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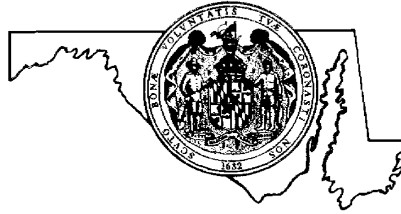

MARYLAND HEALTH CARE COMMISSION

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MEMORANDUM

TO: Commissioners

FROM: Eileen Fleck
Chief, Acute Care Policy and Planning

DATE: July 15, 2021

RE: Staff Recommendations for Final Permanent Regulations: (1) COMAR 10.24.21, State Health Plan for Facilities and Services: Acute Psychiatric Services; and (2) COMAR 10.24.07, State Health Plan for Facilities and Services: Residential Treatment Services

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Maryland Health Care Commission (MHCC) staff is requesting that the Commission repeal the regulations in COMAR 10.24.07 that address acute psychiatric services and emergency medical services and adopt as final permanent regulations, COMAR 10.24.07: State Health Plan for Facilities and Services: Residential Treatment Services. MHCC staff is also requesting that the Commission adopt a new Chapter COMAR 10.24.21: State Health Plan for Facilities and Services: Acute Psychiatric Services (Chapter). The current State Health Plan chapter that addresses acute psychiatric services, COMAR 10.24.07, also includes standards for residential treatment centers (RTCs), specifically RTCs for juvenile sex offenders and interim RTC capacity. When the Commission adopted COMAR 10.24.21 as proposed permanent regulations, Staff recommended that the standards for residential treatment centers remain in COMAR 10.24.07, and that the standards for acute psychiatric and emergency medical services be repealed. The standards for emergency medical services are outdated and do not apply to Certificate of Need projects that involve hospital emergency departments.

The 30-day formal comment period for the proposed COMAR 10.24.21 and COMAR 10.24.07 ended on June 7, 2021. Staff did not receive any comments on the regulations that remain in COMAR 10.24.07. Three organizations commented on COMAR 10.24.21, and these comments are posted on MHCC's website.[1] Staff's summary and analysis of these comments and staff's recommendations follow.

[1] https://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_shp/hcfs_shp.aspx

Johns Hopkins Health System

Johns Hopkins Health System (JHHS) commended MHCC for its inclusion of Policy 6, which calls for an increase in funding for the provision of mental health services by the private sector, and also by federal and State governments to adequately meet the needs of Maryland's population. JHHS noted that increased funding is crucial for improving access for patients and offering community-based services. JHHS stated that community-based services allow for timely discharge and reduce readmission rates.

Staff Analysis and Recommendation

Staff recommends no changes and notes that JHHS did not suggest any changes to COMAR 10.24.21.

Maryland Psychiatric Society

The Maryland Psychiatric Society commented that it disagreed with the description of State facilities as no longer caring for short-term acute psychiatric patients, which is included in the second paragraph under COMAR 10.24.21.03A. The Maryland Psychiatric Society also objected to the proposed Chapter's description of the role of State psychiatric facilities as primarily dedicated to the forensic patient population, stating that there is a need for long-stay acute psychiatric patients. It noted that these patients are currently treated in acute care settings, which leads to shortages of psychiatric beds. The Maryland Psychiatric Society believes that the State should have responsibility for the most complex long-stay patients and requested that the regulations be revised to "reflect the goal of a full continuum of State care for all patients with serious and persistent mental illness."

Staff Analysis and Recommendation

Staff recommends no change in response to the comments of the Maryland Psychiatric Society. The description of the current use of State psychiatric facilities is included because previously the State psychiatric hospitals were used frequently for acute psychiatric patients who were not forensic patients. The description of the current use of State psychiatric facilities is included for context, and it is not a statement or policy directive on how State psychiatric facilities should be used for non-acute psychiatric patients. Staff notes that the comments of the Maryland Psychiatric Society have been shared with the Secretary of Health who is developing plans for the State psychiatric hospitals.

Sheppard Pratt

Sheppard Pratt requested changes to the adverse impact standard, COMAR 10.24.21.05B(9). Sheppard Pratt commented that profit margins for acute psychiatric care are among the lowest of any regulated inpatient service in Maryland, but there is no consideration of the financial viability of existing providers as part of the Certificate of Need (CON) review process for acute psychiatric services. Furthermore, Sheppard Pratt explained that the agreement between the State of Maryland and the Centers for Medicare and Medicaid Services provides protection for acute care general hospitals with inpatient psychiatric services, but private special psychiatric hospitals, like Sheppard Pratt do not have the same protections.

