



*Keeping You Connected...Expanding Your Potential...
In Senior Care and Services*

December 12, 2018

Ben Steffen
Executive Director
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, Maryland 21215-2299

RE: MHCC: Response to Final Report Dated December 11, 2018

Dear Mr. Steffen:

On behalf of LifeSpan Network and our comprehensive care facility (CCF) members, we again appreciate the opportunity to provide our feedback to the *Modernization of the Maryland Certificate of Need Program: Final Report* dated December 11, 2018. The report essentially contains two sets of possible recommendations: 1) the Maryland Health Care Commission's (MHCC) recommended ideas for reform of CCFs contained in a matrix (pages 17-20); and 2) general recommendations put forth by the MHCC (pages 32 - 38).

At the onset, it is important to note that the nursing home industry understands that change is inevitable with the approval of the TCOC Model. The issue is simply ensuring that the "right" change is made. While LifeSpan does support many of the recommendations contained in the Final Report that focus on streamlining the process and reducing applicant costs, there are recommendations which we strongly believe will decrease quality of care in the industry and require further review.

Pages 17-20: CCF Services Matrix

Six of the nine "potential solutions" contained in the matrix refer to the State Health Plan. At the same time the MHCC conducted the CON Modernization Task Force, it also began the process to revise the *State Health Plan for Facilities and Services: Comprehensive Care Facility Services*. Many of the issues discussed unfortunately overlapped between the two workgroups. While the CCF industry requested that the revisions be temporarily placed on hold until the conclusion of the CON Modernization Task Force, the MHCC continued to move forward on the State Health Plan revisions and these revisions were promulgated in the Maryland Register on December 7th. LifeSpan will be submitting a more detailed comment letter on these revisions. However, LifeSpan did want to comment on the following recommendations contained in this Final Report:

- #2 and #4: **Oppose:** Establishing an exemption from CON review process for project development in jurisdictions with occupancy rates above a specified threshold and permit docketing of applications in jurisdictions that have no need if the proposal is aligned with the TCOC model. Please see our comments below under the general recommendation section of this letter that explain our opposition in further detail.
- #3: **Oppose in part:** Permit docketing of applications for new facilities in a jurisdiction that has a percentage of CCFs that fall below MHCC-established quality standards.

While not elaborated on in this Final Report, the State Health Plan revisions define the MHCC-established quality standards as the Federal 5-Star Rating System. LifeSpan has significant issues with the 5-Star Rating System and is opposed to the exclusive use of it in the State Health Plan. The 5-Star Rating System can unfairly discriminate against comprehensive care facilities depending on their resident acuity levels, the retention of staff vs. staffing numbers as well as the subjectivity of the survey process. This is especially true in rural areas where staff retention is more consistent than in urban areas. It is for this reason that Maryland created its own “Pay for Performance” (P4P) measurement system. As such, LifeSpan believes that Maryland’s P4P rating system is a better indicator of quality and should either be used instead of the 5-Star Rating or in conjunction with the 5-Star Rating. It is also important to note that the MHCC has stated that this revision would require statutory change even though it has already been included in the State Health Plan revisions.

- #5: **Support:** Eliminate CON requirements for facility modernization if bed capacity is not changing.

Under current law, a CON is necessary even if bed capacity is not changing within a facility or within a jurisdiction. LifeSpan supports both the elimination of a CON for a facility when the facility’s bed capacity is not changing as well as when a facility is relocating within the same jurisdiction but is not changing its bed capacity. LifeSpan also supports eliminating CON requirements when a facility is decreasing its bed capacity.

- #6: **Oppose:** Allow changes in bed capacity of more than 10 beds or 10 percent of existing bed capacity without a CON.

As highlighted by the MHCC in the proposed State Health Plan revisions, nursing home utilization has decreased. As such, there has been no data or clear justification for expanding the current law which now limits changes in bed capacity to 10 beds or 10 percent of existing bed capacity rather than to “more than” as indicated in this recommendation.

- #7: **Support:** Eliminate project expenditure level (capital expenditure) threshold defining a requirement to obtain a CON.

LifeSpan supports this recommendation. Currently, many nursing facilities that undergo modernization projects without bed need changes are required to undergo a CON review. This is a costly and often time-consuming process. Business decisions, lending requirements, etc. should dictate these decisions and the State should not add cost when there is no changes to bed capacity.

