

**Legal Department**

September 20, 2024

Mr. Mark Hengstler, Esq.  
Staff Attorney  
Green Mountain Care Board  
144 State Street  
Montpelier, Vermont 05602

**Subj: Final objections to preserve record for appeal**

Dear Mark:

I am submitting these final objections concerning the actions taken by the Green Mountain Care Board ("GMCB") during the FY25 budget and the FY23 enforcement process and resulting actions. These objections are intended to provide the GMCB with an opportunity to address our concerns and to preserve RRMC's rights for any potential appeal.

We restate and incorporate by reference Objections I through IX, previously submitted to you on September 13, 2024, but modify the X reservation of rights to now incorporate arguments related to contested case requirements in section II below. We also maintain and continue all other objections previously submitted to you, incorporating them by reference, since a formal response has not been received, namely, objections submitted on September 11, 2024, September 10, 2024, and September 5, 2024. Additionally, we present other new objections as stated below.

**I. Lack of Due Process Under 18 V.S.A. § 9456**

RRMC objects to the GMCB's enforcement actions taken on September 13, 2024, regarding the enforcement of RRMC's FY23 budget, due to a failure to provide proper notice and an opportunity to be heard as required by 18 V.S.A. § 9456(h)(2)(B).

**A. Inadequate Notice and Ambiguity in Communications**

On June 5, 2024, Chair Foster issued an enforcement letter to RRMC stating that the hospital should be prepared to "discuss potential enforcement action" but indicated that any enforcement action would be deferred until the FY25 budget hearing. This communication was ambiguous and failed to constitute formal notice of enforcement proceedings as required by statute.

During the FY25 budget hearing on August 7, 2024, RRMC was not made aware that any official enforcement proceedings were occurring. The discussion focused solely on the alleged FY23 variance without any indication that formal enforcement actions were being initiated. The GMCB's approach lacked the clarity and specificity mandated by law for such serious matters.

### **B. Deprivation of Statutory Rights**

From June 5, 2024, to September 13, 2024, RRMC was not provided with the formal notice and hearing required under 18 V.S.A. § 9456(h)(2)(B). This statute explicitly mandates that before imposing any enforcement action, the GMCB must afford the hospital an opportunity for a hearing. By failing to do so, the GMCB denied RRMC its statutory rights.

### **C. GMCB's Acknowledgment of Separate Actions**

During the September 6, 2024, hearing, Staff Attorney Mark Hengstler stated: "So these are two separate matters that will necessitate—if enforcement action is taken for any hospital—will necessitate a separate enforcement order. So these are separate actions." (September 6, 2024, GMCB Hearing Transcript, p. 10). This admission demonstrates that the GMCB was aware it was engaging in distinct actions related to the rights and duties of RRMC as a hospital in which it reviews the budget but failed to inform or provide the necessary procedural safeguards for RRMC to guarantee due process.

### **D. Violation of Due Process Rights**

The failure to provide clear notice and an opportunity to be heard constitutes a violation of RRMC's due process rights under both state and federal law. Due process requires that parties be given notice and a meaningful opportunity to be heard before being deprived of significant rights or interests. This is even more egregious since it is clear on the record that the GMCB knew what it was doing and this was more than just a discussion about potential action.

### **E. Remedy Sought**

RRMC respectfully requests that the GMCB:

1. **Nullify the September 13, 2024, Enforcement Vote:** Declare the vote invalid due to the procedural deficiencies outlined above.
2. **Refrain from Issuing a Final Enforcement Order before October 1, 2024**
3. **Provide Proper Notice and Hearing for enforcement of the FY23 alleged budget variance:** Issue the required formal notice and afford RRMC an opportunity for a hearing in compliance with **18 V.S.A. § 9456(h)(2)(B)**.

## **II. Violation of the Vermont Administrative Procedure Act (VAPA)**

RRMC asserts that the GMCB failed to adhere to the contested case requirements mandated by the Vermont Administrative Procedure Act ("VAPA"), specifically under **3 V.S.A. §§ 809–814**, resulting in an unlawful hearing to determine RRMC's legal rights and obligations.

