Brattleboro Retreat
COMPREHENSIVE MENTAL HEALTH SERVICES SINCE 1834

Via electronic mail and U.S.P.S.

August 8, 2024

Ms. Donna Jerry
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Green Mountain Care Board
144 State St.
Montpelier VT 05602

Re: Docket No. GMCB 015-23con Brattleboro Retreat, Re-opening Paused Adolescent Residential Treatment Beds. –Response to Questions

Dear Ms. Jerry:

Thank you for your letter of June 26th, 2024, and for your additional questions. In addition, we have received the letter of public comment submitted by Representative Donohue. This letter will attempt to respond to the questions raised in both letters.

As noted in our prior letter, this project does not neatly fall into any of the jurisdictional criteria outlined in the CON statute. Because it does not, the Brattleboro Retreat believes that the project does not trigger CON jurisdiction. However, the Retreat appreciates the challenge that the Board faces in making this jurisdictional determination. If this project clearly fell within the jurisdictional criteria, the Brattleboro Retreat would already have submitted an application for a certificate of need. However, the Retreat believes there is a real question as to whether this project is a "new healthcare project," and it greatly appreciates the care with which the Board has approached this question.

Because there appear to be some fundamental misunderstandings about levels of care within the healthcare system, and the ability for federal dollars to be used to pay for that care, we start with a brief history of the Medicaid program.

The Medicaid program, as it was designed in 1965, allows states to use federal dollars to pay for health care provided to qualifying Medicaid beneficiaries, but the law was very clear that states could not use the funds to provide for room and board or for schooling. Social Security Amendments of 1965, Pub.Law. 89-97 1862(a)(9) ("no payment may be made . . . for any expenses incurred for items or services where such expenses are for custodial care."). In addition, since 1965, when the Medicaid statute was passed, states have been prohibited from

using the federal Medicaid match otherwise known as Federal Financial Participation (FFP) to pay for medical care provided to persons under the age of 65 in "Institutions for Mental Disease" ("IMDs") absent a waiver of this exclusion. Social Security Act §1905(a)(30)(B). The Brattleboro Retreat is an IMD because it has more than 16 beds and is primarily engaged in providing diagnosis, treatment or care of persons with mental diseases which includes substance use disorders. Social Security Act § 1905(i).

Therefore, the Private Non-Medical Institution (PNMI) program is a multi-agency payment mechanism that allows State Medicaid Program to pay for the medical services provided to residents in child and adolescent residential programs, while other departments in state government pay for the education and room and board charges in those programs.

The PNMI program is not a certification or licensing mechanism, it is a funding mechanism. It does not have conditions of participation. An entity is eligible for PNMI payments if its medical providers have a Medicaid Provider Agreement and is licensed by DCF. Vermont Administrative Rules, Vt. Code R. § 13 010 001-13-010-002.

Conversely, hospitals must be certified by the Centers for Medicare and Medicaid Services to participate in the Medicare program. When a hospital complies with the Conditions of Participation, that makes the hospital eligible to bill Medicare and Medicaid for inpatient (i.e. room and board) charges, because the room and board is short-term and medically necessary. Pub. Law. 89-97 s. 1814(6). However, the Medicaid program as it was originally designed would not pay for stays "inpatient psychiatric hospital services" unless they were provided in facilities in which fewer than half of the beds were psychiatric beds, or in facilities with fewer than 16 beds total. Social Security Act §1905(a)(30)(B).

In 1972, Congress amended the law to allow states the option of covering "inpatient psychiatric hospital services" for individuals under 21, creating the "psych under 21" benefit. Social Security Amendments of 1972 Pub. Law. 92-603. Congress originally required that State Medicaid programs could only use the "psych under 21" benefit for stays in psychiatric hospitals that were accredited by the Joint Commission (then known as JCAHO). In 1990, the Omnibus Budget Reconciliation Act of 1990 authorized CMS to specify other settings besides hospitals that could be eligible to be paid for by the "psych under 21" benefit as long as they were designated as "inpatient" settings.[1] This inpatient designation is a function solely of the fact that the Medicaid program is not allowed to use federal financial participation to pay for residential (meaning room and board) services.

