

THE
University of Vermont
MEDICAL CENTER

By Electronic Mail & U.S. Mail

June 11, 2024

Ms. Donna Jerry
Senior Health Policy Analyst
Green Mountain Care Board
144 State Street
Montpelier, VT 05602
Donna.Jerry@vermont.gov

Re: Docket No. GMCB-004-23con, Development of Outpatient Surgery Center on Tilley Drive, Project Cost: \$129,640,703.

Dear Ms. Jerry:

The University of Vermont Medical Center Inc.'s ("UVM Medical Center") response to the Green Mountain Care Board's (the "Board") post-hearing requests for additional information dated May 23, 2024 are attached hereto. In addition, UVM Medical Center hereby responds to the Office of the Health Care Advocate's ("HCA") post-hearing statement of its position regarding the proposed project dated May 24, 2024.

The HCA advises that UVM Medical Center "presented sufficient evidence that the OSC would help address significant access challenges that Vermonters continue to experience for surgical care and would serve the public good," and recommends that the Board approve the project subject to four Certificate of Need ("CON") conditions. UVM Medical Center appreciates the HCA's thoughtful participation in this proceeding and its conditional support for the project. It also shares the HCA's commitment to controlling the cost of health care. UVM Medical Center responds to each of the HCA's proposed conditions as follows.

- 1. [The Board should] exercise provider rate setting authority to set a price cap for all medical services offered at the OSC near UVM Medical Center's commercial breakeven price as a percentage of Medicare and prohibit UVM Medical Center from charging facility fees at the OSC.**

UVM Medical Center objects to this proposed condition for two reasons. First, the Board is not authorized to fix prices for specific OSC services without first adopting rules to govern this complex undertaking pursuant to 18 V.S.A. §§ 9375(b)(1), 9375(b)(5), 9376(b)(1), and the

Vermont Administrative Procedures Act (“VAPA”), which the Board has not done. Second, imposing the proposed condition based on the record in this proceeding, which does not contain most of the relevant information, would be arbitrary and an abuse of the Board’s discretion.

a. The Board is not authorized to fix prices for OSC services without first adopting rules pursuant to 18 V.S.A. §§ 9375(b)(1), 9375(b)(5), 9376(b)(1), and VAPA.

The Board annually reviews and approves UVM Medical Center’s budget as authorized pursuant to 18 V.S.A. § 9375(b)(7), and its annual budget orders cap UVM Medical Center’s total NPR/FPP and its overall change in charge and commercial rates. See, 18 V.S.A. § 9375(b)(7), Board Rule 3 (adopted pursuant to 18 V.S.A. § 9375(b)(7)); See e.g., In re. University of Vermont Medical Center Fiscal Year 2024, Hospital Budget Decision and Order, Docket No. 23-004-H (October 1, 2023).

The HCA proposes that the Board should go beyond approving the hospital’s budget and capping its overall commercial rates to fix the hospital’s prices for the specific services the hospital will offer at the OSC. The Board may or may not have statutory authority to fix prices for specific hospital services,¹ but it can only exercise any such authority pursuant to rules adopted in accordance with VAPA, which it has not adopted.

In addition to its authority to establish hospital budgets pursuant to 18 V.S.A. § 9375(b)(7), the Board is authorized to “set rates for health care professionals” and “companies” pursuant to 18 V.S.A. §§ 9375(b)(1), 9375(b)(5) and 9376(b)(1), but only after adopting the “methodologies” it will use in such rate setting by rule under VAPA. 18 V.S.A §§ 9375(b)(1), 9375(b)(5), 9376(b)(1). The relevant statutes read as follows:

(b) The Board shall have the following duties:

(1) Oversee the development and implementation . . . of health care payment and delivery system reforms designed to control the rate of growth in health care costs

(A) **Implement by rule, pursuant to [the Vermont Administrative Procedure Act], methodologies for . . .** containing costs that may include . . . payment methods and amounts for integrated delivery systems, health care professionals, or other provider arrangements.

* * *

(5) Set rates for health care professionals pursuant to section 9376 of this title, to be implemented over time, and make adjustments to the rules on reimbursement methodologies as needed.

¹ UVM Medical Center does not concede the fact or construe the extent of the Board’s statutory authority to fix hospital prices. The governing statutes are not a model of clarity, and UVM Medical Center would fully evaluate these issues in the context of the rulemaking required pursuant to 18 V.S.A. §§ 9375(b)(1) and 9376(b)(1).

18 V.S.A. § 9375 (emphasis added).

- (b)(1) The Board shall set reasonable rates for health care professionals . . . and other companies providing health services or health supplies based on methodologies pursuant to [18 V.S.A. § 9375], in order to have a consistent reimbursement amount accepted by these persons.

18 V.S.A. § 9376.

VAPA requires that “[w]here due process or a statute directs an agency to adopt rules,” as in this case, “the agency shall initiate rulemaking and adopt rules in the manner provided by sections 836-844 of [the Act].” 3 V.S.A. § 831(a). The VAPA rulemaking process facilitates good public policy through the deliberate and transparent development of administrative rules with input from both regulated entities and the general public. It involves the publication of a proposed rule, opportunity for public comment, and a public hearing. See, 3 V.S.A. §§ 836-844.

