

Mark Mayo

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RECEIVED
PROJECT NO. 19-053-5839

MAR 12 2020

HEALTH FACILITIES &
SERVICES REVIEW BOARD

March 10, 2020

Illinois Health Facilities and Services Review Board
525 West Jefferson, 2nd Floor
Springfield, IL 62761

RE: Project No: 19-053
25 East Same Day Surgery Center, Chicago
Discontinuation of Facility

Dear Health Facilities and Services Review Board:

I have been involved in the development, startup and operation of ambulatory surgery centers since 1986 and previously was involved in the state/federal health systems planning and Certificate of Need program. I also served as a board member on a national ambulatory surgery center association so I am familiar with the operation of ambulatory surgery centers.

I wish to provide the HFSRB with these public comments on the proposed discontinuation of facilities and ASTC services at 25 East Same Day Surgery Center, Project No. 19-053, and hope that you will consider my comments as you act on this application.

1) At the core of my comments is the possible violation of the Act by the applicant owners, USPI, Inc. and NorthShore/USP Surgery Centers II, in that they voluntarily closed the facility and ceased all services without first obtaining a CON Permit to Discontinue. Section 1130.140 of the Administrative Rules requires a permit or exemption "prior to a discontinuation." The applicant has yet to have obtained a permit to discontinue despite having closed its facility and ceased all services on or before January 1, 2019 (Attachment 10, Page 62 and Attachment 10-C, Page 104).

2) The HFSRB should obtain an attestation from the applicant stating the last calendar date that it provided an ambulatory surgical procedure on its last patient. Said date should be considered in any administrative sanction or penalty against the applicant for failure to first obtain a CON Permit prior to discontinuation.

3) The application does not include a copy of any written notice to HFSRB and/or IDPH of any formal letter of "Temporary Discontinuation." The applicant should provide such documentation within the record of its application.

4) Applicant does not appear to be entitled under your Administrative Rules to an initial or ongoing "Temporary Discontinuation" as it appears that the applicant has failed to meet its obligations under Section 1130.140 of the Administrative Rules. The application on file does not appear to have provided HFSRB with the following documentation as is required:

- a) A stated cause and detailed explanation of the reasons which were unanticipated or unforeseen and caused the temporary suspension of operations; and
- b) Documentation by the applicant that it exercised appropriate efforts to maintain operations; and

- c) The applicant is required under the Section 1130.240(d) of the Administrative Rules to provide HFSRB with reports of the efforts which applicant was making to correct the circumstances causing the temporary suspension/temporary discontinuation. Applicant did not document under any request for Temporary Discontinuation its reporting obligations under Ongoing Reporting and Notification Requirements of Section 1130.240(d) of the Administrative Rules; and
- d) The apparent failure of the applicant to provide HFSRB with a timetable for the anticipated reopening of the facility; and
- e) The apparent failure of applicant to provide ongoing filing with HFSRB of reports each 30 days documenting applicant's progress in correcting the unanticipated or unforeseen cause(s) which led to the temporary closure.

On the basis of the apparent failures of the applicant to meet its obligations under a "Temporary Discontinuation" exemption as noted above, the HFSRB should find that the applicant closed its facility without benefit of a permit being first granted prior to discontinuation. HFSRB should also, based on these facts, find that the applicant was not entitled to a Temporary Discontinuation.

5) It is my understanding and belief that, as it appears in Attachment 11, Page 105, regarding the Background of the Applicant, that the applicant failed to report to the HFSRB that it had or may have had its Medicare participation/certification for 25 East Same Day Surgery Center revoked on or around February 2019 for failure to meet Conditions for Participation in the federal Medicare Program. Loss of the applicant facility's Medicare certification appears to meet the definition of "Adverse Action" under Section 1130.140 of the Administrative Rules, yet the applicant failed to state or document such loss of Medicare certification. Applicant, in fact, states in Attachment 11, Page 105, that there had been no adverse action taken against the facility. It is also on belief that the owners, USPI, Inc. and NorthShore/USP Surgery Center II, should forever after be required to disclose in any inquiry or statement regarding Adverse Action that one of the facilities under its ownership had its Medicare certification revoked.

6) The applicant is required under Section 1130.620.c, State Agency Submittals, to timely file IDPH and HFSRB annual reports. The application does not document that applicant had filed its ASTC Questionnaire in 2019 for data experienced in 2018 (report was due to have been filed about March 2019) and for the 2020 Questionnaire for data experienced in 2019 (which report is due to be filed about March 2020). An IDPH Annual Report is also required to be filed each year. HFSRB should confirm that all required reports were, in fact, filed.

7) The applicant states in Attachment 10, Page 61, that discontinuation will only occur upon approval by HFSRB yet applicant has already closed the facility and discontinued services in either December 2018 or January 2019, well before its submittal of the pending CON Permit application (filed October 18, 2019) and well before HFSRB final approval which is not expected until April 2020. This closure and discontinuation prior to HFSRB approval is in apparent violation of the Act. Under Section 1130.140 of the Administrative Rules, HFSRB may determine that "failure to obtain a permit or exemption prior to discontinuation may result in the imposition of sanctions or penalties as provided by the Act."

This point is important not only for the pending application but to preserve the Board's authority to orderly regulate the health care delivery system as the HFSRB has recently had to deal with several hospitals that closed and discontinued all services prior to obtaining a CON permit to do so.

8) Applicant states under Criterion 1110.130.b in Attachment 10, Page 61, that its reason for discontinuation is “necessary due to substantial decreases in surgical volume and revenue...as operating and overhead costs exceed the Surgery Center’s revenues.” The applicant does not provide in Attachment 10, Page 61 any data to support its assertions. There are no case volume comparisons for 2016, 2017, 2018 and no corresponding case volume by each surgeon during the same periods. There are no net revenue and operating & overhead costs contained in this Attachment 10.

There is, however, net income/net revenue data for 2016, 2017 and 2018 found within Attachment 38, Page 119, which shows a substantial increase in net revenue between 2016 to 2017 from \$3,331,816 in 2016 to \$4,940,410 in 2017, an increase in net revenue of 48.28% which is contrary to the applicant’s stated “substantial decreases in revenue.” Net revenue in 2018 was \$5,000,087 which is still a slight increase in net revenue over 2017 and a substantial increase in net revenue over 2016, not the substantial decrease which applicant states in Attachment 10, Page 61, as its rationale for discontinuation. There is no reported operating and overhead expense data for the same periods provided within the CON application for discontinuation. Any temporary or permanent discontinuation should include a detailed explanation of the reasons stated as is required under Section 1130.140 of the Administrative Rules, not just a blanket undocumented and unexplained statement which appears not to be substantiated by the significant increase in net revenue data from 2016-2018 shown by the applicant in Attachment 38, Page 119.

It should also be noted that during those three reported years of 2016, 2017 and 2018 the applicant only provided charity care to 1 patient.

On the basis of the concerns raised above that I urge the HFSRB to first determine if it has a basis to cite the applicant for a violation of the Act for discontinuing its facility and ASTC services without benefit of a permit to discontinue. The applicant USPI, Inc. is one of the largest operators/managers/owners of ambulatory surgery centers in the United States and, as such, should have more resources than and be more aware of the rules and regulations governing facilities it controls.

If HFSRB substantiates that the applicant discontinued its facility and service prior to first obtaining a CON Permit to discontinue, I urge the HFSRB to seriously consider imposing sanctions or penalties as provided in the Act against the applicant prior to taking any action on the CON application now before you.

Respectfully submitted,

Mark Mayo, CASC