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December 2, 2019

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**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

Via Federal Express

Ms. Courtney Avery
Illinois Health Facilities and Services Review Board
525 West Jefferson Street
Springfield, Illinois 62761

**Re: Metroeast Endoscopic Surgery Center (Proj. 19-043)
Response to Board Staff Report**

Dear Ms. Avery:

Polsinelli represents Metroeast Endoscopic Surgery Center, LLC (the "Applicant"). In this capacity, we are writing in response to the Illinois Health Facilities and Services Review Board's ("HFSRB") findings ("State Board Report") on the Applicant's non-substantive application for permit to add podiatry, pain management, ophthalmology and orthopedic surgery services to its existing ambulatory surgical treatment center ("ASTC") located in Fairview Heights, Illinois. The proposed project is an effort to improve access to the residents of the service area by providing a lower cost setting for elective, non-emergency surgical procedures to, among other things, meet the requirements of third party payors and provide lower out-of-pocket costs for patients. This project is consistent to core tenets of the Illinois Health Facilities Planning Act of *"improving the financial ability of the public to obtain necessary health services;.... guaranteeing the availability of quality health care to the general public; and maintaining and improving the provision of essential health care services and increase the accessibility of those services to the medically underserved and indigent."* (20 ILCS 3960/1).

Pursuant to Section 6 (c-5) of the Illinois Facilities Planning Act (the "Planning Act"), the Applicants submit the following comments.

St. Clair County has a population of 159,000 residents yet patients are outmigrating for ASTC care (e.g., 395 St. Clair patients went to Surgery Center of Centralia and 147 went to Monroe County Surgical Center for care in 2018¹ and an unknown number of patients are traveling to Missouri for lower cost ASTC services). We acknowledge and appreciate that the State Board Report reflects that there are not currently any ASTC's within the 17-mile GSA that offer any of the surgical specialties proposed to be added by the Applicant. Anderson Surgery Center (Permit #18-031), which is not anticipated to become operational until December 31, 2021, has a proposed site 17 miles from Metroeast Endoscopic Surgery Center ("MESC"). Recently, one ASTC closed in Belleville and another one will relocate farther east next year, due

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Atlanta Boston Chicago Dallas Denver Houston Kansas City Los Angeles Nashville New York Phoenix
St. Louis San Francisco Silicon Valley Washington, D.C. Wilmington

Polsinelli PC, Polsinelli LLP in California
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to the end of its lease on the old campus of the HSHS St. Elizabeth. (St. Elizabeth provided notice of lease cancellation after the subject CON permit application was filed.) Since the cost of care within an ASTC is often 75% less than that of a hospital outpatient surgery department, it is vital that the Applicant is able to offer a lower cost, high quality alternative to hospital-based procedures at its existing Fairview Heights location for a broader variety of surgical specialties.

- **Service Accessibility & Unnecessary Duplication/Maldistribution**

The Applicant is seeking a CON permit pursuant to Illinois Administrative Code Section 1110.235 (c)(1)(E)(ii) which states, “beginning January 1, 2018, multi-specialty ASTCs seeking to add additional ASTC services shall apply for a CON permit pursuant to the provisions of this section.” Section 1110.235 of the HFSRB rules delineates the applicable criteria for adding surgical specialties. These are exactly the same criteria as those criteria applicable to the establishment of a de novo surgery center. At the beginning of 2018 when these rules became effective to require a CON permit for the addition of surgical specialties to an existing surgery center, our office consulted with HFSRB staff to ascertain how to present a meaningful application for the expansion of surgical specialties given that the rules are not at all oriented toward such a change nor is there a meaningful framework from a health planning perspective on the potential limitation of such expansions. As HFSRB staff knows, such an expansion can easily be accomplished by an expenditure below the capital expenditure minimum applicable to surgery centers (\$3,585,250) and the surgery center environment is a lower cost alternative to the delivery of this service in a hospital. Further, we note that this proposal does not add surgical capacity to the existing ASTC.

Having just recently obtained a CON permit to add other specialties, the Applicant based the pending application on its previously submitted CON permit application which was found to meet all the applicable review criteria. The Applicant’s Project 19-010, which was approved on June 4, 2019 and also proposed to add surgical specialties (general surgery, plastic surgery and gynecology) at MESC, was found to be in compliance with all relevant provisions of Part 1110 and Part 1120. It was found to have met all of the HFSRB standards in spite of the fact that there was existing capacity within the 17-mile GSA that could accommodate the workload identified within the application. It is important to note that the MESC previous project was not measured against the Service Accessibility or Unnecessary Duplication/Maldistribution criteria² Further, as discussed below, the Assurances language where HFSRB staff made a finding is a meaningless review criterion on which to assess the project for the addition of surgical services which does not add surgical capacity. In fact, the HFSRB staff reports have consistently asserted that there is no target utilization standard for a CON permit application which is limited to the expansion of surgical specialties. Therefore, the assurance statement as provided by the Applicant which stated that utilization would increase beyond current utilization is obvious and truthful but not of material import in considering this project.

