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In Senior Care and Services

May 13, 2019

Sent via email: linda.cole@maryland.gov

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Long-Term Care Planning
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, Maryland 21215-2299

RE: COMAR 10.24.20: *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*[1]

Dear Ms. Cole:

On behalf of LifeSpan Network, below are comments to the revisions to COMAR 10.24.20 *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*, as promulgated in the Maryland Register on April 12th. Unfortunately, while LifeSpan appreciates the removal of the docketing exception related to the Total Cost of Care Model, we continue to have strong concerns regarding the remaining two exceptions as well as the use of the federal 5-Star rating system as the only quality measurement.

Use of the 5-Star Rating System

LifeSpan has consistently raised concerns regarding the use of the 5-Star rating system. In the proposed State Health Plan, the 5-Star rating system is used as the determination of whether a nursing facility can qualify for a CON and/or whether the exception is triggered for a nursing facility to docket a case even when there is no need in the requested jurisdiction.

Because of issues with the federal 5-Star rating system, Maryland currently operates its own Pay-for-Performance (P4P) rating system through the Maryland Department of Health (MDH).[2] The problems that precipitated the development of Maryland's P4P system continue

[1] Throughout this letter, the commonly referred to term "nursing facility" is used for comprehensive care facility.
[2] Maryland's P4P system is approved by CMS.

today, such as the need to take into account staff retention rather than simply staff ratios. Often, this more accurately reflects the quality of care provided in many facilities, such as those in Western Maryland and other rural areas, where staff turnover is very low. Recently, CMS made several changes to the 5-Star rating system and, despite no additional survey being performed, many facilities experienced a decline in the rating, demonstrating the subjectivity of the system.

During the 2019 Session, the Maryland General Assembly passed budget language reinforcing the P4P system by requiring that additional monies be allocated to it and that the MDH refocus the system to be more patient outcome specific. It is difficult to understand, and no specific explanation has been provided, why MHCC would not want to incorporate either the P4P or at least specific measurements from it into the quality metric. It is important to note that the use of 5-Star rating system is an "absolute" cut-off requirement in the proposed State Health Plan and is not simply information for consideration by the MHCC. As such, LifeSpan believes that Maryland's P4P rating system should be taken into consideration as well as any other quality indicators that could be put forth by the nursing facility rather than the 5-Star rating system. As we have offered during past discussions, we would embrace the opportunity to work with the MHCC to find a mutually acceptable resolution to this issue.

Docketing Rule Exceptions

Overall, **LifeSpan does not support the ability to docket an application or approve a certificate of need when there is no identified need in the jurisdiction.** As stated in the proposed regulations, the MHCC cannot docket an application involving an increase in nursing facility bed capacity unless the jurisdiction in which the facility is, or will be located, has an identified need for additional beds. The proposed regulations alter this requirement by continuing to allow for two docketing exceptions.

Granting the authority to docket an application eventually paves the way to CON approval despite no identified need in that jurisdiction for new beds, which essentially dilutes the very premise of the CON process. The CON process has long been based on identifying need in the community for the requested action. Simply stated, when health care services are unavailable to those in need in a particular jurisdiction, the MHCC authorizes the addition of new beds and/or new health care services. It is hard to comprehend why the MHCC would want to actively promote the development of additional nursing home beds and/or new facilities at a time when nursing home utilization is declining, and the State continues to emphasize the development of increased home-and-community based services.[3] Under Maryland TCOC Model, the nursing home industry should be incentivized to realign existing beds rather than add new beds to a system when there is no identified bed and there is declining nursing home utilization.

Regarding the two exceptions, LifeSpan's additional concerns are below.

[3] This is evidenced by the requirements contained in these revisions where an applicant must provide information to every prospective resident about the existence of alternative community-based services as well as other requirements and the continued work by the Maryland Department of Health to transition individuals from nursing homes to alternative community-based services through the Money Follows the Person Program and other waivers.

1. **Allow the docketing of an application <u>without an identified need</u> for additional beds if more than 50% of the comprehensive care facilities in the jurisdiction had an average overall CMS star rating of less than three stars in CMS's most recent five quarterly refreshes for which CMS data is reported.**

In addition to the points referenced above, this exception ignores the fact that 50% of the facilities in the jurisdiction could have a rating of 4 or even 5 stars. By allowing a new facility or new beds without any identified need will simply lower the census of all facilities in the jurisdiction, including high ranking homes. Lower census has a detrimental effect on nursing facilities. Rather than increasing the number of nursing facilities or beds in the jurisdiction, the State should focus its efforts on ensuring that those facilities that consistently score a 2 or 1 rating institute an improvement plan to increase scores rather than simply adding beds. The residents in those facilities are entitled to the same quality of care as those that may be served under this exception.

2. **The Commission may docket an application by an existing freestanding comprehensive care facility with fewer than 100 beds that proposes a replacement facility with an appropriate expansion of bed capacity in a jurisdiction <u>without identified need</u> for additional beds if the applicant demonstrates:**

(a) Replacement of its physical plant is warranted, given the facility's age and condition; and

(b) The additional bed capacity proposed is needed to make the replacement facility financially feasible and viable.

First, it is unclear how the term "appropriate" would be determined as it relates to an expansion of bed capacity. Theoretically, a nursing facility with 99 beds could add an additional 25 beds through a renovation. Why should a nursing facility with 99 beds be allowed to docket but a nursing facility with 101 beds not? The arbitrary cut off of "fewer than 100 beds" is appears to be very arbitrary. Second, if there is no identified need in a jurisdiction, it is unclear how additional bed capacity would make the replacement facility financially feasible and viable given that census would simply be stretched among a greater number of facilities, which would hurt existing facilities and residents. Third, this exception is very much a complete dilution of the CON process given that it focuses solely on a facility's financial viability. Fourth, if a facility wants to increase bed capacity without a CON, the law already allows it to "creep beds" every two years. The ability to "creep beds" is an acceptable process that provides nursing facilities the ability to add beds even if there is no additional need. For these reasons, LifeSpan cannot support this exception. However, LifeSpan would be supportive of allowing a relocation of a facility within the same jurisdiction without a CON but only if bed capacity remained "as is."

Thank you for your consideration into these issues.

Sincerely,

Danna L. Kauffman
Schwartz, Metz and Wise, PA
On Behalf of LifeSpan Network

Sincerely,

Paul N. Miller
Senior VP of Operations and Products
LifeSpan

cc: Ben Steffen, Executive Director, MHCC
Tiffany Robinson, Deputy Chief of Staff, Office of the Governor
Robert R. Neall, Secretary, Maryland Department of Health
Webster Ye, Deputy Chief of Staff, Maryland Department of Health
Katie Wunderlich, Executive Director, Health Services Cost Review Commission
The Honorable Cheryl Kagan, Co-Chair of the AELR Committee
The Honorable Samuel Rosenberg, Co-Chair of the AELR Committee
The Honorable Shane Pendergrass, Chair of the House Health and Government Operations Committee
The Honorable Dolores Kelley, Chair of the Senate Finance Committee