

Regulatory Oversight of Health Planning in Alabama:

Essential in 1979, Essential Today

Prepared by Williford and Associates, LLC.

Recently, a great deal of attention has been focused on the State's Certificate of Need program for health planning and development. It has been suggested that the current regulatory process is no longer necessary and should be replaced by a "free market" approach to business development. While the rationale presented is compelling to those who understand the complexities of the healthcare system, it does not offer a practical, long-term solution that has, at its core, the best interest of the citizens of Alabama.

When evaluating the need for a Certificate of Need program in Alabama, it is essential to understand some key differences between America's consumer-driven free market and its current healthcare market. These differences represent the reasons why a statewide health planning and development process that includes regulatory oversight is necessary at some level. Absent such a process, the dynamics of a free market have the potential to dramatically impact the availability of quality, affordable health care for all Alabamians.

- **Key Difference #1: There are buyers and sellers in both the healthcare market and the consumer-based free market; however, the context of their relationship and the relative decision-making power of the buyer and the seller are very different.**

In a consumer-based free market, the buyer has the freedom and the choice to purchase goods and services. And in doing so, the buyer usually has access to a wealth of information on which to base a purchase decision, including the cost of goods and services and alternatives. In this way, the buyer is the primary driver of demand and the decision maker in a free market.

In America's healthcare market, the buyer (or "patient") doesn't typically have the knowledge to determine what goods and services are required. Patients rely on the sellers ("providers") of healthcare to determine what goods and services are necessary, such as medical equipment, drugs, and procedures, through examination and diagnosis. And, as a general rule, once patients know what goods and services they need, they don't usually have the ability to purchase them independently. To a large degree, patients must depend on providers to authorize and deliver healthcare goods and services. Therefore, unlike a consumer-based free market, the healthcare market is primarily driven by the sellers of healthcare ("providers") instead of the buyers ("patients"). In addition, the decisions individuals make related to healthcare goods and services are very different than traditional consumer goods and services because they most likely have a much more direct, significant, and long-lasting impact on their quality of life.

- **Key Difference #2: Buyers are responsible for 100% of the cost of goods and services in the consumer-based free market; however, the buyer is often not responsible for the full cost of goods and services in the healthcare market.**

Again, in a consumer-based free market, the buyer typically has access to information on which to base a purchase decision, including the cost of goods and services and alternatives. In the healthcare market, information on the cost of goods and services is not usually readily available. There are several reasons for this, but perhaps the most significant reason is that patients don't customarily pay for the full cost of healthcare services within the current healthcare system. Instead, insurance companies and employers typically pay all or a large portion of the cost to the hospitals and/or physicians on behalf of the patient who is responsible for a smaller share of the cost commonly referred to as a co-payment. This scenario is the same whether the patient is covered by a private company or one of the nation's government-funded healthcare programs (Medicare and Medicaid) that ensure the provision of healthcare services for citizens 65 and older as well as the economically disadvantaged and the disabled. And, in situations when patients don't have insurance, hospitals must often absorb all or a large portion of the costs, which are usually not recoverable because of the exceptionally high cost of healthcare goods and services. Therefore, because patients are not responsible for the full cost of goods and services in the healthcare market, they do not typically consider their cost as strongly as they would goods and services in the consumer-based free market.

If healthcare were allowed to function in a free market, the differences that characterize healthcare have the potential to be exploited and to result in duplication of services, segmentation of the market, and over-utilization of healthcare in general. In fact, some of these issues exist today, even with regulatory oversight. Absent a statewide health planning and development process, it is highly likely that these issues would be further accentuated and would result in a more fragmented and less accessible healthcare system.

Since its establishment in 1979, the purpose of the State's Certificate of Need (CON) program has been to protect the healthcare interests of Alabama's citizens that might arise in a free market by promoting the development of community-oriented health services and facilities. The program requires applicants to demonstrate cost-effectiveness and a "need" (demand) for healthcare services before creating duplication in supply or additional expense to the system. Through application of a proven methodology that involves review of relevant health-related data and information on the facilities and services available in a geographic area, the program supports the determination of an informed decision that is in the best interest of the citizens of the area. It is also worth noting that studies demonstrate the cost of healthcare is lower and the quality of patient-outcomes is better in states with a CON program. ^{1 2}

Updates have been made to the CON program over time; however, like any program, it could benefit from ongoing improvements. Today, a need exists to improve several key aspects of the program and specifically the "review of applications" in order to expedite non-controversial projects and reduce the process costs for competing applications. Doing so would make the program more efficient, ensure it remains true to its purpose, and

minimize its vulnerability to political and economic interests that pose a threat to the availability of quality, affordable health care for all Alabamians.

