

STATE OF VERMONT  
GREEN MOUNTAIN CARE BOARD

In re: University of Vermont Medical            )       Docket No. 22-004-H  
Center Fiscal Year 2023                            )

**PETITIONER’S MOTION FOR STAY**

Petitioner The University of Vermont Medical Center Inc. (“UVMMC” or the “Hospital”) moves to stay the Green Mountain Care Board’s (the “GMCB” or “Board”) October 10, 2024 Order Correcting Budget Deviation and Denying Budget Adjustment Request (the “Enforcement Order,” attached as Exhibit A), pending UVMMC’s appeal of the Enforcement Order to the Vermont Superior Court. The Enforcement Order suffers from serious procedural and legal defects and, as a result, is invalid. Allowing it to take immediate effect for the Hospital’s 2025 Fiscal Year, which began on October 1, 2024, presents a grave risk of irreparable injury to UVMMC and, more importantly, to UVMMC’s patients and Vermonters at large because compliance will necessitate spending cuts that will have an immediate and negative impact on access to health care services. For the reasons set forth in the following memorandum of law, UVMMC requests that the Board stay the Enforcement Order and permit UVMMC to continue operating consistent with its approved FY2025 budget pending resolution of its appeal.

**FACTUAL BACKGROUND**

**A. The GMCB’s Authority Over Hospital Budgets.**

By statute, the GMCB is charged with reviewing the budgets of the hospitals that it regulates. That review requires examination of extensive information in

accordance with several priorities and objectives set by the Legislature. *See* 18 V.S.A. § 9456(a)-(c). After review, “the Board [must] establish a budget for each hospital on or before September 15, [and issue] a written decision by October 1.” *Id.* § 9456(d)(1). Each hospital is required to operate within its established budget. *Id.*

When a hospital exceeds its budget, the GMCB has two powers concomitant with its budget review authority. It “may, upon application, adjust a budget established under [Section 9456] upon a showing of need based upon exceptional or unforeseen circumstances.” *Id.* § 9456(f). Alternatively, and separate from its adjustment authority, the GMCB may bring an independent enforcement action “to enjoin, restrain, or prevent” violation of any section of Section 9456. *Id.* § 9456(h).

The GMCB’s enforcement powers must respect, and cannot violate, the due process rights of the responding hospital. While the GMCB can pursue various forms of enforcement—including levying civil penalties or ordering “corrective measures as are necessary to remediate the violation”—no enforcement may be imposed unless the responding hospital receives notice and is given an opportunity to be heard. *Id.* § 9456(h)(2)(B)(i)(II); *see also id.* § 9456(h)(2)(A) (“After notice and an opportunity for hearing, the Board may impose . . . a civil administrative penalty . . .”); *id.* § 9456(h)(2)(B)(ii) (“Orders issued under this subdivision (2)(B) shall be issued after notice and an opportunity to be heard[.]”).

**B. The GMCB Improperly Conflated FY23 Budget Enforcement With FY25 Hospital Budget Review.**

In fiscal year 2023 (“FY23”), UVMHC generated actual revenue that

exceeded the amount approved by the GMCB in its final budget order.<sup>1</sup> The GMCB issued its notice of a FY23 budget violation to UVMMC on May 30, 2024, requesting certain information and informing the Hospital that it should be prepared to discuss potential budget enforcement action at its FY25 budget hearing.<sup>2</sup> The University of Vermont Health Network (“UVMHN”) CFO Rick Vincent responded to this notice on July 2, 2024, in which he provided requested information, formally requested a budget adjustment pursuant to 18 V.S.A. § 9456(f), and acknowledged that some of the underlying issues necessitating an adjustment could arise in the course of the FY25 budget hearing.<sup>3</sup> The Board did not notice a hearing on the potential budget enforcement and did not indicate, prior to the FY25 budget hearing, that it would issue a decision regarding budget enforcement without providing UVMMC a hearing for that purpose as required by law.

The Board conducted UVMMC’s FY25 hospital budget hearing on August 28, 2024. That hearing was noticed solely as a budget hearing and was appropriately and primarily devoted to discussing UVMMC’s FY25 hospital budget request.

