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VIA FEDEX

Courtney Avery
Board Administrator
Illinois Health Facilities and Services Review Board
525 West Jefferson, 2nd Floor
Springfield, Illinois 62716

Re: Comments in Response to State Board Staff Report for Project #17-013 Geneva Crossing Dialysis, Applicants: DaVita, Inc. and DuPage Medical Group, LTD.

Dear Ms. Avery and Members of the Board,

The State Board Staff Reports ("SBSR") confirm that this DMG/DaVita project can only succeed by syphoning patients from existing providers. The combined lack of existing patients and the inevitable adverse impact that will result to other area providers (in violation of this Board's criteria) warrants a final denial by the Board.

We do not offer this comment to be combative but because we respect this planning process and this Board too much to not call out improper tactics and genuine mistakes when we see them. Moreover, flooding the marketplace with unnecessary dialysis stations that will do nothing to increase access to care, but simply divert patient from one quality provider to another, is contrary to the planning process established in Illinois.

The process of approving new dialysis facilities requires an applicant to provide evidence of an established patient base or through referral letters evidencing where the patients will come from to utilize the facility. This application, filed well over a one year ago does not contain evidence of where the ***new*** patients will come from to utilize this facility. DMG has repeatedly shown that they do not have an established group of nephrologists, and ***that should strike you as a major issue*** because it means that they do not have a sufficiently established nephrology patient population that will utilize this facility. The patients that DMG is counting on to fill this facility are already being treated by existing providers. This is best evidenced by: (1) the fact that they have presented other practice's nephrology patients to the Board as their own; (2) their referral letters are so deficient that, despite having been inexplicably accepted by Board staff, they meet none of the Board's requirements for referrals; and (3) the testimony this Board has

heard from existing providers that their patients are being encouraged – and even strong-armed – into switching practices.

For months the applicants have evaded this Board, deferring their applications over and over again - an unheard of FOUR times – hoping to find a moment where the Board has either forgotten the shortcomings of these projects or is focused on something else. After nine months and several new consultants, the applicants have finally submitted additional information – not voluntarily, but only after it was requested by the Board Staff.

The additional information served two purposes. First, it attempted to deflect from the ***several misrepresentations made to the Board*** by treating their past statements as inconsequential. Second, DMG provided information that significantly expanded this project's service area and then argues for a change in the Board staff finding's using methods that they themselves admit are not found in rule or statute. The additional information contains no legal basis to warrant the approval of this unnecessary application. Further, the processing of this additional information has resulted in a circumstance in which Board Staff is now ***inconsistently*** applying the exact same regulations to projects within the same industry, each facing the same standards of review with Board criteria. To be clear – this is not a call for comparative review, because we are raising this issue ***before*** the Board has considered the application. Moreover, we are not introducing the applications – thus seemingly calling for ***the Board*** to make a similar decision. However, there is an ***absolute right*** to have the Board staff apply those regulations in the same manner. The fact that this additional information is the basis of the Board Staff finding the application in conformance with all review criteria is extremely concerning. This inconsistent application of the rules calls into question the integrity of the planning process prescribed by the legislature and signed into law by the Governor. Should the Board base their decision on the erroneous findings of the SBSR, their decision would be entirely arbitrary and capricious, and it would undermine the validity of the Board's decision.

At the September 26, 2017, the Health Facilities and Service Review Board ("HFSRB") meeting, the Board properly voted to deny this project. Nothing has changed to justify an alternative result. We ask that you sustain this Board's previous vote at your July meeting, and provide this Project a final denial.

"New" Information

Board Staff posed four questions to the applicants in an effort to elicit information from the applicants. In each response, the applicant has proven the truth of every statement that the opposition has presented for this Board to consider over the last year.

DMG Nephrologists Lack of Access to Information from Fresenius ESRD Facilities

After appearing in front of this Board and stating, ***under oath***, that they do not have access to patient data at Fresenius ESRD facilities, the applicants have finally come clean to admit that they ***do*** in fact have access to patient data. The additional information submitted by the applicant and SBSR make no mention of this intentional misrepresentation, nor does it mention whether the Board is considering a formal censure, as is allowed under its rules, or has

even been made aware of this undeniably intentional misrepresentation. This, alone – the ***intentional misrepresentation of material information before the Board***, presented in an attempt to gain advantage in the consideration of an application – justifies the denial of these projects.

The applicants go on to blame their decision to wall-off patient data on HIPAA and their inability to obtain patients waivers allowing the transfer of their medical history to Fresenius ESRD facilities. This is a weak explanation, to say the least, but perhaps there is legitimacy to it, as these are not DMG nephrology patients, anyhow. These issues are created entirely by the applicants and designed to perpetuate a false narrative that they lack access to patient information at other ESRD facilities. An applicant should not receive credit for offering to solve an unnecessary problem that it, unilaterally, created.

Innovation

Like so many who appear before the Board, the applicants have stated that their project was innovative and that no other provider can offer these services to patients in the area. It turns out that, like their statements regarding lack of access to patient data, these statements also ring hollow. The "innovations" that DMG proposes still seems to be nothing more than its electronic health records. All of the other "innovations" are entirely practices that DaVita employs. Unfortunately for the applicants, this could hardly be considered to be innovative when it is – and has long been - the standard for everyone else in the industry.

DaVita's Status as the Sole Provider for Dialysis Service to IlliniCare Patients

We commend the applicants for finally admitting that they are not the only provider for dialysis service to IlliniCare. Why they choose to state otherwise ***under oath*** when appearing before the Board is unclear to us. There can be no supportable decision without exploring these repeated misrepresentations. For those keeping score – ***this is the third patently false statement made by applicants under oath***.

