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| IN THE MATTER OF | * | BEFORE THE |
| HOPE HEALTH SYSTEMS APPLICATION | * | MARYLAND HEALTH |
| Docket No. 20-03-2444 | * | CARE COMMISSION |

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**SHEPPARD PRATT HEALTH SYSTEM'S RESPONSE TO HOPE HEALTH SYSTEMS' EXCEPTIONS**

Sheppard Pratt Health System, Inc. ("Sheppard Pratt"), by its undersigned counsel and pursuant to COMAR § 10.24.01.09B, submits this Response to the Exceptions of Hope Health Systems, Inc. ("Hope Health") to the Reviewer's March 30, 2022 Recommended Decision in the review of Hope Health's modified Certificate of Need ("CON") application and related materials (together, the "Application").

Sheppard Pratt supports the Reviewer's recommendation that the Maryland Health Care Commission (the "Commission") deny the Application based on Hope Health's failure to demonstrate that its proposed project is viable or that it is the most cost-effective alternative for providing additional psychiatric hospital bed capacity for children and adolescents.

## Introduction

Hope Health's stated history of providing culturally competent outpatient mental health care to underserved, minority communities is laudable. Hope Health is a for-profit enterprise that seeks to establish a 16-bed special psychiatric hospital to treat children and adolescents in a renovated portion of a commercial office building in Baltimore County. It does not currently own or operate any inpatient facilities. The worthiness of Hope Health's stated mission and genuineness of its intent, however, do not relieve Hope Health of its obligation to demonstrate compliance with

the standards that this State and Commission have promulgated to ensure that healthcare facilities, including special psychiatric hospitals that will serve children and adolescents, are established in a manner that effectively serves and safeguards Maryland residents. Hope Health has not complied with those standards.

Moreover, Sheppard Pratt rejects the suggestion that Hope Health is uniquely positioned to serve its target population on the basis of what Hope Health calls its extensive experience providing outpatient mental health services in these communities. Without diminishing those services, Sheppard Pratt notes that, with the exception of MedStar Franklin Square Medical Center, every current provider of acute psychiatric services in the proposed service area already provides all of the outpatient services that Hope Health offers. Hope Health's outpatient offerings are not unique.

Sheppard Pratt is a private non-profit psychiatric institution founded in 1891. It is Maryland's largest private provider of mental health, special education, and substance abuse treatment services, with more than 2,700 employees and 34 programs in 38 locations. Its outpatient offerings in the proposed service area surpass those of any other outpatient provider. While Sheppard Pratt welcomes the expansion of services by providers who demonstrate compliance with the standards and regulations – and indeed did not oppose the two most recent CON Applications to add child and adolescent capacity to this same service area, it rejects the contention that another Hope Health is uniquely positioned by virtue of its outpatient offerings that Sheppard Pratt also provides to the same patient population.

Sheppard Pratt also objects to Hope Health's contention that a for-profit company's status as a minority owned business uniquely positions it to serve minority and low-income patients. Hope Health has not put forward information demonstrating how the diversity of its ownership

will translate to unique clinical care or diverse staffing. In fact, as Sheppard Pratt has commented throughout this review, Hope Health's staffing projections demonstrate that it intends to employ its staff at lower-than-market rates and without benefits. (DI# 30, pp. 5-8, DI# 47 pp. 4-9.)[1]

Certainly, the Commission should consider whether to evaluate a proposed facility on the basis of an applicant's demonstrated ability to address existing access barriers, including barriers for minority, low income, and underserved populations. Indeed, other State Health Plan chapters contemplate that an applicant may justify the need for a program on such grounds. COMAR § 10.24.17.05A(5) (Cardiac Surgery and PCI); COMAR § 10.24.09.04B(1) (Acute Inpatient Rehab). Should the Commission deem this an appropriate consideration for these services, it should study this issue and promulgate standards that identify what an applicant must demonstrate in order to receive a CON premised on addressing these barriers.

