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Maine Hospital Association

MAINE'S LEADING
VOICE FOR HEALTHCARE

TESTIMONY OF THE MAINE HOSPITAL ASSOCIATION

In Opposition To

LD 189 - *An Act to Increase Availability and Affordability of Mental Health Care and Substance Use Disorder Services by Removing the Certificate of Need*

LD 743 - *An Act to Increase the Availability and Affordability of Health Care by Eliminating Certificate of Need Requirements*

March 11, 2025

Senator Bailey, Representative Mathieson and members of the Health Coverage, Insurance and Financial Services Committee, my name is Jeffrey Austin, I am with the Maine Hospital Association and I am offering this testimony in opposition to CON repeal.

The Maine Hospital Association (MHA) represents community-governed hospitals including non-profit general acute care hospitals, private psychiatric hospitals, and Maine's only acute rehabilitation hospital.

Legislation repealing Maine's Certificate of Need program is a regular issue for the legislature. This bill is similar to repeal bills from:

- 2023 (LDs 1541 and 1554);
- 2021 (LDs 931, 932, 935, 927 and 1004);
- 2017 (LD 482);
- 2015 (LD 734);
- 2013 (LD 162) and,
- 2011 (LD 360).

In 2011, this Committee initiated significant changes to the CON program in Maine. We supported those changes and we do not believe that full repeal is the right policy for Maine. We urge you to oppose these bills.

Policy Challenge

Before any medical care provider in Maine may make a significant investment in health care infrastructure, the provider must first obtain a "Certificate of Need" from the Department of Health and Human Services (DHHS). The purpose of "Certificate of Need," or CON, is to review the proposal in light of existing infrastructure to determine the impact of the proposal on health care spending in the community.

The supporters and opponents of CON are after the same thing – lower health care spending. The difference is in the strategy employed to achieve that goal. There are two primary aspects to total health care spending:

Volume of Services x **Price** Per Service = Total Spending

Supporters of CON laws, including MHA, believe CON laws reduce the volume of services by restricting oversupply. Opponents of CON laws believe that restricting supply increases the price per service. This is the tension on CON laws.

Background

The concept of Certificate of Need (CON) originated with the federal government in the early 1970s. Most states followed-suit by the end of the decade. The federal government repealed its CON law in 1986. States have generally modified their CON laws since 1986 but at least 36 still have a CON law applying to at least some capital expenditures (according to the National Conference of State Legislatures). Maine enacted its CON law in 1977 and it has seemingly been reviewed, revised and otherwise tinkered with ever since. The last major revision to CON took place last session.

The CON process is basically a permitting system where a hospital applies to the Department of Health and Human Services for permission to make an investment. The state can approve the request, deny it, or approve it with conditions. The vast majority of CON applications are granted (according to the Administration's testimony a few years ago, 95% of applications were granted).

We believe it is more appropriate to think of CON as a check on development rather than a block. That doesn't mean every single proposal receives approval, but I believe most are approved.

Even though most projects get through CON, we believe the review process is positive. The process is not always easy but it is a public process, where members of the community, large payers and others can understand, and where appropriate, comment on a major investment in health care infrastructure.

Regulatory Overview

There is a CON implementing rule (Chapter 503). There is a distinct CON unit at DHHS with its own webpage.

CON Statutes

CON applies to both nursing homes and medical care facilities (e.g. hospitals).

There are 5 basic triggers in the CON law that necessitates DHHS review.

1. **Transfer of Ownership or Control.**

If a "health care facility" that provides medical care is going to be sold, the CON laws require that a certificate be issued first.

2. **Acquisitions of Major Medical Equipment.**
   - Medical Equipment over $4.6 M in value (doubled in 2011 and adjusted by inflation since)

3. **Capital Expenditures.**
   - $14M (tripled in 2011 and adjusted by inflation since)

4. **New Health Service.**
   - Capital Costs associated with NHS $4.3M (increased tenfold in 2011 plus inflation since)
   - Operating Costs associated with NHS $1.4M (increased 150% in 2011 plus inflation since)
   - New Technology associated with NHS $4.6M (doubled in 2011 plus inflation since)

5. **New Health Facility.**
   - Capital Costs $3M (not inflated)

As you can see, these are much higher standards than existed prior to the 125th Legislature.

