

COPA MONITOR ANNUAL REPORT

YEAR ENDING JUNE 30, 2020

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March 24, 2021

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I. INTRODUCTION AND BACKGROUND

A Certificate of Public Advantage (COPA) was granted by the Tennessee Department of Health (TDH) when it determined that the benefits outweighed the public disadvantages associated with a reduction in competition that could result from the merger of Mountain States Health Alliance (MS) and the Wellmont Health System (WM) into a new company named Ballad Health. With the issuance of the COPA, TDH and the Attorney General's Office became responsible for regulating and actively supervising Ballad Health to ensure the merger provided a public advantage. In effect, competition was replaced with regulation.

A Terms of Certification (TOC) document was negotiated and signed as part of the COPA process that outlines the procedure for active supervision of Ballad Health by the State of Tennessee. This oversight includes the computation of a numerical score for three Sub-Indexes and a pass or fail score for a fourth Sub-Index. When combined, the indexes represent the Index, a composite score. The purpose of this Index is to provide an objective evaluation of whether there is a continuing public advantage from the merger by tracking progress in four categories:

1) Population Health; 2) Access to Health Services; 3) Economic; 4) Other (Quality). This Index is to be computed annually for 10 years. In this report, I have provided to the TDH my recommended Index score for the fiscal year ending June 30, 2020, the second full year under the TOC.

The TDH will consider the Index score; Ballad Health's degree of compliance with the TOC; Ballad Health's performance trends; and, other factors to make an annual determination of the ongoing public advantage of Ballad Health to the Northeast Tennessee and Southwest Virginia regions.

In addition to the objective evaluation system by which TDH will track the ongoing public advantage provided by Ballad Health, there are other elements of active supervision. The active supervision structure includes three distinct functions: 1) COPA Compliance Office; 2) Local Advisory Council; 3) COPA Monitor. The COPA Monitor is responsible for evaluating the continued public advantage of the COPA by monitoring Ballad Health's compliance with the TOC, and by collaborating with the TDH to evaluate performance against the Index. The COPA Monitor conducts audits; reviews reports from the Compliance Office, Local Advisory Council, and Ballad Health; and makes recommendations to the Commissioner of Health, the TDH, and the Attorney General. This report is the third COPA Monitor Annual Report that, pursuant to the TOC, includes the following: the Index score, updates on compliance with the COPA and the TOC, status of existing corrective actions, any recommended enforcement mechanisms if necessary, any additional findings, and any other information requested by the Commissioner, TDH and the Attorney General.

II. FORCE MAJEURE EVENT

On March 12, 2020, Governor Bill Lee issued Executive Order No. 14 declaring a state of emergency in Tennessee to facilitate the treatment and containment of the COVID-19 pandemic. Thereafter, on March 13, 2020, President Trump issued a declaration proclaiming that the COVID-19 outbreak in the United States constitutes a national emergency beginning March 1, 2020. The declaration of state and national emergencies due to the COVID-19 pandemic constitute a “Force Majeure Event” for purposes of the TOC. The Commissioner for the Tennessee Department of Health and the Tennessee Attorney General temporarily suspended through June 30, 2020, portions of articles three, four, five and six of the TOC, which are still in effect at the publication of this report due to the ongoing pandemic. Details on the temporary suspension of certain articles in the TOC are posted on the TN Department of Health website, and can be accessed here:

<https://www.tn.gov/content/dam/tn/health/documents/copa/2020-03-31%20Temporary%20Suspension-Letter%20-executed.pdf>.

Much of this report is based on the period of July 1, 2019, through February 29, 2020.

III. INDEX SCORE

As part of the TDH’s exercise of active supervision, an Index to annually track demonstration of ongoing public advantage is computed. The Index consists of four Sub-Indexes that correspond to categories of potential benefits and potential disadvantages from the Ballad Health merger.

Economic Sub-Index

The Economic Sub-Index annually results in either a pass or fail score. It consists of measures to verify a minimization of economic disadvantages resulting from a reduction in competition or degree of compliance with the TOC. To determine the pass or fail score, the most significant considerations are discussed below (Note: the summary below is not an all-inclusive list of the considerations for the Economic Sub-Index pass or fail score).