In this case, however, Hope Health has failed to not only establish that it is a cost-effective program but that it has resources to maintain the project. It does not. For the reasons described below, the Commission should uphold the Reviewer's Recommended Decision and deny Hope Health's CON Application.

## I. Hope Health Failed to Demonstrate That Its Proposed Program Is Cost-Effective - COMAR 10.24.01.08G(3)(c).

The Reviewer found that Hope Health put forth a low cost option and that the proposed services are needed generally, but appropriately found that Hope Health did not demonstrate cost-effectiveness. More specifically, the Reviewer stated, "My chief concern is effectiveness, as noted above, but I do not believe I have a definitive analysis in the record that would allow me to make

[1] Sheppard Pratt's citations to "DI" are to the Docket Index appended to the Reviewer's March 30, 2022 Recommended Decision at Appendix 3 (Record of Review).

a confident recommendation on this criterion." (Recommended Decision at 27.) The Reviewer found that she lacked "confidence in the quality of the business planning performed by Hope Health for this project," and "question[ed] whether [Hope Health's] project is the best option." (*Id.*) The Reviewer further found that recently approved projects for these services "have more existing ancillary and support space for inpatients and families of inpatients than Hope Health has identified and would probably be hard-pressed to feasibly develop" and that the proposed project was "minimal in size." (*Id.*) These findings caused the Reviewer to be "concerned that, with respect to physical facilities for the proposed new hospital, the low-cost alternative put forth in this review may have a negative impact on [Hope Health's] ability to have comprehensive programming addressing a broad range of patient needs, on the feasibility of serving patients with specialized needs, and on patient and family satisfaction." (*Id.*) Further, the Reviewer identified a concern that the project's "minimal plan" may have "a negative impact on its ability to compete in the market and to provide effective patient care." (*Id.*)

Rather than address the substance of the concerns that its proposed hospital will lack sufficient space to support patient needs or sufficient ancillary space for patients and families, that its charges for services are not cost effective given that its competitors offer more services at less cost, or that the changes made to its projections and assumptions throughout the review raised serious concerns as to its ability to effectively plan this project, Hope Health seeks to diminish the Reviewer's criticism to a complaint about floor plans, which were apparently never submitted to the Commission staff nor interested parties as required by regulation. Hope Health alternatively argues it lacked sufficient notice of the basis for the Reviewer's findings. Finally, Hope Health argues that the Reviewer's application of this standard to its project was improper. These arguments fail.

The Recommended Decision provides adequate support for its analysis and provided Hope Health with adequate notice for the bases of the Reviewer's decision. The Reviewer's findings were identified following a discussion of the evidence and positions of the parties to this review, including the Sheppard Pratt's interested party comments. As set forth in the Decision, Sheppard Pratt noted in its interested party comments that Hope Health relied on flawed calculations and unsupported assumptions. (*See* DI# 22, 30, 47, and 48.) It further demonstrated that Hope Health anticipates drawing 85% of its patients from other existing providers in the same service area, and treating such patients at higher rates, thereby increasing the costs on the healthcare delivery system. (*Id.*; *see also* Sheppard Pratt Exceptions, 5.) The Reviewer expressly referenced a section of Sheppard Pratt's comments "'under the heading of 'appropriate planning' for 'patient safety and other quality issues,'" stating that Sheppard Pratt "questions the project design, noting the omission of outdoor space, a commercial kitchen, and adequate space for dining, security, seclusion, and entry and admissions space. It also criticized the poor location and design of nursing units and questioned the ability to appropriately separate patient populations by age." (*Id.* at 25 (citation omitted).)[2] The Reviewer's analysis and findings on cost effectiveness also

