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Medicaid

December 8, 2014

Diona Mullins, Policy Advisor
Office of Health Policy
Cabinet for Health & Family Services
275 E. Main Street, 4W-E
Frankfort, KY 40621

RE: Certificate of Need Strategies

Dear Ms. Mullins:

Anthem is pleased to submit our suggestions regarding possible strategies for changing the Certificate of Need (CON) program that would further the Commonwealth's Triple Aim of better value, better care, and population health improvement.

In recent years, the Commonwealth has realized significant benefits within the fields of health care delivery and financing. The expansion of managed/coordinated care has promoted access to primary care services, improved outcomes for Kentucky citizens and generated savings for our government programs. Much remains to be achieved, but removal of the barriers presented by Kentucky's antiquated Certificate of Need requirements will go a long way to enabling managed care organizations and Kentucky providers to better provide Kentuckians access to high quality, affordable physical and behavioral health care services

We would be glad to discuss our suggestions with you. Please let us know if you have any questions or need further information. Thank you in advance for your consideration.

Sincerely,

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Certificate of Need Program: Ideas for Modernization
December 8, 2014

The Commonwealth of Kentucky has identified a need to update and modernize its current Certificate of Need (CON) program to increase accessibility to providers, improve health outcomes for the growing number of Kentuckians seeking to access services, and reduce health care costs more effectively.

A primary impetus for Kentucky's original CON laws was to control the *supply of services* for Medicaid beneficiaries based upon a belief that this was a way to control program costs. Since that time, however, Medicaid programs have evolved, and States have developed and refined many other more effective tools, including Medicaid fee schedule rates, risk-based capitation with managed care organizations, value based purchasing, clinical criteria, and prior authorization.

CON has largely been supplanted by more sophisticated policy options and administrative controls. CON laws were implemented at a time when facility-based care was the standard, and before there were more meaningful measurements of outcomes or quality-based "pay-for-performance" arrangements. CON laws should be revisited in light of those developments, but particularly because of the national trend toward replacing institutional care with home and community-based services (HCBS), spurred largely by the *Olmstead* decision, that requires States to provide Medicaid services in the most integrated community settings possible.

Kentucky's CON Program is Outdated

The design of Kentucky's CON program strongly favors existing health systems and current providers operating in the State or in a specified service area. While existing organizations are allowed to proliferate, smaller --and often lower-cost--- providers face significant barriers to market entry. This problem is exacerbated by the increasing number of hospital consolidations. As a consequence of Kentucky's outdated CON, beneficiary choice and access to providers is limited.

- With hospital system consolidations increasing, we will have fewer, but larger hospital systems, with increased leverage, and less competition. If CON is not relaxed, the result will be regional monopolies which, by definition, have no competitors to foster cost efficiency and quality improvement.

- The CON program perpetuates a preference for high cost settings and services, at the expense of lower cost alternatives. CON laws are anti-competitive and tend to create *de facto* monopolies for facilities. Ironically, preserving higher cost facility-based services as the primary option for care, while suppressing the ability of smaller providers such as home health, durable medical equipment, and long term services and supports (LTSS) to enter a geographic area harms individual beneficiaries in Medicaid the most by limiting choice and access.

- Large health systems have been able to take advantage of CON laws because they are more likely to have the financial and staff resources needed to obtain a CON, as well as the ability to intervene in and/or oppose the applications of other providers seeking a CON. CON application

fees can exceed $25,000, plus attorneys' fees, making the process cost-prohibitive for many small providers.

- The CON program currently does not allow for the flexibility needed to best manage the needs of the now 1.2 million Medicaid-covered Kentuckians while still achieving cost and quality goals.
    - For example, facilities that wish to convert beds to lower-cost transition beds, a practice that routinely occurs before a discharge, must go through the CON process.
    - Some Kentucky counties currently have very few approved home health providers with CON, ultimately limiting care options for the medically fragile and needy. As a result, patients remained in acute hospital settings for prolonged durations.