## A. GMCB is an Agency Subject to VAPA

1. **Agency Definition:** Under 3 V.S.A. § 801(b)(2), an "agency" includes state boards authorized to determine contested cases. The GMCB fits this definition as it makes determinations affecting hospitals' legal rights and obligations.
2. **Contested Case:** The enforcement action against RRMC's FY23 budget variance is a "contested case" because it involves the determination of RRMC's legal rights and obligations after an opportunity for a hearing is required by law.
3. **No Exemption:** The GMCB is not exempt from VAPA requirements under 3 V.S.A. § 816 or any other statutory provision. The legislature has also not provided alternative procedures for the GMCB regarding budget enforcement actions under 18 V.S.A. § 9456.

## B. Failure to Provide Proper Notice of a Contested Case Hearing

1. **Statutory Requirements:** 3 V.S.A. § 809(b) requires agencies to provide parties with reasonable notice of a hearing, including time, place, nature, legal authority, and matters at issue.
2. **Inadequate Notice to RRMC:** The GMCB's communications failed to inform RRMC that the August 7, 2024, hearing would be a contested case hearing regarding enforcement actions. The term "discussion" was used instead of "hearing," and no details were provided as required by statute.
3. **GMCB's Awareness of Procedural Requirements:** Despite the ambiguity in communications, external statements by GMCB staff acknowledge that separate enforcement actions were being considered, yet RRMC was not properly notified.

## C. Denial of Procedural Safeguards

1. **Opportunity to Present Evidence:** RRMC was not given a meaningful opportunity to present evidence, call witnesses, or cross-examine adverse witnesses, as required by 3 V.S.A. § 809(c).
2. **Decision Based on the Record:** A formal record of evidence upon which the GMCB based its enforcement decision does not exist outside of the GMCB transcripts and cannot exist since notice and a hearing complaint pursuant to VAPA did not occur. Therefore, this action violates 3 V.S.A. § 809(g).
3. **Requirement of Written Findings:** The GMCB did not provide written findings of fact and conclusions of law as required by 3 V.S.A. § 812(a). Moreover, should the GMCB provide findings of fact and conclusions of law, it does not change the fact that they have failed to provide appropriate notice, and opportunity to prepare a defense and be heard.

## D. Violation of Due Process

The GMCB's failure to follow VAPA's contested case procedures deprived RRMC of its due process rights guaranteed under both the state and US Constitution because its action occurred without formal notice and a hearing.

## E. Remedy Sought

RRMC respectfully requests that the GMCB:

1. **Nullify the Enforcement Actions:** Invalidate the FY23 enforcement actions taken during the FY25 budget proceedings due to its deviation from procedural requirements.
2. **Provide a Proper Contested Case Hearing:** Schedule a new hearing that complies fully with VAPA procedures, allowing RRMC to exercise its afforded rights.

## III. Abuse of Discretion and Arbitrary Enforcement Decision

Even assuming that the enforcement proceedings were procedurally sound (which RRMC contests), the GMCB's decision to enforce RRMC's FY23 budget was an abuse of discretion, arbitrary, and capricious.

### A. Disregard of Substantial Evidence

1. **Increased Patient Volume:** RRMC experienced an influx of patients from outside its service area, leading to higher-than-anticipated revenues. This was not due to mismanagement but to fulfilling its duty to provide care.
2. **Expansion of Essential Services:** RRMC expanded services such as the Infusion Center and a Mobile MRI unit to meet increased demand, demonstrating responsiveness to community needs.
3. **Absorption of Inflationary Costs:** RRMC absorbed \$2 million in inflationary costs, contributing to the variance but reflecting prudent financial management in a challenging economic environment.

### B. Failure to Address RRMC's Justifications

1. **No Substantive Rebuttal:** The GMCB failed to meaningfully engage with or refute the detailed evidence and explanations provided by RRMC. Therefore, one would presume the GMCB is not able rebut the substantial evidence RRMC provided. However, it then still voted to enforce RRMC's budget.
2. **Lack of Reasoned Decision-Making:** The GMCB did not explain why RRMC's evidence was insufficient, violating principles established in *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 20, where arbitrary decisions by the GMCB that are not based upon standards and principles were not lawful per the Vermont Supreme Court.