Thus, the Conditions of Participation for PRTFs have a detailed "certification of need" requirement that essentially functions as a determination that the residential care is medically

[1] https://www.cms.gov/medicare/health-safety-standards/certification-compliance/psychiatric-residential-treatment-facility-providers#:~:text=OBRA%2090%20provided%20authority%20for,separate%20type%20of%20inpatient%20setting.

necessary—rather than required by a child's social needs. 42 C.F.R. § 441.152 (a). This PRTF requirement mirrors the hospital-level medical necessity determination that must be made before every admission. 42 C.F.R. § 482.30(c).

The "inpatient" label that has been applied to PRTF programs, therefore has more to do with the payment limitations in the Medicaid program, than with the treatment needs of the children who are seeking care. The level of care remains residential.

A residential level of care can be distinguished from an inpatient level of care in the following ways:

Inpatient Level of Care	**Residential Level of Care**
Short stays (7-10 days) meant only to stabilize an acute exacerbation of illness	Longer stays (30-180 days) aimed at longer-term mental health goals.
Initial treatment plan within 72 hours	Initial treatment plan within 7 days
Treatment plan updates (upon change in condition or) every 7 days	Treatment plan updates (upon change in condition or) every 30 days for PRTF and every 90 days for other residential programs
24/7 nursing presence on the unit	24/7 nurse availability
Daily meetings with Attending Clinician	Weekly meetings with Attending Clinician (consultation available as needed)
Locked unit with secure courtyard	Unlocked unit with fenced yard
No ability to engage in activities outside the hospital setting	Community activities and field trips are part of the treatment program
Meds administered by nursing staff	Meds self-administered by residents with supervision from nursing staff
Education provided through a tutor on the inpatient unit	Education provided through an independent school in a separate school location

To be clear, the Retreat does not seek to evade the Green Mountain Care Board's Certificate of Need jurisdiction. Rather, the Retreat seeks to ensure that the Board's limited resources are devoted to questions that properly fall within its statutorily defined jurisdiction. Whether this project falls within the statutory definition is a determination that can only be made by the Board. To further assist the Board in making this determination, the Retreat provides the following responses to the Board's additional questions.

1. **Explain in detail why the proposed PRTF is not a new healthcare project.**

There are five separate definitions of "new healthcare project" in 18 V.S.A.§ 9434(b), and these are the five kinds of projects that require a Certificate of Need, and therefore, qualify a project for the Green Mountain Care Board's Certificate of Need Jurisdiction. As this Board well knows, these five definitions are:

> (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]
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> (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 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.
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> (3) The offering of a health care service or technology having an annual operating expense that exceeds $1,000,000.00[3] 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.
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> (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.
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> (5) The offering of any home health service.

18 V.S.A. § 9434(b). As described in prior submissions, the Brattleboro Retreat believes that only the third and fourth criteria are at issue in this jurisdictional determination.

A. Is the re-opening of pre-existing adolescent residential treatment program a "new health care service or technology"?

The Retreat has provided high-intensity residential programing to adolescents through many different iterations of its program over the course of 50 years. The intensity of the programming

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[2] The Board has increased this dollar amount.

[3] The Board has increased this dollar amount.

and the level of accreditation that the program had achieved did not have an obvious analog in the Vermont licensing standards in 2021, at the time the program was paused.

For example, the Retreat's adolescent residential program in 2021 was accredited with the Joint Commission. The Joint Commission's standards largely mirror CMS's PRTF standards, including with regard to restraint and seclusion. These standards are more rigorous than those imposed by the Department for Children and Families Licensing Standards.

The Brattleboro Retreat is delighted that the State of Vermont has now authorized the creation of a payment mechanism that recognizes the programmatic rigor and accreditation standards that the Brattleboro Retreat's residential programs have always met.

The Brattleboro Retreat maintains that the proposed re-opening of a program that operated for 50 years continuously from the 1970s until 2021, does not trigger any of the jurisdictional criteria, for the following reasons.