Pages 32-38: MHCC General Recommendations

The MHCC recommendations are divided into three sections and, for the most part, many recommendations focus solely on one industry. For CCFs, LifeSpan's comments pertain to the first section – *“Regulatory Reforms to be Started Immediately.”* LifeSpan remains strongly opposed to the recommendation that would:

“Create the ability to waive docketing requirements or other considerations for approval of a CON for a capital project if the HSCRC endorses the project as a viable approach for reducing the total cost of care under Maryland's TCOC model.”¹

It is again important to note that LifeSpan understands that change is necessary and that providers needs to be given flexibility to respond to our changing health care delivery system. However, for the reasons below, we believe that this recommendation is premature and should be placed into the “further study” section to allow additional opportunity for the HSCRC and the stakeholders to implement and develop agreed upon TCOC programs and protocols. Our objections are as follows:

1. While this recommendation doesn't explicitly state it, the recommendation would allow for the development of projects when there is no need in the jurisdiction for the additional service or beds. 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. LifeSpan strongly believes that this premise should be continued and that docketing exemptions that allow for projects without an identified need should not be permitted. Rather, 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 need. The MHCC has already pointed out that nursing home utilization is declining. Why would the MHCC want to encourage more beds rather than a realignment when utilization is declining, and the State continues to emphasize the development of increased home-and-community based services.² During the discussions on this recommendation statements have been made that some facilities would need to add beds in order to be able to meaningfully participate in a TCOC project. At this time, that assertion is not supported by any data and, more importantly, a nursing home is already able to add the lesser of either 10 beds or up to 10% of their existing beds, which provides a CCF with the suggested flexibility.

2. This recommendation is premature. The TCOC Model is set to begin on January 1, 2019, concurrent with the Episode of Care Improvement Program and the Primary Care Model.

¹ This recommendation appears to include possible solutions #2 and #4 in the matrix indicated above.

² This is evidenced by the requirements contained in the State Health Plan revisions where an applicant must provide information to every prospective resident about the existence of alternative community-based services as well as other requirements (page 14 - .05 General Standards) 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.

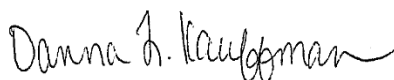
Currently, the State Innovation Group is examining additional payment models for post-acute care, including the ability of post-acute care providers to be conveners of programs. LifeSpan and the nursing home industry are actively participating in this group. The MHCC itself points out in the Draft Decision Matrices of the CON Modernization Workgroup in the Comprehensive Care Facilities grid – “what constitutes TCOC alignment has not been defined by the State or hospitals.” In addition, what would happen if a TCOC project that included the development of additional nursing home beds or services was approved but then subsequently cancelled by the hospital? Would the beds be removed from the system or would those beds not continue to exist at a time when nursing home utilization is declining and there was no identified bed need in the beginning of the project when approved?

3. While this is under the “Immediate Action” section, LifeSpan believes that statutory authority is needed before this can be implemented. The Draft Decision Matrices distributed on October 12th at the CON Modernization Workgroup specifically listed three areas that would require statutory changes: permit docketing of apps for new facilities in jurisdictions that have failed MHCC quality standards; allow changes in bed capacity of more than 10% without needing a CON – expand the waiver bed rules; and permit docketing of apps in jurisdictions that have no need if proposal [is] well aligned with TCOC demonstration. Ironically, the November 9th Draft Report maintained that a statutory change was needed for docketing an application that did not meet quality standards or for expanding the waiver bed rule. However, oddly enough, the Draft Report removed the TCOC model exemption from needing a statutory change. The December 11th Final Report remains silent on the issue. Given the fact that a CON is needed to change bed capacity or to develop a new service, it is unclear how statutory authority is not needed. More importantly, how can one docketing exemption need statutory change but not the other?³

For these reasons, LifeSpan urges the MHCC to remove this recommendation from the “Start Immediately” section of the recommendations and place it under further study. This will allow both the State Innovation Group, the HSCRC and the health care industry the opportunity to discuss additional payment models and develop appropriate parameters.

Again, LifeSpan thanks the MHCC for the opportunity to comment on the Final Report.

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: Maryland Health Care Commissioners

³ It is also important to note that both docketing provisions have already been included in the proposed regulations for the State Health Plan, printed in the Maryland Register on December 7th as approved by the MHCC.