



**STATE OF TENNESSEE
DEPARTMENT OF HEALTH**
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December 21, 2020

Mr. Alan Levine
Chairman, President and Chief Executive Officer Ballad Health
303 Med Tech Parkway
Johnson City, TN 37604

RE: Waiver Request for Actions Related to Ballad Health Cardiology Program

Dear Mr. Levine:

This is in response to your letter dated October 13, 2020 requesting seven waivers of Section 5.05(e) under the Terms of Certification (the "TOC"), each related to cardiology. TDH recognizes that a strong cardiology program is important, not only to the health of a health system's patients, but also for the financial stability of the system.

Your requests have been carefully reviewed and considered. Ultimately, I am able to approve five of the waiver requests and am offering recommended alternatives for the other two.

When the Department granted the Certificate of Public Advantage ("COPA") to create Ballad Health, the practical effect was to award Ballad a monopoly on inpatient beds. There was a concern that over time, such a monopoly would lead to unintended opportunities for monopolies in other areas such as outpatient and physician services. If the Department were to allow these additional monopolies, it would reduce the COPA's public advantage. Consequently, the Department included specific provisions in the TOC to protect against these types of monopoly expansions, including the following:

- TOC Section 5.04(c) This section prohibits Ballad from opposing the award of a certificate of need;
- TOC Section 5.05(a) This section prohibits Ballad from requiring noncompete agreements from physicians except for employed physicians; and
- TOC Section 5.05(e) This section provides that at any time no more than thirty-five percent (35%) of the physicians practicing in certain specialty areas at any nonrural Ballad hospital may be employed physicians. There are exceptions for listed specialties, such as hospital-based physicians.

The Department solicited input from independent cardiologists regarding the likely impact on competition in the region with the removal or modification of the 35% limitation. Their feedback was an important factor in our decision-making.

In particular, Section 5.05(e) serves a number of purposes both by protecting private physicians and by ensuring that the public has a choice between a Ballard-employed physician or an independent physician.

The TOC's intent to preserve choice and competition and to guard against a monopoly on physician services is clearly stated in the last sentence of Section 5.05(e): "In no event should the number of Employed Physicians in any specialty reach a level that would materially and adversely affect existing competition." The State believed then and continues to believe that the 35% employed physician cap is critical to limiting the extent to which competition is reduced in Ballard's geographic service area.

In response to Ballard's requested waiver of section 5.05 (e) for each of the seven actions related to cardiology:

1. The granting of privileges at Johnson City Medical Center ("JCMC") to certain cardiologists affiliated with CVA Heart Institute ("CVA") who serve patients in the greater Johnson City service area.

Ballad's October 13, 2020 letter suggested several reasons for granting this waiver, including the importance of being a full-service tertiary referral hospital, maintaining an open medical staff, and promoting patient access. I do not find these reasons establish a sufficient basis for granting the waiver.

First, Ballad has expressed concern that the inclusion of CVA physicians is essential to meeting the standard of being a full-service tertiary referral hospital. However, a tertiary referral hospital is a hospital that offers treatment for a certain condition, not one that offers access to all physicians providing treatment for the certain condition. Indeed, if all physicians were required to have access, then Johnson City Medical Center and Holston Valley Medical Center would have falsely been considered full-service tertiary referral hospitals prior to the merger as they both had closed medical staffs.

Second, while the Department agrees that patient choice and access to physicians are indeed goals of the TOC, the Department is more concerned with the degree to which access and choice are available overall throughout the geographic service area. As such, the TOC was never intended to ensure that every provider is available to every patient at every facility.

Third, the Department is always concerned about patient choice, patient travel, and specialist access and considers each of those concerns when weighing the benefits and disadvantages of COPA-related decisions. However, there are times when other, competing benefits outweigh those concerns. For example, patient choice, travel, and access to specialists were sacrificed in favor of improved quality and outcomes when the Department approved Ballad's NICU consolidation request.

Fourth, it would be incorrect to suggest that Ballad should rely on the Medical Executive Committee (“MEC”) and board to manage its physician complement and ensure compliance with the TOC’s 35% Employed Physician cap. It is incumbent upon Ballad Health as the physician employer to appropriately select its hospital-privileged physicians in order to stay in compliance with the provisions regarding employed physicians. Accordingly, any argument about the independence of the MEC and its approval process is irrelevant, as the MEC does not have the authority to deny privileges for any qualifying physician.

The maximum percentage of employed cardiologists at JCMC was set at 47.2% on January 31, 2018, with the execution of the TOC. Again, the TOC states, “In no event should the number of employed physicians in any specialty reach a level that would materially and adversely affect existing competition.” In my opinion, and in the opinion of others with whom I have consulted, granting the waiver would violate this provision. Accordingly, **I will not approve an increase in the percentage of employed cardiologists at JCMC above the 47.2% maximum, and to the extent the requested waiver would result in an increase above this maximum amount, the waiver is denied.**

However, the TOC’s 35% Employed Physician rule does not prohibit Ballad from granting privileges to CVA cardiologists at JCMC. The rule limits the percentage of employed cardiologists, not the percentage employed by each Ballad subsidiary. While at the time the TOC was executed, the 47.2% of employed cardiologists at JCMC were all from Ballad Health Medical Associates, if Ballad desires, it may add employed doctors from CVA to JCMC by reducing employed doctors from Ballad Health Medical Associates. This flexibility in applying the 47.2% restriction gives Ballad multiple pathways to add CVA cardiologists to JCMC.

