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April 13, 2020

Green Mountain Care Board
144 State Street
Montpelier, VT 05602

Re: Memorandum in Lieu of Hearing - Northwestern Medical Center Emergency Department Modernization Project -GMCB-003-19con

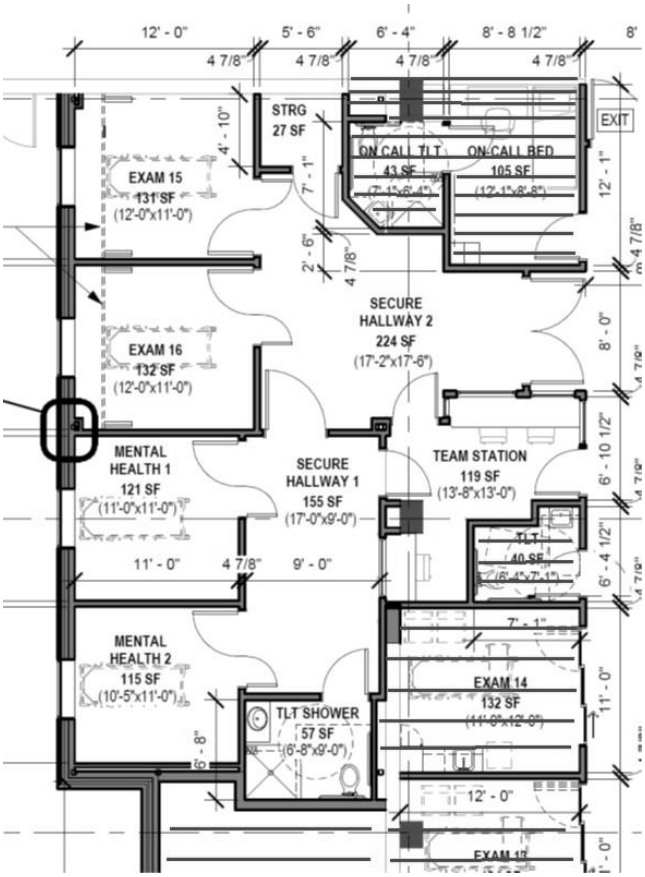
Dear Chair Mullin and members of the Green Mountain Care Board,

The Office of the Health Care Advocate (HCA) is an interested party in the certificate of need (CON) proceeding captioned GMCB-003-19con. Northwestern Medical Center's (NMC) CON application does not meet the statutory criteria that the Green Mountain Care Board (Board) uses to approve CONs. Specifically, NMC's application does not "support equal access to appropriate mental health care that meets standards of quality, access, and affordability equivalent to other components of health care."[1] As such, we ask the Board to approve the CON only if conditions are included to ensure that NMC provides patients in the emergency department (ED) for mental health reasons with a care environment on par with that experienced by patients in the ED for non-mental health reasons. Further, we ask the Board to reserve the right to reopen the above-captioned CON proceeding and impose sanctions on NMC if evidence indicates a significant increase in project costs or failure to provide an equitable care environment for patients in the ED for mental health issues compared to patients in the ED for other reasons.

The Vermont Legislature charged the Board to review CON applications using multifaceted criteria.[2] While some CON statutory criteria are broad concepts, others are clear and specific. The criterion at issue in this matter is clear. A CON application must "support equal access to appropriate mental health care that meets standards of quality, access, and affordability **equivalent to other components of health care**…"[3] In other words, in order to be approved, a CON application must propose infrastructure that provides persons with mental health issues the same level of care and access to appropriate quality medical care that is afforded to patients not presenting with mental health issues. The proposed ED mental health unit (ED MHU) does not provide the physical infrastructure needed for parity of care between mental health and non-mental health ED patients.

[1] 18 V.S.A. § 9437(9).
[2] 18 V.S.A. § 9437.
[3] 18 V.S.A. § 9437(9) (emphasis added).

Before delving into our substantive arguments regarding NMC's application, we provide a brief description of the proposed ED MHU to provide a factual background to this matter. NMC applied for a CON to renovate its ED on June 27, 2019. The total cost of the proposed renovation is $7,616,215.[4] Part of the renovation is the creation of the ED MHU.[5] Below, we provide a schematic of the proposed ED MHU taken from the larger schematic NMC submitted to the Board as part of its CON application.