The CON program stifles innovation. Kentucky's CON law limits the ability to test new models of care including accountable care organizations and provider-led systems of care. Managed care organizations have been testing new provider initiatives particularly in the quality improvement space and it is imperative that high quality providers who see Medicaid beneficiaries are available in all service areas. Efforts in furtherance of the current CON program in Kentucky are encouraging a massive step backwards by emphasizing facilities over home and community based services.

- The Commonwealth's CON process places an unfair burden on stakeholders participating in the Medicaid program at a time when Kentucky's program is growing significantly and in need of providers willing to care for beneficiaries. CON applicants can use the expedited non-substantive review process only if they do not provide a health care service for which the Commonwealth must file a Medicaid state plan amendment.

- The CON program treats providers of social and supportive services as if they were medical and health service providers. CON laws are intended to regulate high cost medical, nursing and clinical facilities and this focus gives the CON laws an inherently medically-driven perspective. While the Commonwealth wishes to promote and expand the availability and options for LTSS, many home and community based services (HCBS) that would benefit Kentucky residents, are not medical in nature. Rather, they are primarily social care services that support activities of daily living and independence, and administered by clinically trained and licensed providers but do not require a medical degree.

- The CON law places Medicaid Federal matching funds in jeopardy. States like Kentucky that have developed a significant facility-based LTSS infrastructure over the years, stand to lose Federal matching funds for HCBS under the new Medicaid HCBS settings regulations released by CMS in January 2014. The rules emphasize that HCBS generally must be independent of facilities, yet Kentucky's CON rules create a formidable barrier to formation and growth of quality HCBS.

The CON process is burdensome and inefficient and lacks input from key stakeholders. The process can take up to ten months to complete, and requires substantial resources that often place the process out of reach for smaller providers.

- The timeline allows providers only two opportunities annually to have their applications reviewed and lacks transparency, leaving many applicants in limbo and without remedies when their applications are denied or delayed.

- The CON process is administered by the Division of CON within the Cabinet for Health and Family Services, but two other key Commonwealth stakeholders in the Cabinet – the Medicaid program and the Kynect health insurance Exchange – are not represented in the CON process. These two important state programs have a significant vested interest in the availability, quality, and mix of providers serving Kentuckians, on behalf both of the people they serve and Kentucky taxpayers.

Modernizing Kentucky's CON Program

There are several ways the Commonwealth can modernize its CON program to better support care, choice, and access for people in Kentucky and inject efficiency into the health care delivery system. Below are several recommended program changes that Kentucky could adopt that would further the principles outlined in the request for stakeholder input on modernizing the CON.

Promoting Adoption of Efficient Technology

- Reform the CON application process to make it more efficient and accessible, with CON applications accepted year round regardless of provider type or service category.

Incentivizing Development of a Full Continuum of Care

- Revise the application process so that costs and process complexity are better matched to the provider type, size, and the nature of the services proposed. Establish separate tracks for inpatient/institutional, office-based and home-based providers.
- Exempt providers of non-medical home and community-based services (e.g. HCBS waiver services) from CON.

Supporting the Evolution of Care Delivery

- Expand the process so that State Medicaid and Kynect Exchange staff participate in and provide input to the CON review and decision making process.

Improve Value of Care

- Require petitioners and respondents to submit cost-effectiveness data including impact on both the State and Federal budgets to support their positions with respect to the application under review.

Incentivizing Quality

- Amend the non-substantive review process to account for innovations that result from benefit changes in the Medicaid program and quality improvement initiatives being generated in the State Health Department or the Centers for Medicare & Medicaid Services.

Improving Access to Care

- Require CON incumbents opposing a new application to demonstrate that they currently contract with the Medicaid and Kynect programs, have adequate staff capacity to handle additional patient volume, are financially stable, meet quality and outcomes standards established by the Commonwealth as well as credentialing and certification requirements.