[2] As Sheppard Pratt discussed in its April 6, 2022 Exceptions, in response to the safety and security concerns Sheppard Pratt raised, Hope Health provided the conclusory response that "the facility will be designed to meet the State and federal requirements and shall ensure high quality care and safety for its patient population;" and has "been designed to meet the unique needs of the adolescent and child patient population and in keeping with the FGI Design Standards and Guidelines." (DI#27, 14-17.) Hope Health further stated that "the plans are also in the schematic design phase and may be slightly updated to improve patient processes." (*Id.*) Prior applicants for psychiatric services have provided far more information concerning the specific safety and security features of their proposed facilities. *See In re University of Maryland Medical Center,* Dkt. No. 18-24-2429, Application at 5; *In re Anne Arundel Medical Center Mental Health Hospital*, Dkt. No. 16-02-2375, Application at 18-20; *In re Sheppard Pratt at Elkridge*, Dkt. No. 15-152367, Application at 8-9.[2] Given the significant needs of the proposed patient population, the Commission should not approve a project on the basis of construction and design

references the "substantive criticism" by Sheppard Pratt "with respect to some of applicant's choices in forecasting average length of stay, revenues, and expenses, as well as comments on Hope Health's assumptions in preparing elements of its application that touch on questions of project costs and effectiveness." The review process gave Hope Health sufficient notice of these concerns and opportunity to demonstrate compliance with the cost-effectiveness standard. Hope Health did not do so.

Hope Health's contention that the Commission may simply disregard the "effectiveness" portion of the cost-effectiveness standard must be rejected. Hope Health's citation to a single decision in the 2016 review of an intermediate care facility ("ICF") that never opened or requested first use approval does not, as Hope Health contends, demonstrate a consistent application of the cost-effectiveness standard that would permit Hope Health or the Commissions to exclude the "effectiveness" portion of the standard from its review. That the Reviewer's discussion in an ICF review did not generally focus on effectiveness of ICF services does not stand to exclude effectiveness as a requirement of future reviews of other types of health care entities subject to CON review.[3] Other Certificate of Need reviews demonstrate that the Commission appropriately considers the CON applicant's ability to effectively provide services, and its projected costs in

specifications and plans that do not demonstrate sufficient safety features based simply on the applicant's generalized assertions and promise to "slightly update" its plans in the future.

[3] Indeed, a recent CON Decision on a different ICF does not even suggest that the requirement no longer exists for ICFs, but reasons instead that "Information on the 'effectiveness of ICFs, in general, is lacking.") March 17, 2022 Decision, *In re: Alcohol and Drug Intermediate Care Facility Certificate of Need Hygea, Inc.* Docket No. 21-03-2450.)

doing so in relationship to other providers. (*See, e.g., In Re Baltimore Upper Shore Cardiac Surgery Review*, Docket Nos.: 15-02-2360 and 15-02-2361, Dec. 30, 2016 Decision, 104.)[4]

Moreover, cost-effectiveness may appropriately be measured differently for facilities that are not rate regulated by the Health Services Cost Review Commission ("HSCRC"). Non-rate regulated facilities may control and adjust their rates in response to the market. By contrast, effectiveness in comparison to other providers is a critical concern for a rate-regulated facility, especially one that projects shifting 85% of its volume from existing providers, and even then, shifting only the lower-severity patients, in the same service area, that are more profitable to treat. A Reviewer has found a program that projects to primarily shift cases from existing providers, as does Hope Health, as failing to meet the cost-effectiveness standard.[5] (*In re Suburban Hospital*, Dkt. No. 17-15-2400, September 20, 2020 Recommended Decision. ("I cannot accept the argument that it is cost effective to develop a new liver transplantation center that will largely be shifting cases from existing providers.").)

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[4] The Decision finds: "[BWMC] provided information on the manner in which access could improve for cardiac surgery patients in the BWMC service area. It made the case that it can be an effective provider of cardiac surgery services." However, "Coupled with the more modest BWMC projection of system savings, predicated on reaching higher volumes than I have found to be likely, I find that BWMC has not proposed a project that demonstrates that it is the most cost effective alternative for improving access to cardiac surgery or reducing charges for this service.". While this was a comparative review, the Decision assessed each applicant's compliance with the cost-effectiveness standard independently and did not reach the comparative review factors. *Id.*

[5] This Application was withdrawn before the recommended decision proceeded to the full Commission for consideration.