The ED MHU consists of two ligature free rooms that are individually lockable (labeled Mental Health 1 & 2), two "flex" rooms that are individually lockable (labeled Exam 15 & 16), two secure hallways that are individually lockable (labeled Secure Hallway 1 & 2), one bathroom (labeled TLT SHOWER), one storage area (labeled STRG), and one staff area (labeled Team Station). We marked areas not part of the ED MHU with horizontal gray hash lines.

In terms of the flow of movement in the ED MHU, the two ligature free rooms open onto Secure Hallway 1 via lockable doors. Secure Hallway 1 opens onto Secure Hallway 2 via a lockable door. Both "flex" rooms open onto Secure Hallway 2 via lockable doors. The staff station opens onto both secure hallways. Lastly, Secure Hallway 2 opens onto a main ED hallway via lockable double doors.

[4] GMCB-003-19con, Application, Ex. 1.
[5] GMCB-003-19con, Application.

NMC's ED MHU proposal has two defects. These defects result in patients in the ED MHU not having equal access to quality care as patients in other parts of the ED: first, the lack of a common space in the ED MHU and second, the fact that the ED MHU will be locked from the ED. Each of these defects individually denies mental health patients parity with non-mental health patients and each defect can and must be remedied by attaching conditions to the CON so that the CON complies with the relevant statutory criterion. Although the HCA will detail these two deficiencies below, these concerns are not ours alone. They have been identified by subject matter experts including the Vermont Department of Mental Health, Disability Rights Vermont (DRVT), and a group of citizens including Representative Anne Donahue.[6]

Because the lack of common space in the ED MHU denies patients access to the quality of care afforded to other ED patients, the Board should condition the CON to include a common space in the ED MHU.

Subject matter experts, including Vermont's Department of Mental Health and Disability Rights Vermont, have unambiguously stated that common space is necessary for the proposed infrastructure improvements to provide a baseline level of parity to non-mental health patients.[7] ED MHU common space allows mental health patients access to peer and professional support persons and therapeutic resources that are a necessary component of quality care. ED MHU common space would ensure that the proposed infrastructure improvements provide a parity in access to physical resources needed to provide the same level of care to mental health and non-mental health patients. The parity requirement does not mean that mental health patients have access to the same care *resources*, such as x-ray machines, exam room equipment, etc., but rather that mental health patients have access to the same *level* of care afforded to non-mental health patients. A common space is required so that ED MHU patients have access to the same level of care as non-mental health ED patients.

As Representative Donahue states, the failure to provide any common space is "a serious gap in meeting quality standards and in providing equivalent standards of quality as for other health conditions."[8] We agree with the statements of DRVT, the Vermont Department of Mental Health and representative Donahue that the lack of dedicated common space in the ED MHU is neither consistent with the state's goal of ensuring the delivery of quality care in Vermont hospitals nor the statutory requirement that physical improvements must provide mental health patients with the same access to quality care as non-mental health patients.

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[6] See GMCB-003-19con, A. Donahue et al. Public Comment (Nov. 11, 2019); GMCB-003-19con, S. Squirrell, Commissioner, VT Dep't Mental Health, Public Comment (Nov. 14, 2019); GMCB-003-19con, Disability Rights VT Public Comment (Jan. 3, 2020).

[7] Id.

[8] GMCB-003-19con, A. Donahue et al. Public Comment, 2 (Nov. 11, 2019).

Because a locked ED MHU abridges voluntary patients' rights to leave, the Board should condition the CON on NMC reconfiguring the ED MHU design or on NMC adopting a policy that the exits will only be locked when all patients in the adjacent rooms are involuntary or when other doors in the ED would be locked.

