (EOC) Survey serves as a measure of satisfaction.

Commission staff disagree with Lorien's statement that the Maryland EOC Survey has "low return rates and may not be an appropriate measure of quality". The Maryland EOC Survey is a valid and reliable measure that has been in use since 2007. The survey was created based on other validated CAHPS surveys and addresses many of the same measures of satisfaction. Response rates on the Maryland-specific EOC Survey are comparable to other CAHPS surveys. Furthermore, this EOC Survey is 30 percent of the Medicaid Pay for Performance Score for Maryland nursing homes, indicating that the EOC Survey is considered valuable.

In response to Lorien and to clarify the process, for a Maryland nursing home to be considered, both its CMS Overall Star Rating and Maryland-specific EOC performance score must meet or exceed the Maryland state average for each of the three applicable years, consistent with current regulations (COMAR 10.24.16.07D(4)). More specifically, if the Maryland nursing home qualifies, the Maryland-specific EOC performance scores will be mathematically averaged with all Maryland nursing homes with which it has common ownership. If the resulting average meets or exceeds the Maryland state average for each of the three years (2016, 2018, and 2019), that nursing home may qualify to apply for a CON. (Other requirements, such as those in COMAR 10.24.16.06C, must be met by every applicant.)

Commission staff recommend no change be made to using the state average performance scores on the Maryland-specific EOC survey, in defining a quality performing Maryland nursing home, as described in the public notice, consistent with current HHA Chapter regulations.

Qualifying RSA Applicants

Quality of Care Qualifications

Lorien disagrees with "requiring prospective Maryland-licensed RSA applicants to have maintained accreditation with a deeming authority for at least the three most recent years of operation. Such accreditation is an expensive requirement that serves as a barrier to entry for new RSA HHA applicants and stifles competition. It should not be a mandatory requirement. Good Quality of Care can be and is ensured by other measures…"

Staff Analysis and Recommendation:

The HHA Chapter (COMAR 10.24.16.07D(1)) requires that "*in the case of a Maryland licensed RSA applicant, it has operated with an established quality assurance program that includes systematic collection of process and outcome measures, and experience of care measures and has* ***maintained accreditation through a deeming authority recognized by the Maryland Department of Health and Mental Hygiene for at least the three most recent years."*** (Bold emphasis added). Since this is in regulation, it cannot be modified until the HHA Chapter is updated. In addition, staff believes that since there are no CMS star ratings for non-Medicare certified RSAs, there needs to be some alternative approach for determining that an RSA applicant is a quality provider. Accreditation organizations are nationally recognized as professional agencies capable of ensuring that health care organizations meet predetermined criteria and standards of quality. During the 2017-2019 HHA CON project reviews, of the nine total applicants, two were RSAs which met the quality performance requirements, including maintaining accreditation, and both were approved to establish an HHA.

For RSA applicants seeking to establish an HHA, Commission staff recommend maintaining the requirement for accreditation as an objective measure of quality assurance. Commission staff can consider Lorien's suggested revisions to the regulatory language in the HHA Chapter when it is updated.

Proposed CON Exemption

Lorien "proposes that the Commission adopt a CON exemption provision applicable to existing Nursing Homes wishing to establish a new Home Health Agency (HHA) if they currently offer an onsite continuum of care which includes a separately licensed assisted living facility."

Staff Analysis and Recommendation:

Outside of the comments on the recommended quality measures and performance levels, Lorien proposes that the Commission adopt a CON exclusion[1] provision to permit existing nursing homes that offer a continuum of care to establish HHAs without obtaining a CON. This is proposed to be comparable to CCRCs which can establish a specified number of nursing home beds, based on CCRC size, to exclusively serve their own residents. This proposal would require, at a minimum, changes to the HHA Chapter and, preferably, changes to the CON statute. As such, it is a proposal outside of the scope of the qualifying criteria under consideration. The referenced "prior practice that allowed nursing homes to offer HHA services as part of their licensure as comprehensive care facilities without having to obtain a CON" is a practice of which staff has no knowledge. Except in the case of HHAs that may have been grandfathered when CON was first established, this has not been Commission practice.

Furthermore, in essence, Lorien's comments speak to allowing "specialty HHAs" for nursing homes with assisted living facilities, similar to a CCRC-based HHA, which exclusively serve the resident population of its retirement communities. There are currently four CCRC-based HHAs, each of which were required to obtain a CON to establish its specialty HHA. The current HHA Chapter (COMAR 10.24.16.04B) has removed the "specialty HHA" designation, requiring that any proposed new HHA establishment by a CCRC would need to address jurisdictional need and, thus, not be "exempted" from the CON process. MHCC staff does not recommend returning to the concept of specialty HHAs of this type.

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[1] While Lorien uses the term "exemption," MHCC regulations use the term "exclusion" in describing the ability of CCRCs to obtain a specified number of CCF beds to serve its retirement community resident population's needs.