- Commercial payor contracting
 - a. Ballad Health is required to limit annual increases in the amount payors pay for services that were provided for their enrollees to a maximum amount as defined in the TOC. Ballad Health must negotiate in good faith with any payor with business in the Ballad Health service area. Ballad Health cannot limit in any manner the contracting by any provider that is independent of Ballad Health.
 - b. Ballad Health executed 11 contracts with payors for the first time during fiscal year 2020. Additionally, Ballad Health amended a number of contracts with existing payors. The terms and conditions for all new and amended payor

contracts were in compliance with the TOC and final draft of Addendum One* to the TOC. The provisions of draft Addendum One* to the TOC require the COPA Monitor to complete testing of payor contract pricing after the payor contract has been effectuated and actual payments are available for testing. The required testing will be completed in fiscal year 2021.

- c. Ballard Health effectuated changes to its inpatient and outpatient charges in fiscal year 2020. The COPA Monitor reviewed the charge increase and concluded that it was compliant with the TOC.
 - d. The draft Addendum One* to the TOC allows a payor to sign a statement attesting to compliance with the terms and conditions of the draft Addendum One* to the TOC. Two payors signed an attestation statement.
- Ballard Health must provide the TDH and the COPA Monitor a list of competitors for ancillary services and post-acute care services. The lists of competitors were provided by Ballard Health.
 - Discharged patients must be given a choice of a Ballard Health provider and independent providers for ancillary and post-acute care services. There are some exceptions to this provision when Ballard Health is providing services under the provisions of a risk-based, value-based, or shared-savings payor contract. Ballard Health has a process in place at each hospital to distribute a list of all providers, owned and independent, of outpatient and post-acute services to patients when they are admitted.
 - No more than thirty-five percent (35%) of the physicians practicing in the urban hospitals for designated areas of physician practice can be employed by Ballard Health. There are exceptions to the rule, and Ballard Health has requested waivers to the 35% rule, and they were granted by the TDH. The purpose of the TOC rule is that: "In no event should the number of employed physicians in any specialty reach a level that would materially and adversely affect competition." Ballard Health has complied with the restriction to the percentage of doctors who can be employed.
 - Ballard Health cannot place restrictions on vendors from doing business with entities that compete with Ballard Health, which is one of several restrictions with respect to vendors and suppliers. No vendor has filed a complaint with the COPA Monitor that these provisions were violated by Ballard Health.

The COPA Monitor recommends to the TDH that Ballard Health be given a pass score for the Economic Sub-Index.

* Revisions to Addendum One were recently agreed to by the State and Ballard Health. Posting of the executed revised document is expected in Spring of 2021.

Population Health

It is the intent of the TDH that Ballad Health invests its resources with the goal of improving the overall community health status consistent with the regional goals established by the TDH. An improvement in the overall health status of residents in the Ballad Health service area would be a strong objective indicator of public advantage. The Population Health Sub-Index was designed to objectively measure progress toward the goal of improving community health.

According to the TOC, the Population Health Sub-Index is 50% of the Score for Ballad Health. The 50 percentage points will be earned in this second fiscal year based on: 1) investing \$1,333,333 in the approved Population Health Plan (25% of the Population Health Sub-Index Score); 2) achieving 46 process measures from the State approved FY2020 Implementation Roadmap for the Population Health Plan (75% of the Population Health Sub-Index Score).

The TOC Population Health investment requirement for year two is \$2,000,000. However, the spending commitment has been adjusted for the Force Majeure period to \$1,333,333. Ballad Health exceeded its Population Health spending commitment of \$1,333,333 in fiscal year 2020.

The Population Health Plan includes 46 process measures, and Ballad Health achieved 42 of the 46 for 91% of the process measures. An example of a Population Health process measure that was achieved in fiscal year 2020 is: "Expand additional Ballad Health Team Member wellness initiatives through B Well."

Based on the above described calculations, which were set out in the TOC, the COPA Monitor recommends the TDH awarding 47 of the 50 possible percentage points for the Population Health Sub-Index.

Access to Care.

To improve the health status of the citizens in the Ballad Health service area, there must be an improvement in access to health care and preventative services. According to the Institute of Medicine, the primary United States government agency responsible for public health research, access to health care means, "the timely use of personal health services to achieve the best health outcomes." Much of the service area is rural; there is virtually no public transportation; and roads, especially during inclement weather, can be difficult to travel. To objectively measure improvement in access to healthcare and preventive services, an Access to Care Sub-Index was designed. The Access to Care Sub-Index measures the characteristics of the health delivery system as well as the utilization of health services and consumer satisfaction.