Sheppard Pratt concluded that the lack of consideration for the financial viability of existing providers of acute psychiatric services in the impact standard is not consistent with regulations for chronic hospitals and acute inpatient rehabilitation services, included in the State Health Plan chapters for those services and suggested specific wording changes to the impact standard. The suggested changes included the following: apply the impact standard to all projects involving acute psychiatric services that require CON review; require an applicant to estimate the impact of its proposed project on bed utilization and payer-mix for existing providers in the same planning region or from which the applicant projects to capture market share; require an applicant to estimate the impact on quality of care at other providers that will likely be affected by the project; require an applicant to estimate any reduction in the ability of the affected providers to maintain specialized staff or resources based on historic levels of acuity. Sheppard Pratt stated that its proposed changes are consistent with standards for several other services addressed in the State Health Plan, including outpatient hospice services; inpatient hospice services; home health agency services; emergency hospital services; and ambulatory surgical services.

Staff Analysis and Recommendation

Staff notes that during the informal comment period Sheppard Pratt requested changes to the adverse impact standard that would take into consideration the financial viability of existing providers. When Staff revised the impact standard and recommended that a project that jeopardized the financial viability of an existing provider should be considered unacceptable, the Commission rejected those changes at the February 2021 Commission meeting, prior to adoption of the proposed Chapter. During the discussion of changes to the impact standard, it was suggested that the Commission should not have a policy that protects existing providers from the competition of new providers. However, the Commission also expressed that giving consideration to the impact on patient access of a proposed CON project is acceptable. As written, the standard explicitly states that a proposed CON project cannot have an unwarranted impact on patient access.

Although Sheppard Pratt noted that regulations for other services require consideration of the impact of a proposed CON project on the financial viability of an existing hospital or health care facility, consistency with other regulations is not a strong justification for its proposed changes. Potentially, the Commission would want to revise the impact standards in those regulations too, in a way that aligns with the views expressed by the Commission at the February 2021 Commission meeting.

With respect to the additional analysis requested of CON applicants, staff notes that, while the regulations do not specify that an applicant produce all of the analysis suggested by Sheppard Pratt, an applicant is required to provide a service-area level needs assessment. An applicant is required to define the service area of its proposed project. In addition, an applicant must provide projected psychiatric discharge rates and average length of stay for its service area population and provide projected market share assumptions. The reasonableness of the applicant's analyses and assumptions will be evaluated by staff based on discharge data for other providers of acute psychiatric services with overlapping service areas and providers who might for other reasons be deemed comparable to the proposed CON project. The Commission cannot approve a CON project if need for the project has not been demonstrated. By curtailing the development of unnecessary capacity for acute psychiatric services, the need standard reduces the likelihood that a CON project with a detrimental impact on an existing provider will be approved.

Staff also notes that part of the purpose of the needs determination for historically underserved populations, which is part of the assessment of need for a project, is to prevent an

applicant for a CON project from ignoring the needs of patients who are perceived as more expensive to treat or potentially more difficult to treat or discharge in a timely manner. That standard is specifically aimed at both ensuring patients' needs are met and reducing the opportunity for business practices regarded as unfair to existing providers.

In addition to demonstrating the need for proposed acute psychiatric services, the Chapter, at COMAR 10.24.21.05B(9)(a)(iv), provides that an applicant must show that

> If the project will likely reduce the availability or accessibility of acute psychiatric services by eliminating, downsizing, or otherwise modifying a facility or service, the applicant shall document that each proposed change will not inappropriately diminish the availability of or access to acute psychiatric services: for the population within an optimal drive time, as defined in Regulation .05B(1) of this Chapter; for the population in the hospital's health planning region; or for the indigent, underinsured, and uninsured.

By including the above standard concerning access to acute psychiatric services, the Commission may consider changes in access to specialized services that would be negative for patients, which could include existing providers' inability to maintain specialized staff or services.

Staff concludes that the Chapter appropriately reflects the views expressed by the Commission and will likely ensure that excess capacity is not approved with unwarranted detrimental effects on existing providers, without many of the changes suggested by Sheppard Pratt. However, staff also recommends a non-substantive change to COMAR 10.24.21.05B(9)(a), as shown below with strikethroughs for deletions and underlining of added text.

(9) Adverse Impact.

> (a) A ~~capital~~ project requiring action by the Commission involving acute psychiatric services shall not have an unwarranted adverse impact on the total cost of care, availability of acute psychiatric services, or access to acute psychiatric services. If the applicant is a Maryland general hospital seeking a capital-related adjustment in its global budget revenue, it shall demonstrate that:

The suggested changes clarify the intent of the adverse impact standard, which is to consider adverse impact for all projects requiring action by the Commission. Sheppard Pratt perceived the inclusion of the modifier "capital" as narrowing the applicability of the standard, which is not the intent. The term "capital project" is not defined in regulations of the Health Services Cost Review Commission or the Maryland Health Care Commission. Based on the physical space requirements for acute psychiatric services, staff expects that nearly every project will include spending money for the creation or modification of a psychiatric unit.