For example, the physician demand study prepared by PYA shows a need for 4.4 to 4.9 additional full-time equivalent cardiologists in the Southwest Region in 2021. Thus, if the number of private cardiologists can be increased, additional employed cardiologists could be added to JCMC while maintaining the percentage of employed cardiologists at no more than 47.2%.

Alternatively, if Ballad was able to negotiate an agreement, such as a co-management agreement for cardiology services with the independent and employed cardiologists, that provides for increasing the percentage of employed cardiologists above 47.2%, I would give careful consideration to that agreement in determining that existing competition is not materially affected. Of course, any such agreement would require approval of all independent cardiologists.

It is important to note that all cardiologists in the Sullivan County region (HVMC and BRMC) are employees of Ballad. If Ballad could reach an agreement whereby the independent cardiologists at JCMC agreed to expand their practices to HVMC and BRMC, I would then look at the aggregate impact on the independent cardiologists in the two regions and carefully consider permitting the number of employed cardiologist at JCMC to increase beyond the 47.2% maximum employed percentage as it would be advantageous to the citizens of Sullivan County if they had a choice between employed cardiologists and independent cardiologists.

Thus, while I cannot approve the request from Ballad to increase employed cardiologists at JCMC above the maximum 47.2% percentage established on January 31, 2018, Ballad can still achieve its objective of adding CVA cardiologists to the medical staff at JCMC through other actions such as those suggested above or which are generated by the Ballad executive leadership.

Finally, regarding this first waiver request, the Department was notified that privileges were granted to cardiologists at JCMC during the period of public emergency when certain provisions of the TOC - including the 35% Employed Physician cap – were temporarily suspended. While the temporary suspension technically permits granting privileges to employed cardiologists at JCMC during the state of emergency, TDH does not consider the action to be consistent with the intent of that temporary suspension because it is not directly related to COVID-19. It is important to be aware that once the temporary suspension resulting from the pandemic is lifted, this change would result in immediate noncompliance.

2. The hiring by Ballad Health Medical Associates Heart and Vascular Care (“BHMA”) of one electrophysiologist (“EP”) in Johnson City and the granting of privileges to practice at JCMC.

Electrophysiologists have been grouped with cardiology to compute the employed doctor percentage of 47.2% at January 31, 2018. For the reasons discussed above, **I do not approve increasing the percentage of employed cardiologists above 47.2% and therefore, deny the waiver requested.**

3. The hiring by CVA of one interventional cardiologist in Bristol, TN and the granting of privileges for the interventional cardiologist to practice at BRMC.

On January 31, 2018, 100% of the interventional cardiologists at BRMC were employed by Ballad. If Ballad adds another employed interventional cardiologist the percentage of employed cardiologists does not change, it is still 100%. Accordingly, **the requested waiver is granted.**

4. The hiring by CVA of one interventional cardiologist and one non-invasive cardiologist in Kingsport, TN and the granting of privileges for these two cardiologists to practice at HVMC.

On January 31, 2018, 100% of the interventional cardiologists and non-invasive cardiologists at HVMC were employed. If Ballad adds another employed interventional cardiologist and a non-invasive cardiologist to practice at HVMC, the percentage of employed physicians in these areas does not change. The employed physician percentage is still 100%. **The requested waiver is granted.**

5. The hiring by CVA of one cardiothoracic surgeon in Kingsport, TN, and the granting of privileges to such surgeon at HVMC and, for cross coverage purposes, at BRMC and JCMC.

Cardiothoracic surgery will be added to the list of physician specialties exempted from section 5.04(e). **This requested waiver is granted.**

6. The granting of privileges at HVMC and JCMC for coverage purposes to a cardiothoracic surgeon who has been previously approved by your office to be hired by CVA in Bristol, TN, with privileges at BRMC.

Cardiothoracic surgery specialty will be added to the list of specialties exempted from section 5.04(e). **The requested waiver is granted.**

7. The granting of privileges at HVMC and BRMC for coverage purposes of cardiothoracic surgeons who may periodically need to cover for patients at HVMC and BRMC.

Cardiothoracic surgery specialty will be added to the list of specialties exempted from section 5.04(e). **The requested waiver is granted.**

While the Department takes our oversight role very seriously related to the COPA, we also see ourselves as partners with Ballad Health in working through the various issues that will invariably arise in this unprecedented process. Ballad's success is imperative to the residents of Northeast Tennessee and Southwest Virginia, and we want to do our part to help make that possible.

Please let my staff know if you have any additional questions or need further clarification.

Sincerely,



Lisa M. Piercey, MD, MBA, FAAP Commissioner,
Tennessee Department of Health

Cc: Tim Belisle, General Counsel
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