While UVMMC and the Board briefly addressed the FY23 budget overage, neither the Board nor its staff presented any evidence regarding the basis or rationale for

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<sup>1</sup> *See generally* Letter from GMCB Chair Owen Foster to UVMHN CEO Sunil Eappen, RE: UVMMC and Porter Hospital FY23 Budget Violations (May 30, 2024), [https://gmcbboard.vermont.gov/sites/gmcb/files/documents/Notice%20of%20UVMMC%20%26%20Porter%20FY23%20Budget%20Order%20Violations%20\\_%205.30.24.pdf](https://gmcbboard.vermont.gov/sites/gmcb/files/documents/Notice%20of%20UVMMC%20%26%20Porter%20FY23%20Budget%20Order%20Violations%20_%205.30.24.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Letter from UVMHN CFO Rick Vincent to GMCB Chair Owen Foster, RE: May 30 GMCB Letter on UVM Medical Center and Porter Hospital FY23 NPR Variance (July 2, 2024), <https://gmcbboard.vermont.gov/sites/gmcb/files/documents/UVMMC%20%26%20Porter%20-%20Response%20to%20Notice%20of%20Budget%20Violation.pdf>.

enforcement, and UVMMC was therefore provided no opportunity to address the Board's or the Board staff's analysis regarding enforcement.

During the Board's hospital budget deliberations in early September 2024 (after the FY25 budget hearing had concluded), the Board's staff did present analysis pertaining to the FY23 enforcement, including in part a comparison of UVMMC's budgeted to actual revenues and expenses. The staff ultimately recommended "Full Enforcement" of UVMMC's FY23 revenue in excess of its approved budget "through a commercial-rate adjustment in FY25."<sup>4</sup> However, the Board's hospital budget deliberations were not noticed as a hearing on FY23 budget enforcement, and UVMMC was provided no opportunity to cross-examine or counter the staff's analysis, apart from the same opportunity to present comment that was made available to any member of the public. Upon being presented with the staff recommendation for enforcement, UVMMC explicitly objected to the GMCB proceeding to a vote on enforcement without providing UVMMC with the hearing to which it was legally entitled.

On September 13, 2024, and without pausing to notice or conduct an enforcement hearing, the GMCB voted to deny UVMMC's request that the Board retroactively adjust its FY23 budget to align with its actual revenue and voted to "correct UVMMC's material budget deviation by reducing its overall change in charge and commercial negotiated rate increases for FY25 and FY26." *See Exhibit*

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<sup>4</sup> Hospital Budget Review: Review of Hospital Budget Requests & Key Metrics (September 6 & 9, 2024), <https://gmcbboard.vermont.gov/sites/gmcb/files/documents/FY25%20Hospital%20Budget%20Review%20-%20SEPT%20-%20Hospital%20Budget%20Details%20%28PART%202%29.pdf>, at 128.

A, Enforcement Order at 4. The net effect of the Enforcement Order is a 4.4% reduction of UVMMC's commercial rate cap in FY25, which is estimated to equal approximately \$40 million.

## **ARGUMENT**

The GMCB's Enforcement Order is so legally flawed that it must be invalidated on appeal. It is effective immediately, and, if not stayed, its implementation will cause irreparable harm. Specifically, if the Enforcement Order is allowed to remain in effect during the pendency of UVMMC's appeal, the Hospital will be forced to cut or curtail the healthcare services it makes available to the community. The elimination of those services will cause widespread irreparable harm.

Due to the decisive legal issues that will be raised on appeal, the lack of prejudice the GMCB would face from a stay, and the public interest in access to health care, the Board should stay its Enforcement Order pending resolution of this appeal to avert the need for cutbacks that would needlessly curtail the provision of health care to Vermonters and could take months to years to reverse if this appeal resolves in favor of UVMMC.

### **A. Legal Standard.**

To succeed on a motion to stay pending appeal, a party must demonstrate "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560, 664 A.2d

239, 245 (1995). The Vermont Supreme Court has also emphasized that stays are ultimately a matter left to the discretionary judgment of the court and may be warranted where the moving party “make[s] out a clear case of hardship or inequity in being required to go forward if there is a possibility that a stay will damage someone else.” *In re Woodstock Cmty. Tr & Hous. Vermont PRD*, 2012 VT 87, ¶ 36, 192 Vt. 474, 60 A.3d 701 (internal quotation marks and citation omitted).<sup>5</sup>

Whether the Board finds a multi-factorial framework useful or prefers a more freeform balancing of interests, the analysis supports the conclusion that there are good and important reasons to stay the GMCB’s Enforcement Order and little countervailing prejudice or harm to the public interest or the GMCB that would weigh against a stay.