Standard of Review

Essentially, the review conducted by the CON unit of DHHS considers whether the applicant can provide the service and whether the area needs the service.

- The applicant must be "fit, willing and able.";
- The project must be "economically feasible";
- There must be a "public need" (§335(7)(C)); and,
- The project's sensibility in terms of: (i) overall cost to system, (ii) potential cost to state government, and, (iii) whether there were less costly alternatives (§335(7)(D)).

These are obviously bulleted summaries of terms of art for which greater meaning has developed over the years. DHHS has also adopted rule changes that reform the bureaucratic process of CON and we believe the changes made were positive.

Arguments For Maine's CON Law Regime
Let me briefly identify our primary arguments in support of CON.

1. The Health Care Industry is Not a Classically Competitive Marketplace.
The argument for repeal of CON is clothed in the appealing call of free markets: *'Let the marketplace decide need.' 'Hospitals are just afraid of competition.'* The free market is the best mechanism to allocate resources and guide investment. Hospitals share the concerns of many about government control of the marketplace. However, the hospital sector of the health care industry is a very distorted free market.

At the most basic level, hospitals don't set their prices for the vast majority of their customers.

The government fixes prices for Medicaid and Medicare patients. That government control wouldn't necessarily be a problem; however, the prices are fixed at approximately 85% of costs (Medicare) and 72% of cost (Medicaid). What rational industry accepts less than cost for the majority of their customers.

For another 2-4% of customers, hospitals are compelled by state law to charge nothing - hospitals must provide free care to Mainers below 150% of the poverty level under state law. Other providers do not. There is no level playing field between hospitals and other providers. Hospitals are obligated to see Medicaid patients. Private providers are not.

Private doctors can, and some do, close their doors to Medicaid patients (or limit their caseloads) and hospitals are forced to provide the bulk of care to these patients.

Hospitals then have to increase their prices to privately insured patients to cover the losses from providing care to Medicaid patients. This is a significant, ***government-created***, distortion in the market. There is a correlation between the prices a hospital charges and its volume of government (Medicaid/Medicare) patients. The higher a Maine hospital's share of government-funded patients...the higher the corresponding prices that hospital must charge to private insurers.

If CON is repealed in the name of the free market, then private providers should be obligated to play by the same rules as hospitals – or else there is no level playing field. It's just not fair to pursue only some changes to the health care regulatory regime in the name of competition.

2. Hospitals are Not Like Other Businesses
Hospitals provide vital services that a community must have, including: emergency care, maternity care, primary care as well as mental health and substance abuse services. Unfortunately, these services are under-reimbursed by our current payment systems. Consequently, hospitals need to provide other services that can help defray the costs of these essential components of our health care system.

Briefly consider just one of these services, emergency care. Emergency care is essentially a stand-by service. It's not a principal means to deliver health care, but an emergency department that can handle a broad range of medical crisis is essential. Payers do not make "stand by" payments to hospitals to fund the existence of emergency departments. Hospitals only get paid when the emergency department is in use. A rational marketplace would either: close underutilized,

expensive and often loss-producing emergency departments or charge costs to patients that are far in excess of what they are today.

There is no private sector appetite to compete with hospitals to provide 24/hour per day, 365 day per year, full service emergency room services, particularly in poorer parts of Maine. Urgent care centers in urban centers during normal business hours, maybe. States without CON laws do not see growth in emergency room providers.

Instead, private sector providers want to cherry-pick and compete with hospitals on the services that do provide adequate reimbursement (e.g., surgery and imaging). They are happy to leave to the hospitals the services with much thinner margins, like primary care for Medicaid patients. If one assumes hospitals will not close their doors and go out of business – which does happen in free markets – then the hospital will have to make-up any revenue it loses to competition in the surgical and imaging markets. How does this lower health care costs?

Conclusion

Thank you for taking the time to review this material. We respect the goal of these bills, which is to lower health care costs. Generally speaking, we also agree that market competition is a dependable method to reduce costs. However, health care markets have significant distortions, many of which are caused or created by the government. Maine's CON law cannot be shown to be a significant deterrent to investment. The proponents are relying on a sound theory, market competition as a vehicle to reduce cost, but they are incorrectly applying it to health care.