### C. Inconsistent Enforcement

1. **Leniency Toward Porter Medical Center:** The GMCB did not enforce similar penalties against Porter Medical Center, citing arbitrary factors made up at the last moment by Chair Foster on September 11, 2024, like financial position and pricing structure, and then modified again on September 13, 2024.
2. **Disparate Treatment Without Justification:** RRMC was not afforded the same arbitrary considerations despite RAND data reflecting RRMC outpatient costs being lower than Porter. No rationale was provided for this inconsistent application of enforcement, which is arbitrary and capricious.

#### **D. Significant Prejudicial Impact**

1. **Financial Harm:** The enforcement action imposes approximately \$5.5 million in cuts over two years, severely impacting RRMC's ability to meet critical needs of its community.
2. **Impact on Community Services:** These cuts threaten RRMC's ability to provide essential healthcare services, particularly in a rural area where access to care is already challenged.

#### **E. Remedy Sought**

RRMC respectfully requests that the GMCB:

1. **Reconsider the Enforcement Decision:** Review the substantial evidence provided by RRMC and reverse the enforcement action.
2. **Ensure Fair and Consistent Application of Standards:** Apply enforcement standards consistently across all hospitals to prevent arbitrary and capricious actions. Decisions should not penalize hospitals for opening access and taking care of their community.

#### **IV. Arbitrary Denial of Retroactive Budget Adjustment**

RRMC objects to the GMCB's denial of its request for a retroactive budget adjustment under 18 V.S.A. § 9456(f), arguing that the denial was arbitrary, capricious, and an abuse of discretion.

##### **A. Failure to Provide Substantive Justification**

1. **Lack of Explanation:** The GMCB denied RRMC's request via its September 13, 2024 vote without providing any substantive reasoning or addressing the evidence submitted.
2. **Denial of Opportunity to Respond:** RRMC was not given a chance to address any concerns or reasons for the denial, violating due process.

##### **B. Conflict with Established Precedent**

1. **2018 Adjustments:** In 2018, the GMCB adjusted budgets retroactively for six hospitals to reflect actual performance, setting a precedent for such adjustments.
2. **Acknowledgment of Projections in 2023:** The GMCB approved RRMC's FY24 budget based on FY23 projections, recognizing their validity.
3. **Inconsistent Application:** Denying RRMC's request without explanation contradicts prior practices and established precedents.

### C. Abuse of Discretion

1. **Discretion Must Be Reasoned:** While the GMCB has discretion, it must be exercised based on evidence and consistent with legal standards.
2. **Failure to Exercise Discretion Properly:** The denial without rationale, explanation, or support of facts indicates a failure to consider RRMC's request thoughtfully and impartially. It is also a deviation by the board from its discretion.

### E. Remedy Sought

RRMC respectfully requests that the GMCB:

1. **Reconsider and Approve the Adjustment:** Grant the retroactive budget adjustment in line with past practices as this will cure the prejudicial effect of the GMCB's abuse of discretion.
2. **Provide a Detailed Explanation:** If the request is denied again, offer a substantive rationale to allow RRMC to understand and, if necessary, challenge the decision.

### V. Exceeding Statutory Authority, Abuse of Discretion, and Lack of Due Process Under 18 V.S.A. § 9456 and GMCB Rule 3.401

Even assuming that the enforcement proceedings were procedurally sound (which RRMC contests), the GMCB's decision to reduce RRMC's FY25 budget by \$2.7 million due to the FY23 alleged budget variance, significantly attributed to increased patient volume and expanded access to care, exceeds its statutory authority under 18 V.S.A. § 9456, constitutes an abuse of discretion, and violates RRMC's due process rights.