## **B. The Balance of Factors Favors A Stay Of The Enforcement Order.**

### **1. The Risk of Irreparable Harm to UVMMC and the Public Interest Is High Absent A Stay.**

The public interest favors a stay of the Enforcement Order because its implementation will reduce access to health care in Vermont. In response to this Order, UVMMC will first work to reduce expenses in ways that will impose the least negative impact on patient care and UVMMC’s employees. However, in light of the unprecedented magnitude of the rate and revenue cuts imposed, the GMCB’s Enforcement Order will also require UVMMC to close certain medical services

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<sup>5</sup> In addition to the four-factor test applied in *Gilbert*, the Vermont Supreme Court has considered various other standards for motions to stay. *See, e.g., Vermont Fed’n of Sportsmen’s Clubs v. Birmingham*, 2020 VT 27, ¶ 13, 211 Vt. 657, 229 A.3d 704. In *Vermont Federation of Sportsmen’s Clubs*, the Court observed that application of other multifactor tests would yield similar results to the “balancing of interests” described in *Woodstock Community Trust. Id.*

entirely and reduce access to other services, possibly including transfers from other hospitals. UVMMC has separately submitted, under seal, a schedule of the services that are currently being considered for closure or curtailment in light of the Enforcement Order. *See* Exhibit B, filed separately on this date with UVMMC's Request to Treat Exhibit as Confidential. While some of those services will likely be closed or curtailed solely as a result of the Board's FY25 budget order, others will only be closed or curtailed if UVMMC is also required to comply with the FY23 Enforcement Order.<sup>6</sup> But in order to comply with both the budget and enforcement orders, the UVMHN is forced to begin implementing those closure and curtailment plans within the coming few weeks.

When those reductions in services are implemented, patients from Vermont and New York's North Country will be unable to receive the healthcare that they need. Some of these patients may have the time, resources, and other support necessary to travel further from home to receive the healthcare they can currently obtain from UVMMC. But many others—usually those with the fewest resources and who have already been the most disadvantaged—will simply go without care. In many instances, those patients will grow sicker; in others, they will needlessly suffer; and in yet others, they will die sooner than they would have if they had gotten the care they need. In addition, the employees who provide or

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<sup>6</sup> The exact combination of services to be closed or curtailed will depend on the Board's ruling on this Motion, and any subsequent expedited Motion to Stay that may be considered by the Superior Court on appeal. *See* V.R.C.P. 74(c) ("If the agency does not grant a stay, the court after the filing of the notice of appeal may, upon motion, stay the agency decision and make such other orders as are necessary to preserve the rights of the parties upon such terms and conditions as are just."). In the interest of transparency with the GMCB, Exhibit B also includes those services at CVMC that are being considered for closure or curtailment in light of the CVMC FY25 budget.

support those services may lose their jobs. While UVMMC will take every possible step to minimize the impacts of these closures on patients and employees, the effects will still be profound. All of these closures can be carried out relatively quickly but, once completed, they would take years to reverse and rebuild. Most importantly, none of those harms can be remedied once they have been inflicted; indeed, they are the manifestation of “irreparable injury,” “hardship,” and “inequity.”

For the same reasons, UVMMC faces the prospect of irreparable harm absent a stay. *See Gilbert*, 163 Vt. at 560, 664 A.2d at 245 (identifying irreparable harm to movant as relevant factor). Critically, where—as here—a party faces harm that is “actual and imminent and that cannot be remedied by an award of monetary damages[,]” a stay is proper. *In re Cathedral of the Immaculate Parish Charitable Trust Appeal*, No. 23-ENV-00010, 2023 WL 6130412, at \*8 (Vt. Super. Aug. 28, 2023) (quoting *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995)). For example, in *Cathedral of the Immaculate Parish Charitable Trust*, where the appellants faced the execution of a demolition permit, the Superior Court held that the demolition of the building “could not be redressed with monetary damages” and even found that “the concern of irreparable harm [was] particularly great” under those circumstances, such that it was not necessary to accord as much weight to the potential for success on the merits. *Id.* As discussed above, certain medical services will be reduced or discontinued altogether without a stay of the Enforcement Order, causing lost or reduced access to healthcare services for the community and lost



jobs. UVMMC is seeking a stay to preserve, for as long as possible, the availability of and access to medical services (and, in turn, community health) pending resolution of its appeal.