1. The program that will be delivered does not vary in any material way from the program that was delivered in 2021. Aside from age-related variations, it also does not differ from the program currently being delivered to children in the children's residential program known as the Abigail Rockwell Children's Center or "ARCC."
2. The adolescent residential program that was operated in 2021 was accredited by the Joint Commission. The Joint Commission's standards mirror the CMS PRTF certification standards in nearly all material aspects. Therefore, although there was no PRTF designation available to the Retreat before 2024, the Retreat's adolescent residential program met those PRTF standards for many years.
3. The Retreat's adolescent residential program has always evaluated potential residents based on their individual needs and the capacity of the milieu-based program at the time. Therefore, the Retreat does not believe that the overall acuity of the resident population will be different in the resumed program.

The Brattleboro Retreat has continuously treated adolescent residents with acute psychiatric illnesses who do not meet the inpatient hospitalization criteria. The Psychiatric Residential Treatment Facility designation will allow the Retreat to better explain the care that the Retreat has always provided to this population.

As noted in each of our previous letters, the Retreat has delivered residential mental health treatment to adolescent patients (aged 12-18) for more than 50 years. The program was temporarily paused during the pandemic. In addition, the Retreat's children's residential program (which treats children aged 6 to 14) has continued uninterrupted throughout the pandemic. One Senior Director of Child and Adolescent Residential Services will oversee both programs, and the program designs are similar in many fundamental ways.

The charts provided in our last letter demonstrate the similarity of programming provided in the previous adolescent residential program to the programming that will be provided in the resumed residential program.

This residential program will have a new certification from CMS that was previously unavailable to Vermont programs. The Retreat does not believe that changing the CMS certification of the program triggers Certificate of Need jurisdiction under any of the statutory criteria.

Because the adolescent residential program is projected to operate at the same financial levels as it did when it was paused, it does not trigger this jurisdictional criterion.

B. But What About Licensed Beds?

The fourth criterion that makes a project subject to a Certificate of Need review process under § 9434(b) is: "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." Id.

As previously stated, the Brattleboro Retreat believes that it still holds a license for 15 adolescent residential beds through the Department for Children and Families, because when the program was "paused" all parties anticipated and intended that the program would be re-opened and that the license would remain in effect. When the Retreat submitted its original jurisdictional determination letter last August, it believed that DCF would be the licensing body for the PRTF, because it was a residential program.

However, as noted in our June letter, Act 137 (S.192), which became law on May 30, 2024, requires a psychiatric residential treatment facility to obtain a license from the Vermont Department of Health. The Brattleboro Retreat holds a license for 149 beds through the Vermont Department of Health. The current capacity of the inpatient units at the Brattleboro Retreat, based on the Retreat's staffing sits at approximately 100.[4]

The Vermont Hospital Licensing Rule explains in section 2.2 of its Purpose, that the Rule applies both to all Hospitals in Vermont, and to "[s]ervices, whether inpatient or outpatient, . . . that do not by themselves meet the definition of a Hospital but . . . which . . . are provided and billed for under the same Centers for Medicare and Medicaid Services Provider Number."[5] This inclusion of services like PRTF services in the Hospital licensing rule, mirrors the intention of the United States Congress described above, in that it includes in the "inpatient" billing and reimbursement mechanism those non-hospital services that can be billed under the same provider number.

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[4] The staffing varies from day to day, but the staffed capacity over the last six months has ranged from approximately 93 to 101 beds.

[5] https://www.healthvermont.gov/sites/default/files/documents/pdf/REG_hospital-licensing.pdf

The Retreat maintains that because of this provision, the Retreat's PRTF program can, and should be licensed under the current Hospital Licensing Rule. However, as the Retreat noted in its previous letter, it remains unclear as to whether the Department of Health will determine that a separate licensure category is necessary. In such a case, the Retreat would apply to reclassify some of its unused, but currently licensed beds to the new category of license. Such an application would not be for a change in the *number of licensed beds* from either DCF or the Vermont Department of Health. The Retreat therefore does not believe that the fifth criterion is triggered by this project.