Subject matter experts have also shown that having a locked ED MHU abridges the rights of voluntary patients who are not temporarily secluded pursuant to 42 C.F.R. §482.13.[9] The various commenters show how a locked ED MHU undermines the dignity of ED MHU patients, provides care in a more restrictive environment than necessary, runs counter to accepted quality and access norms, and requires mental health patients to sacrifice rights to receive treatment. These sacrifices are not required of non-mental health patients.[10] Given the qualifications of the other commenters to assess these issues, we will not restate their positions, which we concur with and fully adopt. We will instead focus on how the technicalities of the ED MHU physical structure abridge the right to leave of voluntary ED MHU patients not subject to temporary seclusion.

As stated above, NMC's ED MHU schematics show that locked doors separate Secure Hallway 1 from Secure Hallway 2 and locked doors separate Secure Hallway 2 from the ED. These locked doors prevent voluntary ED MHU patients who are not in temporary seclusion and who are housed in Mental Health 1 or 2 from leaving the ED MHU. Similarly, if a voluntary ED MHU patient not in temporary seclusion is housed in Exam Room 15 or 16, they are prevented from leaving the ED due to the locked door exiting Secure Hallway 2 into the ED. This is the case both when a voluntary patient not on temporary seclusion is in the ED MHU if there is an involuntary patient(s) in the ED MHU, and when another ED MHU patient(s) is under seclusion. Under the current ED MHU design, voluntary ED MHU patients will be denied the right to leave – a right afforded to non-mental health patients.

Of particular concern is how one ED MHU patient's right to be free of restraint is impacted by the restraint of one or more other ED MHU patients. For example, consider the case where there is a voluntary patient in Mental Health 1 and an involuntary patient in Mental Health 2, neither of whom is temporarily secluded. This situation presents an impossible problem to remedy within the current proposal. On one hand, the door exiting Secure Hallway 1 should be locked to prevent the involuntary patient from leaving the ED MHU. On the other hand, the door exiting Secure Hallway 1 cannot be locked without abridging the voluntary patient's right to leave the ED MHU. The physical layout of the proposed ED MHU simply does not allow for an acceptable resolution of this problem: the door exiting Secure Hallway 1 cannot be locked and unlocked at the same time.

It should be noted that this issue cannot be remedied by saying the voluntary patient can ask staff to be allowed out of the ED MHU or that locking the ED MHU is required for "safety." As federal courts have made clear, it is discrimination to make mental health patients, in this case voluntary ED MHU patients, to force a mental health patient to accept this additional step to exit the ED MHU in order to obtain care, a burden that non-mental health patients are not similarly

[9] Note 6.
[10] Id.

required to bear to leave the ED. Nor is it legal for NMC to place patients with mental health conditions who are not an imminent danger to themselves or others in a locked ward.

The Board should not take NMC's word that it will somehow prevent the abridgement of voluntary patients' right to leave the ED MHU. NMC has a history of improperly restraining patients and there is no reason to now believe it will act differently.[11] Further, the physical layout of the ED MHU makes it certain that the rights of some voluntary ED MHU patients will be violated unless NMC adopts clear policies to prevent this from happening.

We respectfully ask the Board to approve NMC's CON application with two conditions: first, a condition requiring common space in the ED MHU and second, a condition requiring NMC to configure the ED MHU or adopt policies regarding when the doors can and cannot be locked such that mental health patients who are voluntary and not temporarily secluded can be treated without abridging their right to leave the ED MHU. Further, we ask the Board to reserve the right to reopen the above-captioned CON proceeding and impose sanctions on NMC if legitimate evidence indicates a significant increase in project costs or failure to provide an equitable care environment for patients in the ED for mental health issues compared to patients in the ED for other reasons.

Thank you for consideration of our position.

[11] GMCB-003-19con, Response to Q002, 40-62 (Aug. 22, 2019).

Respectfully submitted on April 13, 2020

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CERTIFICATE OF SERVICE

I, Eric Schultheis, hereby certify that I have served the above MEMORANDUM IN LIEU OF HEARING on Michael Barber, Green Mountain Care Board General Counsel; Donna Jerry, Green Mountain Care Board Health Policy Analyst; Anne Cramer and Jonathan Billings, representatives for NMC; and A.J. Ruben, representative of Disability Rights Vermont, by electronic mail, return receipt requested this 13th day of April, 2020.

s/ *Eric Schultheis*
Eric Schultheis
Office of the Health Care Advocate