The fact that UVMMC's appeal also raises critical statutory and constitutional questions of due process compounds the prospect of irreparable harm to both UVMMC and the populations it serves. In the context of a preliminary injunction analysis, the Vermont Supreme Court has "recognize[d] that in most cases the violation of a plaintiff's constitutional rights is itself a sufficient irreparable injury." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 41, 205 Vt. 586, 178 A.3d 313. Here, UVMMC faces the prospect of an Enforcement Order issued without adequate notice or an opportunity to be heard in violation of the Vermont Administrative Procedures Act ("VAPA") and the federal and state constitutions. The violation of UVMMC's statutory and constitutional due process rights constitutes irreparable harm sufficient to support a stay independent of, and in addition to, the substantial risk of irreversible harm to public health described above.

Furthermore, there is no risk of meaningful prejudice to the GMCB if the Enforcement Order is stayed. The GMCB's hospital budget review and enforcement powers are statutory and represent authority conferred by the Legislature, which must be exercised consistent with the requirements and limitations imposed by the Legislature. The GMCB cannot assert that it will suffer cognizable prejudice arising out of a bona fide dispute about whether it has failed to comply with its

statutory duties. To the contrary, the integrity and authority of the GMCB are implicated in this proceeding, and the GMCB should welcome the opportunity to either have its interpretation of the law affirmed or, more likely, receive critical guidance on the proper implementation of controlling statutes.

The GMCB may assert that it also has a duty to act on behalf of the public or in the public interest which would be compromised by a stay of the Enforcement Order. While the Board certainly does have a duty to act in the public's best interest, that duty cannot be reduced to the simple proposition that the GMCB's important role in containing the growth of per capita health care costs means that any action it takes in purported service of that objective is *de facto* in the public interest.<sup>7</sup> The GMCB is charged with pursuing multiple priorities and objectives that must be harmonized, and it does not have unqualified power to take any action it sees fit—or to forego statutory procedural requirements—as it carries out its work.

## **2. UVMMC Is Substantially Likely To Prevail On The Merits Of Its Appeal.**

There is also a substantial likelihood that UVMMC will prevail on the merits. UVMMC submits that the procedure that resulted in the Enforcement Order was woefully deficient because the GMCB failed to respect UVMMC's statutory and

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<sup>7</sup> UVMMC anticipates that the GMCB may assert that failure to implement the Enforcement Order will negatively impact Vermonters because their health care premiums will go up. That argument has no merit: while the GMCB reduced UVMMC's budget by over \$40 million dollars, it took no commensurate action to lower the commercial insurance rates it previously approved for 2025. Simply put, a stay of the Enforcement Order will have no impact on those who purchase healthcare insurance this year.

constitutional rights.

The threshold issue is that a GMCB hospital budget enforcement proceeding falls within the definition of a “contested case” under the Vermont Administrative Procedures Act. VAPA defines a “contested case” as “a proceeding, including but not restricted to rate-making and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for [a] hearing[.]” 3 V.S.A. § 801(b)(2). By statute, the GMCB can only exercise its enforcement powers “after notice and an opportunity for a hearing.” 18 V.S.A. § 9456(h)(2)(A); *see also id.* § 9456(h)(2)(B)(ii) (“Orders issued under this subdivision (2)(B) shall be issued after notice and an opportunity to be heard . . .”). Because a budget enforcement action (a) determines important rights of a hospital, including the rates it can charge; and (b) can only be carried out after notice and a hearing, it is a contested case under VAPA.

As such, any hospital subject to potential GMCB enforcement action has important procedural rights in the contested case proceeding, including but not limited to the following:

- the opportunity to respond and present evidence and argument on all issues involved;
- the right to a decision based on the contested case record, including findings of fact based on the record evidence and matters officially noticed;
- the right to make objections to evidentiary offers; and
- the right to conduct cross-examinations required for a full and true disclosure of the facts.

