

#21-017 Comment on State Board Staff Report



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Via Email

Ms. Courtney Avery
Administrator
Illinois Health Facilities and Services Review
Board
525 West Jefferson Street, 2nd Floor
Springfield, Illinois 62761

**Re: Physicians' Surgical Centre (Proj. No. 21-011)
Technical Comment to State Board Report**

Dear Ms. Avery:

Polsinelli PC represents O'Fallon Surgical Center, LLC d/b/a Physicians' Surgical Centre and Haris Assets, LLC (collectively, the "Applicants"). 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 Applicants' application for permit to add orthopedic surgery services to its existing ambulatory surgical treatment center ("ASTC") located in O'Fallon, Illinois.

This request is considered a "non-substantive project" as defined in the Illinois Health Facilities Planning Act (the "Planning Act")¹ to allow an existing multi-specialty surgical provider to offer a health care resource that is scarce in the area it serves. It does not involve a capital expenditure in excess of the capital expenditure minimum (which, as of July 1, 2021, is \$3,797,666) nor does it propose the expansion of operating room capacity at its existing location. Rather, the plan merely involves an expenditure of less than 5% of the capital expenditure minimum and the credentialing of an additional specialist to the medical staff of the center.² The Applicants' plan will improve access to health care services for Illinois residents in and around O'Fallon, who otherwise regularly travel to Missouri for care by making its existing clinic

¹ 20 Ill. Comp. Stat. 3960/1 et seq.; 20 Ill. Comp. Stat. 3960/12(8).

² The Planning Act does not provide a level playing field for all types of providers of the same service, otherwise this lower cost project would not be under the jurisdiction of the HFSRB in connection with the credentialing of a new type of physician specialist.

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available to orthopedic physicians to provide their patients a lower cost option for surgical procedures that do not require a hospital stay. In doing so, it will support the requirements and goals of Federal and State government insurance programs (such goals are associated with the core tenets of the Planning Act) along with commercial payors contracted with employers and plan sponsors to improve outcomes and access while lowering health care costs both for the government, for employers, large and small, and to reduce out-of-pocket costs for patients and their families. Providing this option is more important than ever due to the COVID-19 pandemic, which significantly impaired the ability of the public to obtain medical care, particularly marginalized groups.

This proposal follows the Applicants' two recent applications related to this surgery center. These applications were filed in 2019 and 2020. The first application related to the relocation of their existing surgery center to O'Fallon with construction of the facility and associated operating space (Project No. 19-025). The second application in 2020 was to add surgical specialties to allow the surgery center to credential ophthalmologists and pain management specialists (Project No. 20-041). Despite the fact that the 2019 CON application moved surgical treatment space to a new location in the planning area and established a new facility, the HFSRB staff determined that both Project No. 19-025 and Project No. 20-041 met all the applicable criteria of the HFSRB rules. In fact, HFSRB staff evidently determined that the CON application for Project No. 20-041 was such a nominal filing that it did not warrant the issuance of a State Board report, and the HFSRB Chair approved the application based on an internal memo confirming that the project met all applicable criteria and should be approved, apparently, based on the face of the application. Despite the fact that Project No. 20-041 is identical to Project No. 21-011 in all material respects, the HFSRB staff issued the State Board Report (rather than sending it to the Chair for desk approval) and made preliminary findings that Project No. 21-011 failed to meet four criteria relative to Part 1110. Such differential treatment is a textbook example of an arbitrary and capricious application of a government agency's rules to exercise authority over a business' property. The situations are identical, with the exception of the opposition leveled at this project by Hospital Sisters Health System. Importantly, it is settled law that it is not the responsibility of the HFSRB to protect market share of individual providers.³ There can be no justification for treating such petitions in a disparate way. If these findings are not corrected and the CON permit application is not approved, such a denial is certain to be invalidated in any appeal as there would be no rational connection between the facts found and the choice made.

³ *Provena Health v. ILL Health Facilities Planning Bd.*, 886 N.E.2d 1054, 1061, 1067 (Ill. App. Ct. 2008).