2. **Explain the extent to which restraint and seclusion were part of the prior program and will be part of the proposed program.**

When the Brattleboro Retreat suspended its adolescent residential program in 2021, the staff employed in the program were trained side-by-side with inpatient staff in verbal de-escalation, emergency prevention, and restraint and seclusion using the techniques taught by the Crisis Prevention Institute ("CPI"). Because the Retreat's residential program has been certified by The Joint Commission, it follows both Joint Commission and CMS Standards for restraint and seclusion. These standards can be found at 42 C.F.R. § 482.13 (e)[6] for inpatient settings. In other words, the processes used in the adolescent residential program matched the inpatient processes for restraint and seclusion, and were, in consequence, more rigorous than the restraint and seclusion regulations that residential programs governed solely by the Department for Children and Family Regulations.[7]

The new program will have similar restraint and seclusion standards, which are codified at 42 C.F.R. § 483.356 [8] for PRTF settings. The PRTF standards do include requirements that are not present in the inpatient hospital standards, such as the requirement of post-intervention debriefings, and reports to the State Medicaid agency and the State Protection and Advocacy program. These requirements are already part of the Vermont Department of Mental Health's Regulation Establishing Standards for Emergency Involuntary Procedures.[9] As a result, they have already been incorporated into the Brattleboro Retreat's policies.

3. **Specify in detail other components that are included in the PRTF that were not included in the residential program that was suspended in 2021.**

Because the previously submitted charts provided a comparison between the previous residential program, and the PRTF, the Retreat will now provide you with the changes that have been made

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[6] https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107ap_a_hospitals.pdf

[7] https://outside.vermont.gov/dept/DCF/Shared%20Documents/FSD/Publications/RTP-Regs.pdf

[8] https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107ap_n_prtf.pdf

[9] https://mentalhealth.vermont.gov/sites/mentalhealth/files/doc_library/Regulation_Establishing_Standards_Emergency_Involuntary_Procedures_Manual.pdf

in the Children's residential program since 2021, which will be incorporated into the PRTF when it opens.

As noted above, the only regulatory requirement in the PRTF regulations that the previous program did not adhere to is the following: The PRTF regulations require reporting every restraint or seclusion to the State Medicaid Program and the State Designated Protection and Advocacy system. The previous residential program was not required to make these reports, but the Brattleboro Retreat's inpatient programs are required to do so. 42 C.F.R. § 483.374(a).

All the other regulations outlined in 42 C.F.R. § 441.151 et seq. and 42 C.F.R. § 483.356 et seq. were already incorporated into the work of both the Adolescent and Children's residential programs.

There have been additional programmatic changes to the Children's Residential Program since 2021 and these will be incorporated into the Adolescent Program as well. These are as follows:

- The staff have moved from 8-hour shifts to 12-hour shifts. Staffing ratios have not changed.
- The program has added an administrative assistant to free up direct-care staff.
- The admissions workflow has changed to decrease stress on the day of admission by sending out releases and other paperwork in advance.
- Group programming and activities have increased to build additional skills in light of the limitations that the pandemic placed on social and emotional learning and development.
- More individualized and small group activities are provided in the program and in the community.
- Multidisciplinary treatment teams meet twice per week instead of once.
- The Program provides increased support for children's and families' transportation needs.

Finally, there are some elements of the residential program that the Retreat program provided without reimbursement. These elements included: psychological testing with results that could be shared with outpatient teams; urgent care provided by the Brattleboro Retreat's medical consult service; occupational therapy assessments and dedicated OT time built into the program; and transportation for families or children. All these services have been provided without any compensation for them. The PRTF mechanism will allow the Retreat to submit claims for these services when it is appropriate to do so.

Conclusions

There is an ongoing need for capacity in the adolescent mental health system. Currently the Brattleboro Retreat operates 24 adolescent inpatient beds. Expanded capacity at the inpatient level has not and is unlikely to completely resolve the demand for inpatient beds. This is because adolescents who have completed their inpatient treatment but who need a safe, step-down program do not have adequate placement options. Expanded capacity at the inpatient

level, without expanding step-down options will likely increase the number of patients boarding in acute settings or being discharged to out-of-state programs.

Re-opening the Retreat's residential program will allow the Retreat to more effectively stabilize acutely ill adolescent patients and discharge them to appropriate settings, thereby relieving bottlenecks in the system. The PRTF program will also enable placing agencies to access residential care for adolescents before they need inpatient treatment—thus, providing an earlier intervention that will hopefully reduce the need for adolescent hospitalizations.

Because this program has only been temporarily closed, the Retreat hopes that the Board will find that this project does not trigger CON jurisdiction.

Thank you in advance for your time.

Sincerely,

Elizabeth R. Wohl
General Counsel