State of Maryland
Department of Health

Health Services Cost Review Commission
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The Honorable Delores G. Kelley
Chair, Senate Finance Committee
3 East, Miller Senate Office Building
Annapolis, MD 21401

Dear Chair Kelley and Committee Members:

The Health Services Cost Review Commission ("HSCRC") submits this letter of information for Senate Bill (SB 879) titled, "Public Health – Maryland Infant Lifetime Care Trust Funded by HSCRC and Maryland Patient Safety Center Duties". SB 879 charges the HSCRC with overseeing the funding of a Maryland Infant Lifetime Care Trust.

We applaud the sponsor for continuing the conversation to produce meaningful reforms to medical malpractice laws and find ways to address rising malpractice costs. As reforms are considered, there needs to be a balanced approach to support patients and their families when injuries occur while also ensuring a sustainable funding mechanism for malpractice insurance and expenses. The following provides considerations for the sponsors of the Lifetime Care Trust that is proposed.

As the Commission has expressed in the past, the HSCRC remains concerned about rising medical malpractice costs and the practice of defensive medicine, which, in combination, increase the cost of hospital care. These costs, particularly costs related to birth injury, have been increasing in Maryland in recent years and threaten access to care for consumers and put additional pressure on the Maryland Total Cost of Care agreement with the federal government.

Birth related malpractice insurance, in particular, is among the most expensive forms of insurance. As malpractice rates climb, both consumers and the State's Total Cost of Care (TCOC) agreement are threatened. From a consumer standpoint, rising malpractice costs contribute to increased hospital costs which are passed onto consumers through higher taxes, premiums, and other out-of-pocket costs. High hospital malpractice insurance premiums and a lack of reinsurance providers for specialty services such as obstetrics also threatens continued access to these services, potentially creating a void of available maternity services for mothers as hospitals are unable to afford the high costs associated with birth-related malpractice.

Over time, higher hospital costs resulting from medical malpractice costs also threaten the State's ability to achieve its goal to build up to $300 million in annual savings under the TCOC Agreement with the federal government. If this savings goal is not met, the benefits that the State's Medicare waiver brings to Marylanders would be jeopardized. These benefits include the equitable funding of Uncompensated Care, which improves access to critical healthcare for Marylanders, as well as enabling a system that links hospital payment to performance on quality measures (which includes malpractice-related measures).

Under the Maryland Health Model, hospitals have strong incentives to reduce malpractice events and expenses since they all are operating within pre-approved global budgets under which they are at risk for costs, including higher malpractice premiums and claims, and the cost of defensive medicine. Therefore, reforms that would reduce costs and improve quality could help the State achieve its TCOC goals and required standards of performance. The Commission and Maryland hospitals are focused on reducing avoidable utilization such as readmissions and complications so the interest of hospitals, physicians, and patients are aligned in this respect. If the cost of malpractice claims continues to increase, there could be an increased incentive for providers to practice defensive medicine that does not provide quality value, thereby subverting the goal to reduce avoidable utilization. Such an increase in costs would impact Maryland's success on meeting the cost growth and quality requirements under the Model.

While the HSCRC is supportive of malpractice reforms, there are a few outstanding strategic and operational points that should be considered in SB 879. First, SB 879 proposes the creation of a new non-governmental organization to administer the birth injury fund. This private entity would have the authority to decide the amount to distribute to patients, the amount needed in the fund, and therefore the amount to be assessed to payers through the hospital rate setting system. This would be an unparalleled level of authority for a non-governmental organization to make decisions about the care of Marylanders and our State's healthcare finance system. This opens questions on whether or not this should instead be a government agency to ensure appropriate oversight and accountability in managing the fund.

Second, the fiscal implications to payers should be considered carefully in planning. SB 879 specifies that up to an additional $40 million could be added to hospital rates annually in order to support the fund as well as the formation and administration costs of the Trust. Using the rate-setting system as a mechanism to generate funding for these items would require increased hospital rates for all payers, including the Maryland Medical Assistance Program (Medicaid).

The bill as currently drafted would assess only obstetric services. However, the federal Centers for Medicare and Medicaid Services (CMS) requires that any provider tax be broad based and applicable to all payers. Therefore, the hospital assessment should be revised to be effectuated on all patient revenues, not just on obstetric services. CMS would most likely not approve the assessment as proposed under SB 879, causing the Department to face federal compliance issues.

Additionally, the HSCRC is required to provide written notice to CMS regarding any new payment methodology that affects the hospital rate-setting system. Under the agreement, CMS then has the authority to accept or reject the change (Section 8. a. iii., pp. 17-18). CMS' authority to make the final decision applies to hospital rate-setting system changes created in legislation passed through the Maryland General Assembly.

Finally, the creation of the Infant Lifetime Care Trust under SB 879 has significant operational considerations that would require the HSCRC to expend its limited existing resources to support the processes proposed in the bill. To start, HSCRC would be tasked with directing hospital assessments through the rate-setting system into the Fund's account and overseeing payments from the account to cover the costs of the Trust. The HSCRC anticipates that this step would require a similar approach as other processes we manage (e.g., Uncompensated Care). This bill however lays out a distinctly different approach for managing the Fund than we have historically seen as successful. In other similar routines, HSCRC determines payment into and out of the account rather than having a third party, private entity determine payments. We would encourage a similar approach to be adopted in SB 879.

Another operational consideration is that SB 879 would require HSCRC to procure the help of contractors to conduct the following provisions in SB 879:

1. Studying and making available to the public a report "assessing the status of the State's hospital reinsurance market and the cost of self-insurance programs, including the availability, adequacy, and affordability of reinsurance and facilities in the States" (§19-207(b)(6), p. 4 lines 24-29).
2. Compiling "all relevant financial and accounting information" for the rate process, including the costs associated with "medical liability" and "obtaining medical liability insurance" (§19-220(a)(2)(v), pp. 6-7 lines 29 and 5-8).
3. Defining, by regulation, "the methodology used to account for costs associated with medical liability in the rate review process" (§19-220(a)(3), p. 7 lines 9-11).

While the HSCRC is experienced in setting hospital rates and hospital finance, the agency has little experience working on issues related to the reinsurance market or the accounting of medical liability and reinsurance. HSCRC would require a contractor with more in-depth experience in this domain. The contractors would need to have knowledge of Maryland's unique rate-setting system, in addition to extensive expertise in issues of medical liability and reinsurance.

The HSCRC thanks the Committee for allowing us the opportunity to share this additional information on SB 879. We believe that by considering the aforementioned areas, legislative action to reform the malpractice environment can provide many benefits to Maryland's healthcare system. If you have any additional questions, please feel free to contact me at katie.wunderlich@maryland.gov.

Sincerely,

Katie Wunderlich
Executive Director