Applicant's Status as it relates to Illinois Medicaid Managed Care Organization Contracts

The applicants made clear that they are contracted with IlliniCare. However, they fail to mention whether they are contracted with the other 6 Managed Care Organizations, as was requested by the Board.

Application of Board Regulations

There are still substantial deficiencies that remain beyond the four issues raised by the Board's request for information, as evidenced by this letter and reflected in the SBSR released for the July Board meeting. As simply as can be put – approving these projects would adversely alter the healthcare delivery system in this HSA in a way that is entirely inconsistent with the HFSRB, its mission, and at its rules.

The process of applying this Board's regulations must done in a mechanical way to ensure an even playing field for all applicants. When the regulations are applied in an inconsistent way, the practical impact is that the Board's resulting decisions are tainted and unsupportable. Again, we are by no means calling for a comparative review of these applications with others, we are concerned with the process by which some of the Board's evaluative criteria have been erratically applied to similarly situated projects. We are highlighting these discrepancies ***prior*** to the Board's consideration and we are not introducing the substance of these other applications. If the Board would like specific examples, we would invite the Board to defer the project and we will identify specific projects (all a part of the public record) to highlight the inconsistent application of the Board's unchanged regulations.

This is not a matter of discretion, which we recognize that the Board has to approve an application despite its failure to meet a criteria. Rather, this is a matter of staff application of Board regulations, which is not a discretionary task, to the contrary it is a process that should be mechanical.

The applicant's referral letter accompanying its applications and referenced in the SBSR, does not meet the HFSRB standard – by the applicant's own admission! It further serves as an indictment of the applicant's disregard for the HFSRB planning process. The HFSRB has in its possession ***six copies of the exact same letter*** (with only the date and some project specific information changed on each), that word for word regurgitates the same flawed understanding of the HFSRB planning process.

The Board's rules require that referral letters indicate the number of patients treated or referred for in-center hemodialysis by each physician. This referral letter lists 5 physicians and ***does not*** provide a breakdown of patients for each of those physicians. The Board's rules require that an applicant provide the estimate number of patients based on documented historical caseloads, but it is impossible for the applicant to provide this information. 3 of the 5 physicians listed only recently began practicing medicine and any "estimate" provided by the applicant is nothing more than a guess. The Board's rules require an applicant to provide an estimate of the number of existing patients who are expected to continue in-center hemodialysis, the applicant did not provide this information. The Board's rules require that a physician's notarized signature be included on the letter. Only one of the five physicians signed the letter a clear disregard for the Board's rules. Finally, the Board's rules require a verification that patient referrals are ***not*** being used to support another pending or approved CON application. There is no verification in the letter submitted for this project or in the identical versions of this letter used for six other projects it was used for. This blatant violation of the Board's rules is justification enough to deny this project a final time. Utilizing ***the same patients*** to justify multiple projects is expressly prohibited by the Board's regulations. It is not clear how these "referrals" were accepted by Board staff – but they certainly should not be accepted by this Board.

Acceptance of these referral letters is inconsistent with the Board's longstanding practice to require referral letters that meet certain criteria and that are sufficient to justify a project utilized at the Board's target utilization levels.

Board Staff's notes on page 10 of the SBSR that there **15** ESRD facilities that do not meet the Board's target utilization rate. This could give Board members the impression that this flawed application has met the Board's standards when it clearly has not. Under the Board rules Maldistribution "***exists when the identified area (within the planning area) has an excess supply of facilities, stations, and services***". This project meets the definition of Maldistrbution yet inexplicably was found in conformance with criteria.

Conclusion

The applicants boast that DuPage County has been targeted because it "does not currently operate any clinics in DuPage County." There is only one way an applicant could explain the sort of unnecessary duplication of services that it proposes. An applicant would have to be able to identify patients to fill these stations. But the applicants cannot do that and have not only refused to comply with the Board's rules but have completely disregarded many of them.

After several public commenters noted the failings of the referral letters for the Board at last year's September meeting, the applicants claimed to respond to the elephant in the room, but only obfuscated the truth in the process. The applicant's only explanation was that they expected to fill the facilities with "DMG patients and they are not patients of other providers at this time." With this one statement the applicants managed to not only admit their inability to identify existing or specific patients for these facilities, but they also neglected to mention that the "DMG patients" are already being provided care by other area nephrologists, many of those same patients receiving dialysis treatments at facilities with excess capacity.

When developing an application for consideration by the HFSRB, the first questions an applicant must consider is where will the patients come from, and what will be the impact on existing providers? The applicants have no answer for the where there patients will come from, and the impact on existing providers will be significant. This Board has already approved two projects for this health service area, which now makes a total of four facilities that are not even online yet. To continue adding to the number of underutilized facilities in the health service area would be detrimental to existing providers and especially patient care.

The applicant's "innovative" approach for these stations is to plant the DMG flags and siphon patients from existing providers. "If you approve it, they will build it, and patients will come" is not innovative and certainly is not responsible health planning. This will undoubtedly put great strain on other already existing area providers who currently serve the community and have excess capacity in HSA 7. It will further undermine the cost savings achieved through the area's End Stage Renal Disease (ESRD) Seamless Care Organization (ESCO). A more practicable approach would be for the applicants to withdraw their application just as they did with their Stone Quarry Dialysis in Hodgkins. The applicant should assess where there is a true need in the HSA and then submit only necessary applications to this Board.

For these reasons, we invite the HFSRB to continue to deny this application and allow for more organized development of ESRD services within these communities.

Respectfully submitted,

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