*See generally* 3 V.S.A. §§ 809, 810. The contested case record must also include: “(1)

all pleadings, motions, intermediate rulings; (2) all evidence received or considered; (3) a statement of matters officially noticed; (4) questions and offers of proof, objections, and rulings thereon; (5) proposed findings and exceptions; and (6) any decision, opinion, or report.” *Id.* § 809(e). While the GMCB may take notice of “generally recognized technical or scientific facts” within its specialized knowledge, the hospital must be informed of “the material noticed, including any staff memoranda or data,” and “shall be afforded an opportunity to contest the material so noticed.” *Id.* § 810(4).

The GMCB determined that a budget enforcement proceeding is not a contested case and that UVMMC is not entitled to the legal rights provided by VAPA or due process. *See* Exhibit A, Enforcement Order, at 20-21. The Board cites no authority for the proposition that a budget enforcement order requiring a hospital to reduce its commercial rates by approximately \$40 million from its approved hospital budget (and another \$40 million in FY26) is not a matter in which a party’s legal rights or duties are required “to be determined . . . after an opportunity for [a] hearing[.]” *Id.* § 801(b)(2). No such authority exists for that nonsensical proposition.

The Enforcement Order also suggests that the FY25 budget hearing doubled as UVMMC’s FY23 budget enforcement hearing. Yet, the FY25 budget hearing was never noticed as a hearing on the FY23 enforcement, and UVMMC never consented (nor was it asked) to merge the two processes or to waive the statutory procedural protections to which it was entitled—and did not receive—in connection with

enforcement. UVMMC received no opportunity to “present evidence and argument on *all issues* involved,” to review in advance and appropriately contest or rebut the analysis conducted by GMCB staff, or to cross-examine any witness, including GMCB staff, regarding the facts that ultimately formed the record before the GMCB. In short, there can be no serious argument that UVMMC received the process to which it was entitled by statute.

During a session of the Board’s FY25 budget deliberations held on September 9, 2024, GMCB staff offered unsworn testimony and argument in support of FY23 budget enforcement action against UVMMC, which the GMCB did not elicit during the FY25 budget hearing held in August. This included, but was not limited to:

- testimony that “efficient” hospitals have no more than 30% variable costs;
- testimony that hospitals should expect to “achieve economies of scale” as patient volumes increase over time;
- testimony that staff disagree with UVMMC’s critique of a Rand study staff referenced regarding certain metrics of hospital performance;
- the presentation of new case mix index-adjusted data for comparison to Rand data;<sup>8</sup> and
- testimony and argument that UVMMC improperly failed to budget certain revenue that it had a reasonable basis to anticipate collecting.

UVMMC submits that none of this testimony, analysis, or opinion is accurate.

Regardless, UVMMC was provided no opportunity to make evidentiary objections, cross-examine the witnesses, or otherwise respond as provided for under

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<sup>8</sup> UVMMC had not seen this analysis before, and the data and methodology the GMCB staff employed to produce it was neither presented nor explained.

VAPA.<sup>9</sup> As a result, the Enforcement Order fails to comply with VAPA and cannot be enforced, such that there is—at a minimum—a substantial likelihood that UVMMC will succeed on the merits of this appeal.

## CONCLUSION

The GMCB's regulatory authority over Vermont hospitals, including budget review and enforcement, is created by statute. Those statutes, and the Vermont Administrative Procedures Act, recognize that a party responding to an enforcement action is entitled to procedural protections that UVMMC was not afforded in the course of the FY25 budget review process. Allowing the Enforcement Order to take effect will trigger an immediate reduction in the availability and accessibility of healthcare services provided by UVMMC, risking irreparable harm to both the Hospital and its patients. Staying the Enforcement Order pending appeal will mitigate that irreparable harm by requiring the closure of fewer health care services, or a lesser curtailment of some services. The Board should not subject Vermonters to unnecessary harm unless and until a court determines that the GMCB did not flagrantly neglect UVMMC's procedural rights as it pursued enforcement of its FY23 budget order. For these reasons and those set forth above, UVMMC submits that the Enforcement Order should be stayed pending resolution of its appeal.

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<sup>9</sup> Representatives of UVMMC were permitted to observe the GMCB's September 9, 2024 meeting and offer limited public comment, but the Hospital was not afforded the due process VAPA requires.

Dated at Burlington, Vermont, this 21st day of October, 2024.

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