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Moreover, the HFSRB never promulgated rules specific to the addition of a surgical specialty to an existing ASTC, and the HFSRB rules that exist relative to ambulatory surgical treatment centers (77 Ill. Admin. Code § 1110.235) have no relevant application to a very basic change in its operations as proposed by the Applicants. In fact, the stated purpose of the HFSRB rules for CON applications states: “the standards presented in [the HFSRB rules] are designed to promote development of needed facilities and services, avoid duplication of services and prevent unnecessary construction.”⁴ Since there is no capacity being added or construction associated with the proposed project, there could be no rationale application process for the expansion of surgical specialties. Consequently, in the absence of any meaningful rules to guide the Applicants in the application process, particularly in light of the prior approval of an identical application, a denial of this application would be an obvious violation of the Applicants’ constitutional due process and equal protection rights.

1. Background

“Improv[ing] the financial ability of the public to obtain necessary health services; . . . guarantee[ing] the availability of quality health care to the general public; maintain[ing] and improv[ing] the provision of essential health care services and increasing the accessibility of those services to the medically underserved and indigent” are core tenets of the Planning Act. 20 Ill. Comp. Stat. 3960/2. This project, which proposes the addition of orthopedic surgeons to the medical staff of a surgery center addresses these principles. It will provide a local, high quality, lower cost option to area hospitals thereby increasing the availability and accessibility of orthopedic surgical services to individuals residing in O’Fallon and surround communities, including the senior population which is more susceptible to musculoskeletal impairments and other marginalized persons.

At the last HFSRB meeting in May, the HFSRB staff went on the record to state that the HFSRB does not concern itself with the specifics of the cost of health care services by comparing one provider to another. This is contrary to the Planning Act’s objective to “to improve the financial ability of the public to obtain necessary health services.” 20 Ill. Comp. Stat. 3960/2. Moreover, the cooperative joint venture review criteria recognizes the value of ASTCs as a lower cost option to hospitals by promoting hospital development of ASTCs. 77 Ill. Admin. Code § 1110.235(c)(6)(D)(iv). Accordingly, the cost of health care services is a central tenet of the certificate of need process and this project will lower the cost of health services by providing local

⁴ 77 Ill. Admin. Code § 1100.10.

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access to patients and moving cases out of the higher cost setting of hospitals.⁵ Any negative statements made in the State Board Staff report that the movement away from a hospital to an ASTC is a negative consideration should be deleted from the State Board Report or otherwise ignored.

The Applicants seek a certificate of need permit to add orthopedics as a surgical specialty. Despite the fact the addition of a surgical specialty *will not add surgical capacity to the area*, the rules suggest that the exact same criteria should apply to this project as are applied to applications to establish a de novo surgery center. Importantly, applications that add physical capacity (additional operating rooms) do not need to address the service accessibility and unnecessary duplication of services review criteria (two criteria for which this project received negative findings). 77 Ill. Admin. Code § 1110.235(c)(1)(C). There is no meaningful health planning construct that the agency might apply to allow additional types of specialists to perform procedures at a surgical center that will not add operating room capacity.

2. Consider the following information relative to the criteria HFSRB staff addressed in the State Board Report.

a. Service to Residents of the Geographic Service Area. 77 Ill. Admin. Code § 1110.235(c)(B)

First, the vast majority of patients served by this existing surgery center reside in the relevant geographic service area and the residency of the patient base post-approval will remain largely unchanged. The purpose of this review criterion is to ensure an ASTC primarily serves the residents of the applicable geographic service area as documented by patient origin information by zip code for all admissions for the last 12-month period, verifying that at least 50% of admissions were residents of the GSA. As noted throughout this technical comment, this project is for the addition of a surgical specialty. Importantly, it does not propose the construction, modification, or establishment of a health care facility, establishment of a category of service or clinical service area, or acquisition of major medical equipment. 20 Ill. Comp. Stat. 3960/2. Further, the cost of the project (\$180,000) is less than 5% of the capital expenditure minimum (\$3,797,666). The proposed plan will increase utilization at an underutilized ASTC by allowing the ASTC to credential orthopedic surgeons to perform procedures at the surgery center. Notably,

⁵ The Applicants have previously documented the Medicare reimbursement differential between hospital surgical services and ASTC services noting that ASTCs are usually paid at about 50% the rate that hospitals are paid for the same service.

