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**Health Services Cost Review Commission**

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March 9, 2020

The Honorable Luke Clippinger, Chair  
House Judiciary Committee  
Room 101, House Office Building  
Annapolis, MD 21401

Dear Chair Clippinger and Committee Members:

The Health Services Cost Review Commission (HSCRC) submits this letter of information for House Bill 1563 (HB 1563) titled, “Public Health – Maryland Infant Lifetime Care Trust Funded by HSCRC and Maryland Patient Safety Center Duties”. HB 1563 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, which threatens access to care for consumers and adds additional pressure on the Maryland Total Cost of Care agreement with the federal government.

Birth related malpractice insurance 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 or 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 HB 1563. First, HB 1563 proposes the creation of a new quasi-governmental organization to administer the birth injury fund. This entity would have the authority to decide the amount to distribute to patients, the amount needed in the fund, and therefore, within the limits provided in the bill, the amount to be assessed to payers through the hospital rate setting system. The Commission would like more information on the organization that would administer the Trust and perhaps a more clearly delineated coordination with the Commission.

Second, the Commission suggests specifying that the assessment to cover the Trust should be broad based and applicable to all payers, as required by the federal Centers for Medicare and Medicaid Services (CMS). Additionally, the HSCRC is required under the Total Cost of Care Model agreement to provide written notice to CMS regarding any new payment methodology that affects the hospital rate-setting system. 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 HB 1563 adds operational duties to the HSCRC that will require additional expertise beyond traditional hospital rate-setting expertise. These additional duties include:

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 therefore require a contractor with more in-depth experience in this domain. The contractor 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 HB 1563. 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](mailto:katie.wunderlich@maryland.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Katie Wunderlich', with a long horizontal flourish extending to the right.

Katie Wunderlich  
Executive Director