² 77 IAC 1110.235(c)(6) and 77 IAC 1110.235(c)(7).



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Despite these facts, the HFSRB staff cited the pending proposal as out of conformance with three criteria, ones that have never been negatively applied to any of the previous applications that this office has submitted to the HFSRB since the pertinent rule change. With this in mind and given the fact that there were no special rules adopted pursuant to which projects for the expansion of surgical specialties should be applied, the State Board Report should not have made negative findings on Service Accessibility, Unnecessary Duplication of Services Criteria or Assurances criteria.

Following is a list of other CON permit applications to add surgical specialties to an existing ASTC since the ASTC expansion of specialties rule. Each was approved to add the specialties requested without negative application of the Section 1110.235(c)(6), (c)(7) or (c)(10)³ criteria despite similar circumstances. These projects are:

- Carle Surgicenter Danville, (Proj. 18-014),
- Hinsdale Surgical Center, (Proj. 18-036),
- Barrington Pain and Spine Institute (Proj. 18-038),
- Ravine Way Surgery Center (Proj. 18-043),
- Chicago Prostate Cancer Surgery Center (Proj. 19-018), and
- Center for Ambulatory Treatment II (Proj. 19-020).

Each of these projects was found to be in conformance with all relevant provisions in spite of other facilities that were not at target occupancy offering the proposed specialties in the area to be served. These findings were consistent with the fact that there are not any rules governing Service Accessibility, Unnecessary Duplication/Maldistribution or Assurances which are specific to the addition of specialties to an existing ASTC.

- **Assurances.**

An issue was raised in the State Board Staff Report and a negative finding made based on the language of the Assurances attestation that was provided in this application. However, as stated in the prior CON permit application for this surgery center operator in staff's assessment of the Assurances attestation for that CON permit application, "the State Board does not have utilization standards for the addition of surgical specialties to an existing ASTC."⁴ As this is the position of the HFSRB, no negative finding should have been made for the pending CON permit application.

³ As stated on page 9 of the Project 19-020 Board Staff Report, page 9 of the Project 18-043 Board Staff Report and page 8 of Project 18-038 Board Staff Report, , "the State Board does not have utilization standards for the addition of surgical specialties to an existing ASTC."

⁴ State Board Staff Report for Metroeast Endoscopic Surgery Center, Project 19-010, page 8.



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- **Opposition Comments**

Note that as a non-substantive project, there is no Safety Net Impact Statement required of this CON permit application. That said, this Applicant has a long track record of serving a very high number of Medicaid patients and, thus, is on par with area health systems as a safety net provider. Despite that, as a competitor to this provider, HSHS submitted letters to the HFSRB intending to block this project. These letters all share the same premise: if MESC, located 29 miles away, begins offering orthopedic surgical services, HSHS hospitals may not have sufficient demand to continue offering orthopedic surgery. While it is understandable that HSHS would be resistant to competing against a facility that offers that same quality of care at a lower cost and in a more convenient location, it is disingenuous to claim that this competition would “remove services” from the community or even jeopardize HSHS’s ability to offer orthopedic surgery. As stated in Dr. Ungacta’s referral letter, he anticipates keeping roughly half of his historical cases in HSHS’s hospital operating rooms and only projects to move 20 cases from Breese, Illinois and a total of 221 outpatient cases. The Applicant expects that patients who live closer to MESC or desire lower cost care will utilize MESC, while those who live near Highland or Breese will continue to receive care locally. Furthermore, one of HSHS’s letters states that its Highland facility currently has “two dedicated orthopedic surgeons who routinely schedule patients for surgeries at our hospital.” These surgeons, along with Dr. Ungacta, will ensure the facility’s orthopedic surgery program continues into the foreseeable future.

We would also like to address the false claim within all of the HSHS letters that the application for permit proposes to add “surgical rooms,” “orthopedic suites” or “beds” or that it involves “opening an ambulatory surgery center.” To be clear, the Applicant is simply seeking to better utilize its two existing surgical rooms by offering additional surgical specialties.

Thank you for your consideration of the Applicant’s response to the State Board’s findings.

Sincerely,

A handwritten signature in black ink that reads 'Kara Friedman'.

Kara Friedman

Enclosure: 19-10 Staff Report