## II. Hope Health Failed to Demonstrate That Its Proposed Project is Viable and That It Has Resources Necessary To Sustain Its Perpetual Losses - COMAR 10.24.01.08G(3)(d).

As required under COMAR § 10.24.01.08G(3)(d), the Commission must "consider the availability of financial and nonfinancial resources, including community support, necessary to implement the project within the time frames set forth in the Commission's performance requirements, as well as the availability of resources necessary to sustain the project." The Commission has recognized that this standard requires that an applicant show that the project will generate excess revenues over total expenses (including debt service expenses and plant and equipment depreciation) if utilization forecasts are achieved for the specific services affected by the project within five years or less of initiating operations. *See, e.g., In re: Anne Arundel Med. Ctr. Mental Health Hospital*, No. 16-02-2375, Decision at p. 32 (Mar. 26, 2018); *In re: Sheppard Pratt at Elkridge*, No 15-152367, Decision at p. 20 (Sept. 20, 2016).

The Reviewer correctly concluded that Hope Health failed to demonstrate compliance with this standard, applicable to all CON projects. As summarized by the Reviewer, Hope Health's "unanswered questions and questions without complete responses, raise serious questions about the financial feasibility of the project, as well as the long-term viability of the proposed hospital operation." (Recommended Decision at 36.) In perhaps a first of a proposed rate-regulated facility, Hope Health failed in its obligation to provide sufficient financial information to the HSCRC for that agency to even opine on the reasonableness of its projected charges and Hope Health's ability to sustain the project. (*See* Recommended Decision at App. 9, p. 4.) This despite more than three requests by the HSCRC for documentation from Hope Health.

As a result of Hope Health's refusal to comply with the Commission's and HSCRC's requests for financial information, the Reviewer had no choice other than to recommend denial of

Hope Health's Application. Indeed, Sheppard Pratt established that Hope Health's project will generate more than $1.7 million in losses in its first five years of operations, assuming realistic operating revenues and expense projections. (DI# 47 at p. 7, Table 8.)

Hope Health now requests that the Commission ignore its own financial projections and repeated refusal to supply financial information and to grant Hope Health a CON based on the unsupported promise that it will have Baltimore County or some other governmental agency underwrite the financial losses of an ill-conceived program to be operated by a for-profit entity. Hope Health's request that Baltimore County underwrite its losses is curious as it projects that the bulk of its patients would originate from outside Baltimore County. Furthermore, a CON condition is not the appropriate format for such a demonstration. Should Hope Health wish to amend its application at this late stage by seeking to demonstrate financial viability in an entirely new manner than it has previously done, it should request an opportunity to modify its application, and provide both the Reviewer and any interested party with the opportunity to review the new demonstration of viability. In any event, Hope Health has not demonstrated a commitment of any entity willing to cover its losses up to $500,000 much less the $1.7 million that Sheppard Pratt projects.

Finally, Hope Health suggests that its decreased revenue in its most-recently filed audited financial statements due COVID-19 pandemic should excuse its ability to demonstrate that it has sufficient financial resources to sustain the proposed project. Contrary to Hope Health's assertion, the COVID-19 pandemic demonstrates the purpose of the Commission's financial viability and feasibility standard. Under its own estimates, Hope Health projects to generate less than $1,000 in profit by year five of its operations. Hope Health would be a single adverse event away from closing, thereby jeopardizing – and not supporting – its proposed patient population.

## Conclusion

For the foregoing reasons, and for those stated in Sheppard Pratt's April 6, 2022 Exceptions and in its filings throughout this review, Sheppard Pratt respectfully requests that the Commission deny Hope Health's Application.

Respectfully submitted,

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April 11, 2022

## CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2022, a copy of Sheppard Pratt Health System, Inc.'s Exceptions to the Recommended Decision on Hope Health System, Inc.'s Modified CON Application Proposing the Establishment of a Freestanding Inpatient Psychiatric Hospital for Children and Adolescents was sent via email and first-class mail to:

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