

May 25, 2018

**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

MAY 29 2018

RECEIVED

VIA HAND DELIVERY

Ms. Kathryn Olson
Chairwoman
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 #17-014 Rutgers Park Dialysis, #17-016 Salt Creek Dialysis; Applicants: DaVita, Inc. and DuPage Medical Group, LTD.

Dear Ms. Olson and Members of the Board,

The State Board Staff Reports ("SBSR") confirm what this Board figured out last year: The DMG/DaVita projects were poorly planned from the start, can only succeed by syphoning patients from existing providers, and that these projects warrant a final denial by the Board.

Unlike the projects and providers that preceded them, DMG does not have an established group of nephrologists and does not have a sufficiently established nephrology patient population. They believe the DMG name will be sufficient to draw patients away from the existing providers already providing access to quality care. 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. Perhaps the most galling component is that DMG refuses to share patient data regarding its patients, thereby creating a problem of access to information, and then claims the problem will be solved by approving seven new facilities for DMG (despite not being able to establish either the need for those facilities nor the existing ability to meet any such need).

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 seven 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

provided, while rich in platitudes, contains no legal basis to warrant the approval of these two unnecessary applications. 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 – tasked with the mechanical application of the Board’s regulations, apply those regulations in the same manner. The failure to do so is the hallmark of arbitrary and capricious conduct that would undermine the validity of any subsequent Board decision.

At the September 26, 2017, the Health Facilities and Service Review Board (“HFSRB”) meeting, the Board properly voted to deny these two projects. Nothing has changed to justify an alternative result. We ask that you sustain this Board’s previous vote at your June meeting, and provide these Projects 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. We would expect that Board Staff would request this information prior to consideration of this project by the Board – or the Board could easily conclude that the intentional effort to withhold this information is sufficient evidence that they are not contracted with those other MCO’s.

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 June 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 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.

As a specific (but not exhaustive) example, the applicant's referral letters 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 changed on each), that word for word regurgitates the same flawed understanding of the HFSRB planning process. 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.

Even more troubling is the fact that the applicants are utilizing *the same patients* to justify multiple projects, which 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.

Board Staff's notes on page 23 of the SBSR that the application fails to meet the criteria associated with Unnecessary Duplication/Maldistribution (Ill. Admin. Code Section 1110.230(c)(2)(b)) but, on page 3 of the SBSR, Board Staff incorrectly states that the applicants successfully met all applicable criteria. Table Eight of SBSR clearly shows that there **21** 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.

Conclusion

You need look no further than the first page of the additional information to see the true intent of these projects: market share. 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 refused to comply with the Board's rules.

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.

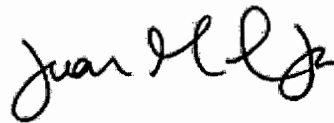
When developing an application for consideration by the HFSRB, the first questions an applicant must consider is where will the patients come from, and what will be the impact on existing providers? The applicants have no answer for the where there patients will come from, and the impact on existing providers will be significant. The cannot and should not be allowed to misrepresent their way around those facts.

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). This planning process is designed to protect against the very ill-conceived market saturation that the applicants propose. A more practicable approach would be for the applicants to withdraw their applications and 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 these applications and allow for more organized development of ESRD services within these communities.

Respectfully submitted,

BENESCH, FRIEDLANDER,
COPLAN & ARONOFF LLP

A handwritten signature in black ink, appearing to read "Juan Morado, Jr.", enclosed within a rectangular box.

Juan Morado, Jr.