OHCA
OREGON HEALTH CARE ASSOCIATION

Oregon's Voice for Long Term Care & Senior Housing

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House Committee on Behavioral Health and Health Care
Oregon State Capitol
900 Court St. NE
Salem, OR 97301

RE: OHCA Opposes House Bill (HB) 4139

Chair Nosse, Vice Chairs Nelson and Goodwin, and Members of the Committee,

Oregon Health Care Association (OHCA) represents long term care providers including skilled nursing facilities and assisted living, residential care, and memory care facilities, as well as licensed in-home care agencies. Our mission is to promote high-quality care for older adults and people with disabilities in Oregon.

While we greatly appreciate the desire to relieve and streamline regulatory burden on health care providers and expand access to care, HB 4139 represents a sweeping and consequential change for Oregon by eliminating certificate of need (CN) requirements for several types of health care facilities. Such a change requires more time to allow the Legislature to understand the impacts of the proposed changes on consumers, providers, health care workers, and the State.

OHCA members believe the current CN process is critical to meeting the Legislature's goal of access to quality health care at a reasonable cost and prevents some of the barriers the Legislature identified in achieving that goal. These barriers, which CN helps to prevent, include insufficient or inappropriate use of existing capacity, duplicated services, and failure to use less costly alternatives. CN also helps ensure a balanced distribution of services and access to these services across geographic areas and socioeconomic groups.

The CN process requires applicants to answer rational and imperative questions, including:[1]

1) Does the proposed project reasonably improve a patient's access to services in Oregon?
2) When looking at all the appropriate and adequate ways of providing that type of service and meeting patient needs, is the proposed project the most effective and least costly alternative way to do so?
3) What is the impact on the cost to Oregon's health care system and is that cost acceptable?

Understanding Oregon's Skilled Nursing Landscape

[1] OAR 333-580-0040 to 333-580-0060.

Skilled nursing facilities provide short-term care and physical rehabilitation following a serious health complication or hospital stay. The compressed length of stay contributes to controlling costs since skilled nursing facilities are less expensive than other facilties that offer rehabilitation services such as hospitals or inpatient rehabilitation facilities. The focus on short-stay rehab versus long-stay institutionalization further reduces costs by utilizing home and community-based care options.

For decades, the Legislature has intentionally prioritized home and community-based services for those in need of longer-term care. This includes residential care facilities, residential treatment facilities, and secure residential treatment facilities; these are all licensed care settings that are *not* subject to CN under current law. It is important to note that residential treatment facilities can and do serve individuals with mental health disorders or substance use disorders.

Nursing facilities, currently operating at just over 73%[2] of their total occupancy, have not yet recovered from the drop in census experienced during the pandemic. This means more than a quarter of licensed nursing facility beds in the state are currently going unused due largely to workforce challenges. Indeed, many facilities have had to voluntarily cap census temporarily due to staffing shortages.

CN accounts for exactly this type of critical information in the state's planning for health services and facilities. In evaluating the availability of resources and alternative uses of those resources, CN requires applicants to explain whether there are alternatives available in the community and whether there will be sufficient qualified personnel and clinical staff to support the proposed projects.

Before eliminating policies like CN as HB 4139 requires, the State should first focus on utilizing bed capacity and finding solutions to improve census in skilled nursing facilities that are already here.

Recent Inpatient Rehabilitation Facility Applications

It is very rare that approved CN applications are appealed. However, in August 2018, Encompass Health—the nation's largest operator of inpatient rehabilitation facilities (IRF)[3]—filed a letter of intent with the Oregon Health Authority (OHA) to develop a 50-bed inpatient rehabilitation facility in Hillsboro. A month later, Post-Acute Medical (PAM), a national competitor of Encompass, also filed a letter of intent with OHA to operate a 50-bed inpatient rehab facility in Tigard.

In March 2020, OHA issued proposed decisions granting the certificates of need for both facilities thereby approving 100 new IRF beds in the same service area. OHCA and Legacy Health Systems appealed this decision because OHA had clearly failed to comply with its own administrative rules. In November 2021, an Administrative Law Judge (ALJ), who had held a six-day hearing on the matter, issued a ruling that OHA had committed multiple errors including disregarding its own rules for determining bed need. The ALJ sent the matter back to OHA with directions to complete an evaluation that was consistent with the law. Unfortunately, OHA ignored this directive from the ALJ and restated its

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[2] Payroll-Based Journal for 2019 Occupancy, NHSN for 2020 and onwards. Data through January 28, 2024. https://www.ahcancal.org/Data-and-Research/facts/Pages/default.aspx#occupancy.

[3] https://encompasshealth.com/about-ehc#:~:text=As%20the%20nation's%20largest%20provider,standard%20for%20excellent%20patient%20care.

original decision to proceed with granting both applications, which the affected parties then had to appeal again.

Among other errors, the ALJ found that OHA disregarded its own rules that outlined a specific method for determining the service area for new IRFs and assessing bed need. OHA elected to use an entirely different methodology that was not outlined in current, existing rules. For example, the rules required OHA to use a zip code analysis to determine the service area. OHA disregarded this rule and chose a different reference point, consisting of large groups of counties, that were not created with CN in mind.

OHA then chose a new methodology for determining bed need involving hospital discharge data, which did not comport with what was outlined in rule.

It was also problematic that OHA failed to properly apply the rules that require it to consider reasonable alternatives, including skilled nursing facility beds, in its bed-need analysis. This was a problem because nursing facilities are licensed and staffed to serve *some* of the same patient population as IRFs. The skilled nursing facility beds in the targeted service area needed to be considered to ensure an accurate analysis.

If OHA had simply applied the law correctly or one of the applicants had allowed the other to move forward individually, the process would have been much more expeditious. Nonetheless, there was ultimately a clear path for Encompass Health to develop its project after PAM withdrew its application in July 2023 that would have been supported by OHA's revised bed need analysis. However, Encompass then also withdrew its application almost three months later in October 2023.

While both companies have publicly cited CN as the reason for their withdrawal, it is worth recognizing that other factors, such as dramatic changes in market conditions and workforce shortages, likely also played a role in them ultimately opting out of development in Oregon at this time.

A Path Forward

While we certainly have agreement with the proponents of HB 4139 on the fact there are problems to be solved regarding access to care, we do not believe that wholesale eliminating CN is the right solution and assert that a properly applied CN process is not a barrier to care.

A better place to start is focusing on easing regulatory burdens for existing providers that can help drive down the cost of care, investing in workforce development, ensuring that reimbursement through Medicaid is adequate, and incentivizing providers to serve individuals with more complex medical care needs, including traumatic brain injuries. We also believe there could be value in OHA reviewing and potentially revising its CN rules to promote clarity and expediency.

Sincerely,

Libby Batlan
Senior Vice President of Government Relations
Oregon Health Care Association