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this is not an activity that requires a capital expenditure nor does it add a Category of Service that the Applicant facility will provide. This project is before the HFSRB solely due to a rule change that went into effect in 2018 that requires a certificate of need permit to add ASTC services in an existing surgery center. 77 Ill. Admin. Code § 1110.235(c)(1)(B)(ii).

Notwithstanding the fact this project is before the HFSRB due to a technicality, the Applicant submitted patient origin information by zip code for Dr. Ungacta's projected referrals. As documented in the application, all 16 patients, reside in the surgery center's geographic service area.⁶ As a result, a positive finding should be made on this criterion or the criterion should not be applicable.

b. Service Demand. 77 Ill. Admin. Code § 1110.235 (c)(3).

As with Service to Geographic Area Residents, this criterion should not be applicable to projects seeking to add ASTC services but not add capacity. Importantly, applications proposing to add operating and/or procedure rooms must submit referral letters documenting sufficient referrals to justify the additional capacity, *the historical referrals do not need to come from within the geographic service area.* 77 Ill. Admin. Code § 1110.235(c)(4) (emphasis added). Given this is an existing surgery center with a documented history of serving patients in the geographic service area, the same standard should apply as to those projects seeking to add capacity.

Notwithstanding there is no rational basis for applying this review criterion to projects like Project No. 21-011, the Applicants met this review criterion. They submitted patient origin

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Zip Code	City	Patients	Distance (Miles)
62040	Granite City	2	9.49
62062	Maryville	1	10.73
62294	Troy	2	10.32
62265	New Baden	4	15.98
62269	O'Fallon	1	3.04
62293	Trenton	3	14.33
62281	Saint Jacob	2	14.63
62216	Aviston	2	16.91

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information by zip code for the Dr. Ungacta's historical referrals. As documented in the application, all 16 projected patients, reside in the surgery center's geographic service area. For the reasons stated herein, a positive finding should be made.

c. Service Accessibility & Unnecessary Duplication of Service (77 Ill. Admin. Code § 1110.235(c)(6) and (7))

As noted above, service accessibility and unnecessary duplication of service are not review criteria for projects proposing to add operating and/or procedure rooms. Presumably, the rationale for excluding these criteria in that scenario is due to the fact the projects involve existing surgery centers, which is the case here as well. The primary difference here is that the Applicants seek to increase utilization at an underutilized surgery center and will not add capacity to the geographic service area. It is counterintuitive to rational health planning and antithetical to the HFSRB's core tenets to implement barriers to care that will force the medically underserved and indigent populations to higher cost settings. Importantly, precedent exists to exclude these review criteria from projects proposing to add surgical specialties without adding capacity and should be done here as well. See Project. No. 19-010.

3. Non-Substantive Application - No Safety Net Impact Criterion

Hospital Sisters Health System has enlisted its confederacy of acquiescent stakeholders to intervene in this proceeding but has set forth no meaningful basis to deny this proposal. This is due to the fact that the expansion of surgical specialty CON proposals are non-substantive projects and the potential impact on any other provider whether or not a safety net provider, has no bearing on the merits of this proposal. But as a reminder, the Applicant and its sister facility, Metroeast Endoscopic Surgery Center, participate actively in Medicaid managed care plans and this provides a significant access benefit to marginalized populations residing in their service areas.

Thank you for your consideration of the Applicant's response to the State Board Report.

Sincerely,

A handwritten signature in blue ink that reads "Ann M Cooper".

cc: Michael Constantino, HFSRB