An improved CON program would:

- **Allow the State Health Planning and Development Agency (SHPDA) to establish its own CON review process**

By statute, a healthcare provider submits a Certificate of Need application to SHPDA requesting approval for major construction projects or to add or update equipment or services. If another provider does not contest the application, it proceeds to the CON Board for a final decision. However, if an application is contested, a review process may be initiated to allow all interested parties an opportunity to respond to the application.

Unlike other entities, such as the State Department of Insurance and the Public Service Commission, which have their own review processes with established criteria, SHPDA's CON review process is governed by Alabama Administrative Procedures Act (APA). The APA does not specify limits on the duration or the cost of the review process. As a result, there have been contested cases consuming excessive amounts of potentially unjustifiable resources.

An improved CON program would allow SHPDA to establish a criteria-driven review process and direct more taxpayer dollars toward the actual delivery of healthcare instead of the funding of a costly regulatory process.

- **Utilize hearing officers who have expertise in healthcare and who are accountable to SHPDA for overseeing the review process**

Another component of the CON review process mandated by the APA requires that a hearing officer, called an Administrative Law Judge or ALJ, be appointed to oversee the review process for a contested application. Currently, and (once again) unlike other entities, there are no educational or experiential criteria for hearing officers.

An improved CON program would utilize hearing officers who have expertise in healthcare and who are held accountable for overseeing the review process either as employees of the State and/or pursuant to a set of guidelines and criteria. This would ensure hearing officers have the background and knowledge required to make critical decisions concerning the State's healthcare system. It would also help to protect decisions from political exploitation, a concern with any regulatory process.

- **Establish a comprehensive database to support health planning decisions and assist in determining whether the CON process results in positive outcomes for the residents of Alabama**

SHPDA has a very well managed system for data collection and analysis considering its limited amount of State-appropriated resources. However, data is not collected with the detail and timeliness necessary to support real-time decision making. In addition,

only certain providers, which represent a small portion of the State's healthcare providers, are required to participate in data submission.

Adequate health planning requires an appropriate investment in the collection and research of relevant and timely data gathered in a consistent manner. An improved CON program would establish a more comprehensive database to support health planning decisions. It would broaden the type of data collected and the type of healthcare providers required to submit data.

- **Require all members of the Certificate of Need (CON) Board and Statewide Health Coordinating Council (SHCC) to meet certain conflict-of-interest and experience criteria**

According to statute, the Governor appoints members of the CON Board and SHCC. For the most part, since the establishment of the CON process in 1979, appointees have been well qualified and dedicated to its purpose. However, because of a lack of appointment criteria, there is always an opportunity to question the impartiality of appointees to special interests and political matters.

An improved CON program would require all members of the CON Board and SHCC to meet certain geographic regional representation (ex. the healthcare environment and needs in Jefferson County are different than the needs in Talladega County, etc), conflict-of-interest and experience criteria, building additional confidence and trust into the process.

Alabamians have a variety of concerns. Education, economic development, transportation and tort reform have been on the forefront politically. However, none is more significant than the planning of comprehensive healthcare services which has a direct impact on the overall welfare and quality of life for the State's citizens, now and in the future.

There is no better time than the present to strengthen the State's healthcare system. Alabama's health planning process should be – to the greatest degree possible – efficient for taxpayers, as much as possible impervious to special interests, and supportive of the highest quality of healthcare services. As has been suggested, this can be achieved in large part by improving the existing Certificate of Need program. Regulatory oversight of health expenditures must occur to ensure the availability of quality, affordable health care for all Alabamians.

¹ "Impact of State Certificate of Need Programs on Outcomes of Care for Patients Undergoing Coronary Artery Bypass Surgery", Rosenthal, MD, et al, January 17, 2002.

² Federal Trade Commission/Department of Justice Hearings on Health Care Competition, Quality, and Consumer Protection, June 10, 2003.