To UVM Medical Center’s knowledge, the Board has neither adopted rules establishing rate setting methodologies pursuant to 18 VSA §§ 9375(b)(1) and 9376(b)(1), nor previously attempted to exercise its rate setting authority pursuant to 18 VSA §§ 9375(b)(1), 9375(b)(5), and 9376(b)(1) to fix prices for specific services offered by hospitals. The Board cannot circumvent the VAPA rulemaking process by engaging in ad-hoc price setting via a CON condition as the HCA proposes; the proposed CON condition would be *ultra vires* and invalid. See e.g., Parker v. Gorczyk, 173 Vt. 477 (2001)(affirming injunction against implementation of a Department of Corrections furlough policy on grounds that the Department was required to adopt the policy as a rule in compliance with VAPA, and the policy was invalid because the Department failed to follow VAPA rulemaking procedures).

- b. A Board decision to impose the proposed condition based on the record in this proceeding would be arbitrary and an abuse of the Board’s discretion.*

Even if the Board had adopted rules to govern the type of price setting the HCA advocates, it could not do this based on this proceeding’s record, which does not contain the relevant and necessary information. The Board must demonstrate a reasonable basis for its imposition of CON conditions with reference to specific findings of fact on the statutory criteria derived from the proceeding record. See, Board Rule 4.403 (the Board shall consider a CON application based on materials included in the record); 18 V.S.A. § 9440(d)(4)(“Any . . . conditional approval [of a CON application] must be directly within the scope of the project proposed by the applicant and the criteria used in reviewing the application”). The Vermont Supreme Court “emphasize[s] that decisions arrived at without reference to any standards or principles are arbitrary and capricious; such ad-hoc decision-making denies an applicant due process of law.” In re MVP Health Ins. Co., 203 Vt. 274, 286 (2016). The Court is also “firm that adequate findings of fact are required, so that we may determine whether the sound discretion implicitly mandated by a statute was in fact exercised.” Id.

The record evidence demonstrates that the proposed project satisfies the CON standard that speaks to the project’s impact on the costs and affordability of medical care. See, 18 V.S.A. § 9437(2).² Specifically, UVM Medical Center has shown that:

- the OSC project will improve the hospital’s financial health, supporting its continued ability to provide multiple other essential services that generate a negative margin;³
- the project will not unduly increase the cost of medical care or reduce its affordability for consumers, but will rather generate a positive incremental net operating margin that will put downward pressure on UVM Medical Center’s need to increase its commercial rates, while increasing local access to surgical care for patients who might otherwise travel far from home at significant personal expense to obtain timely treatment elsewhere;
- UVM Medical Center does not anticipate that the project will result in or contribute to an increase in its annual requests for commercial rates;
- UVM Medical Center’s demand model supporting its CON application does not assume that the project will draw surgery volume away from neighboring hospitals, but rather that neighboring hospitals will maintain adequate capacity to accommodate forecasted growth in demand for outpatient surgeries in their own service areas; and
- there are no feasible and appropriate less expensive alternative means of meeting UVM Medical Centers’ patients’ urgent need for expanded access to outpatient surgical services.

The record in this proceeding does not, however, contain the information the Board would need to determine UVM Medical Center’s “commercial breakeven price as a percentage of Medicare” for the subset of services UVM Medical Center will offer at the OSC, or the information necessary to evaluate the HCA’s contention that “charging facility fees for services offered in an outpatient setting imposes unwarranted costs to Vermonters and therefore should be prohibited at the OSC.”⁴ Nor do the evidentiary record or the Board’s rules contain any standard

² This CON criterion is as follows:

(2) The cost of the project is reasonable, because each of the following conditions is met:

(A) The applicant’s financial condition will sustain any financial burden likely to result from completion of the project.

(B) The project will not result in an undue increase in the costs of medical care or an undue impact on the affordability of medical care for consumers. In making a finding under this subdivision, the Board shall consider and weigh relevant factors, including:

(i) the financial implications of the project on hospitals and other clinical settings, including the impact on their services, expenditures, and charges; and

(ii) whether the impact on services, expenditures, and charges is outweighed by the benefit of the project to the public.

(C) Less expensive alternatives do not exist, would be unsatisfactory, or are not feasible or appropriate.

(D) If applicable, the applicant has incorporated appropriate energy efficiency measures.

18 V.S.A. § 9437

³ UVM Medical has the necessary debt capacity, and the project will produce an operating margin sufficient to both service the debt and contribute over time to stabilizing days cash on hand, which currently sits below the median for an A-rated organization.

⁴ The HCA offers to provide “additional research and materials to the Board” on this latter issue. UVM Medical Center respectfully submits that it is much too late to do that in this proceeding. The HCA has had ample opportunity to submit such information into the record since UVM Medical Center filed its CON Application sixteen

against which that evidence could be judged. In the absence of both an adequately developed record regarding the relevant issues, and clear rules and standards to govern the Board's determinations, imposition of the proposed condition could only be arbitrary and an abuse of the Board's discretion.

