Oregon's Certificate of Need Requirements

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February 13, 2024

Chair Nosse, Vice-Chairs Goodwin and Nelson, and Distinguished Members of the Committee on Behavioral Health and Health Care:

My name is Matthew Mitchell. I am an economist at the Knee Regulatory Research Center at WVU and for a decade I have been studying Certificate of Need (CON) Laws in health care. I was pleased to see that you are considering lifting the CON requirements for rehabilitation facilities, substance use facilities, psychiatric care facilities, and skilled nursing facilities.

I thought it might be helpful to share some of the research on this regulation. I will focus on 3 considerations: 1) the goals of CON, 2) the scientific study of CON, and 3) the particulars of these four CON requirements.

1. The Goals of CON Regulation

As you know, CON regulation in health care was intended to rein in health care spending. Lawmakers hoped that by requiring providers to prove a need before offering new or expanded services, they might limit the provision of expensive, duplicative, or unnecessary care. At the same time, they hoped that planners might be able to divert the provision of care to relatively underserved communities. And though the CON process does not typically include an assessment of a provider's quality or qualifications, advocates also hoped the regulations might increase quality by encouraging more high-volume providers.

2. The Scientific Study of CON Laws

Neither economic theory nor decades of empirical research suggest that CON laws achieve any of these goals. In fact, the balance of evidence suggests that the regulatory regime undermines competition, driving up costs, limiting access, and diminishing the quality of care. The case against CON is especially strong when it limits care for vulnerable populations such as those seeking psychiatric care or substance use treatment.

Standard economic theory tells us that a supply restriction such as CON will tend to shift the supply curve back, raising the costs per unit and limiting the quantity and quality of care. These effects are exacerbated by the fact that CON laws have several anticompetitive features. In most CON states—including Oregon—the process empowers incumbent providers to challenge the applications of their would-be competitors. And since statutory and regulatory language often

compels regulators to deny applications if a new service will "duplicate" (i.e., compete with) an existing service, the process encourages the local monopolization of care.

But we don't have to rely on theory alone. We can look to the real-world experience of Americans. About one-in-three live in a state with either limited or no CON regulation in health care. Many more live in states that have reformed or pared their CON programs back. Relying on this variation across time and across geography, researchers have spent decades comparing outcomes in CON and non-CON markets.

Few regulations have been as well studied as CON laws. To date, there have been 114 academic peer-reviewed empirical assessments of CON laws and together these papers contain 413 separate tests (Mitchell forthcoming). Most find that CON laws undermine their stated goals. By a margin of nearly 5-to-1, tests find that the regulation is associated with higher spending, less access, and diminished quality of care.

3. Psychiatric, Substance Use, Rehabilitation, and Skilled Nursing CON Requirements

While the case for CON regulation is weak, the case for psychiatric, substance use, rehabilitation, and skilled nursing CONs is weaker still. These services are not capital intensive. These services are not over-supplied. And there is no evidence that high-volume providers offer any better care.

To date, not a single study has found that CON regulation enhances care for vulnerable or underserved populations such as psychiatric or substance use patients. In fact, one recent study finds that in states like Oregon that require a CON for psychiatric care, there are 20 percent fewer psychiatric hospitals and 56 percent fewer psychiatric patients per capita (Bailey and Lewin 2021). Another finds that in states with substance use CONs, substance use treatment facilities are less likely to accept private insurance (Bailey, Lu, and Vogt 2022).

4. Conclusion

We need not speculate about what would happen in an Oregon without this regulation. Decades of evidence drawn from hundreds of sophisticated empirical investigations makes it clear that Oregonians can expect greater access to lower cost and higher quality care without CON. Vulnerable and underserved populations such as those in need of substance use treatment or psychiatric care are especially likely to benefit from repeal.

Thank you for the opportunity to offer my testimony today. I am happy to discuss my research in further detail with you or your staffs.

Sincerely,

Matthew D. Mitchell, Ph.D.

Works cited:

Bailey, James, and Eleanor Lewin. 2021. “Certificate of Need and Inpatient Psychiatric Services.” *The Journal of Mental Health Policy and Economics* 24 (4): 117–24.

Bailey, James, Thanh Lu, and Patrick Vogt. 2022. “Certificate-of-Need Laws and Substance Use Treatment.” *Substance Abuse Treatment, Prevention, and Policy* 17 (May). https://doi.org/10.1186/s13011-022-00469-z.

Mitchell, Matthew D. Forthcoming. “Certificate of Need Laws in Health Care: A Comprehensive Review of the Literature.” *Southern Economic Journal*.