#### A. Exceeding Statutory Authority and Abuse of Discretion

1. **Lack of Statutory Authority and Nexus to Powers:** The GMCB lacks express or implied authority under 18 V.S.A. § 9456 and GMCB Rule 3.401 to penalize RRMC for increased patient care volume resulting from expanded access to necessary services. As established in *In re Club 107*, regulatory bodies exceed their authority when acting without a direct nexus to their statutory powers:

"There must... be some nexus between the regulation and a specifically granted power of the Board or between the regulation and the consequences of excessive use of alcohol." (*In re Club 107*, 152 Vt. 320, 324, 566 A.2d 966, 968 (1989)).

Similarly, penalizing RRMC, through the GMCB's arbitrary enforcement process, for meeting community healthcare needs, lacks sufficient connection to the GMCB's statutory mandate or the enforcement rule of 3.401. The *In re Club* court was clear that the actions by an agency must be "reasonably related" to the agency's overall statutory authority. The GMCB is overreaching by attempting to limit RRMC's patient care operations which are tied to clear community needs—areas beyond its expertise and such statutory authority. Similar to the precedent in *In re Club 107*, the mere impact of increased patient volume on RRMC's budget does not grant the GMCB the statutory authority to penalize the hospital for providing essential care through increased access to meet community

demand in FY23. The efforts to regulate patient flow to Rutland County exceed the grant of authority and are an abuse of discretion as a result.

## **B. Arbitrary and Capricious Decision-making**

1. **Arbitrary and Capricious Decision-Making:** The GMCB's decision to enforce RRMC's budget while disregarding substantial evidence submitted by RRMC, which reflects that the FY23 budget variance resulted from increased patient demand and efforts to enhance access to care. The lack of justification, evidence, or analysis for the \$2.7 million budget reduction, while acting outside of its statutory scope to negatively impact patient care in Rutland County, is arbitrary and capricious.

## **C. Negative Impact on Community Health and Access to Care**

1. **Jeopardizing Essential Services:** The budget reduction, with the prejudicial effect of decreasing access to care at RRMC, should an order occur on October 1<sup>st</sup> as voted on September 13, 2024, will threaten RRMC's ability to continue pursuing important critical initiatives such as enhancing imaging services, expanding operating room availability, and reducing wait times—all essential for meeting patient demand in a rural setting and essential in helping the Green Mountain Care Board fulfill its statutory goals. These financial constraints will cause RRMC to reduce certain programs and/or services, negatively affecting community health outcomes and increasing health disparities.

The GMCB must consider more than just the act of a budget reduction, but the effect of such reduction. The effect of this reduction pursuant to an unlawful enforcement action goes outside of the GMCB's statutory authority, contradicts the legislative intent to protect public welfare, health, and safety as outlined in Title 18, and undermines the GMCB's own objectives of improving access to care and advancing health equity.

## **D. Remedy Sought**

RRMC respectfully requests that the GMCB:

1. **Rescind the \$2.7 Million Budget Reduction:** Restore RRMC's FY25 budget to its original amount, allowing the hospital to continue providing essential services and improving access to care. This would show that the GMCB recognizes that the effects of its decisions are critical to consider, as the effects ultimately cause the GMCB to exceed its authority in an arbitrary manner that are an abuse of discretion and violates RRMC's due process rights.
2. **Provide Proper Notice and Hearing:** If the GMCB maintains its position, issue formal notice and afford RRMC an opportunity for a hearing, ensuring compliance with statutory requirements.

## **Conclusion**

In summary, RRMC believes that the GMCB's actions during the FY25 budget approval and FY23 enforcement were procedurally flawed, violated statutory and constitutional rights, exceeded the GMCB's statutory authority in part, and resulted in arbitrary and capricious decisions with a prejudicial effect of harming RRMC financially and leading to the decrease in essential services for Rutland County.

We urge the GMCB to:

- **Address the Procedural Deficiencies:** Correct the violations of due process and statutory requirements.
- **Reconsider the Substantive Decisions:** Review the enforcement actions and budget modifications in light of the substantial evidence already provided.
- **Ensure Fairness and Transparency:** Provide clear rationale for decisions affecting RRMC's operations and RRMC's fair and just response to patient care needs in our region.

Respectfully,

A handwritten signature in black ink, appearing to read 'MEB', followed by a long horizontal flourish.

Mitchell E. Baroody

cc: Mr. Owen Foster, J.D., Chair