The fact that there are no rules or evidence to guide the regulation of rates or margins (see below) within this CON proceeding is not an accident or an oversight. It is the intentional consequence of the regulatory system created by the Vermont legislature. The CON process is not designed to allow the Board to set rates or impose revenue caps in connection with the approval of a particular project. To the extent the Board has those powers, they are properly exercised within the hospital budget setting process, which allows the parties and the Board to articulate the rules by which hospitals' rates and revenue will be judged, and the evidence that would allow the Board to make its decision on a rational basis, rather than arbitrarily. As the Board is aware and its rules require, that evidence includes actual data regarding the financial performance and health of the entire regulated hospital. In the CON proceeding, neither the Board nor the parties have any actual financial information regarding the operation of the OSC upon which a decision regarding rates could be based, because the OSC does not yet exist. And the projections that will form the basis for the Board's CON decision relate to approximately only three percent (3%) of the revenue of the UVM Medical Center. The UVM Medical Center remains committed to doing its part to control the cost of healthcare to Vermonters, and to work with the Board and the HCA to discuss hospital commercial rates and margins within the context of the upcoming budget hearings, where that important discussion can be conducted in a manner that complies with Vermont law and due process.

2. [The Board should] require that all revenue in excess of 2.5% margin from the OSC be earmarked to support future inpatient mental health and substance use disorder related investments.

UVM Medical Center wholeheartedly agrees with the HCA's emphasis on supporting investments in mental health and substance use disorder treatment, among other important health care treatment needs. It nonetheless objects to this proposed condition because the Board is not authorized to impose a CON condition requiring UVM Medical Center to use proceeds of the OSC to fund other facilities or services outside the scope of the OSC project. The CON statute expressly prohibits this:

[i]n granting . . . a conditional approval, the Board shall not mandate a new health care project⁵ not proposed by the applicant or mandate the deletion of any existing

months ago on February 10, 2023. The HCA was expressly invited to submit a Statement of Position that might have included this information by April 25, 2024, but elected not to do so. See, First Amended Scheduling Order (February 28, 2024).

⁵ "Health care project" is defined as follows:

- (1) The construction, development, purchase, renovation, or other establishment of a health care facility, or any capital expenditure by or on behalf of a hospital, for which the capital cost exceeds \$3,000,000.00.
- (2) The purchase, lease, or other comparable arrangement of a single piece of diagnostic and therapeutic equipment for which the cost, or in the case of a donation the value, is in excess of \$1,500,000.00. For purposes of this subdivision, the purchase or lease of one or more articles of diagnostic or therapeutic equipment that are necessarily

service. Any . . . conditional approval must be directly within the scope of the project proposed by the applicant and the criteria used in reviewing the application.

18 V.S.A. § 9440(d)(4). In other words, CON conditions may regulate the applicant's development and operation of the approved project as necessary to ensure that the project satisfies the CON criteria set out in 18 V.S.A. § 9437. But a CON condition may not require the applicant to use a project's margin to develop or support a different facility or service outside the scope of the approved project as the HCA proposes.

3. [The Board should] prohibit UVMHC from conducting a marketing and advertising campaign and require that any budget for such activities be eliminated.

UVM Medical Center does not intend to advertise or market the OSC for the purpose of attracting patients from outside its service area. It should not, however, be unduly restricted from notifying the community of the outpatient surgery center development in the normal course of its patient education and wayfinding initiatives, or its community relations activities, or from publicizing the OSC as may be necessary to fundraising planned to cover part of the project's costs.

4. [The Board should] require that UVMHC submit to the Board an analytical method to evaluate the causal impact of the OSC on surgical wait times once the center is operational.

UVM Medical Center is willing to work with the Board to develop a method to evaluate the impact of the OSC on surgical wait times.

* * *

interdependent in the performance of their ordinary functions or that would constitute any health care facility included under subdivision 9432(8)(B) of this title, as determined by the Board, shall be considered together in calculating the amount of an expenditure. The Board's determination of functional interdependence of items of equipment under this subdivision shall have the effect of a final decision and is subject to appeal under section 9381 of this title.

(3) The offering of a health care service or technology having an annual operating expense that exceeds \$1,000,000.00 for either of the next two budgeted fiscal years, if the service or technology was not offered or employed, either on a fixed or a mobile basis, by the hospital within the previous three fiscal years.

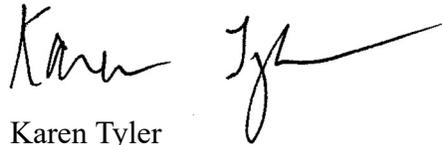
(4) A change from one licensing period to the next in the number of licensed beds of a health care facility through addition or conversion, or through relocation from one physical facility or site to another.

(5) The offering of any home health service.

18 V.S.A. § 9434(b).

UVM Medical Center thanks the Board for its careful and thorough review of the proposed OSC project. The record demonstrates that the project satisfies each of the certificate of need criteria, and the Board should therefore approve the Application. UVM Medical Center looks forward to developing the OSC for the benefit of its patients and the public good as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Tyler", with a long horizontal flourish extending to the right.

Karen Tyler
Associate General Counsel
The University of Vermont Health Network Inc.