The Access to Care Sub-Index is 30% of the Final Score for Ballad Health. For Year Two, these percentage points are earned by Ballad Health based on maintaining or exceeding baseline performance for 27 target access measures, which are weighted to reflect their importance.

Ballad Health achieved 24 of 27 target quality measures. An example of a target quality measure is “Screening - Breast Cancer.”

Based on the application of the Access Sub-Index weights as described in the TOC, the COPA Monitor recommends that TDH award 27 of the 30 possible percentage points for the Access to Care Sub-Index.

Other (Quality)

Quality of care delivered by Ballad Health is an important component of the TDH’s evaluation of public advantage. The Other Sub-Index was designed to measure continuous quality improvement, and it consists of measures to evaluate the quality of hospital and hospital-related care provided to the patients Ballad Health serves. The Institute of Medicine has defined the quality of health care as “the degree to which health services for individuals and populations increase the likelihood of desired health outcomes and are consistent with current professional knowledge.”

The Other Sub-Index measures include metrics on quality and consumer satisfaction around the following domains: performance of key health system divisions; payer performance; employer performance; and scale, spread, and sustainability. There are two sets of measures in the Other Sub-Index: 1) The Target Quality Measures, which are 17 measures where Ballad Health should show improvement and 2) Quality Monitoring Measures, which are 83 measures for which Ballad Health is required to report performance in order to provide a broad overview of system quality. An example of a Target Quality Measure is “Postoperative Hip Fracture Rate.”

Ballad Health was required to improve or maintain performance for each Target Quality Measure so that Ballad Health’s performance remains either above the performance during the baseline year or the current national and/or States’ estimates of Target Quality Measures, whichever is associated with better quality outcomes.

The Other Sub-Index is 20% of the Final Score for Ballad Health. Ballad Health met the required improvement standard for 13 of 17 Target Quality Measures and the reporting standard for all of the Quality Monitoring Measures, and Ballad Health reported its performance on all of the 83 monitoring measures.

Based on the application of the Other (Quality) measures as defined by the TOC, the COPA Monitor recommends the TDH awarding 19 of 20 possible points for the Other (Quality) Sub-Index.

Summary of Index Score

The COPA Monitor recommends the following to the TDH for the Index score for fiscal year 2019:

Economic Sub-Index	Pass
Population Health	47 points
Access to Care	27 points
Other	<u>19</u> points
TOTAL	92 (rounded) points out of a possible 100 points

The Index Score is one consideration that the TDH considers to make its annual determination of public advantage from the operation of Ballad Health. A passing economic Sub-Index score and a composite score of 92 for the other three sub-indexes is an indication of clear and convincing advantage to the public from the operation of Ballad Health.

IV. COMPLIANCE WITH THE COPA AND TERMS OF CERTIFICATION, CORRECTIVE ACTIONS, AND ENFORCEMENT MECHANISMS

COPA Compliance Office Review of Possible Violations of COPA and Terms of Certification

The COPA Compliance Officer - Annual Report for FY 2020 (which is posted on the TN Department of Health website and can be accessed here:

<https://www.tn.gov/content/dam/tn/health/documents/copa/COPA-Compliance-Office-Annual-Report-for-FY2020.pdf>) discusses two violations of the TOC, charity care and spending, both are discussed below.

COPA Monitor Review of Possible Violations of the COPA and Terms of Certification

- Charity Care

The TOC requires that charity care provided by Ballad Health each year must be greater than a base amount increased for inflation. The base amount of charity care is the amount of charity care on IRS Form 990 for fiscal year 2017. If the charity care provided by Ballad Health in any year does not meet the required amount, the COPA Monitor may waive the noncompliance with the charity care requirement. The amount of charity care provided in fiscal year 2020 was below the minimum amount required by the TOC for several reasons. The most material reason was that the Commonwealth of Virginia expanded its Medicaid program; therefore, a number of Virginia residents whose care would have been classified as charity in 2017 qualified for Medicaid in 2020. Additionally, the Commonwealth of Virginia increased the amount paid by Medicaid for services, and thus the loss Ballad Health incurred for treating Virginia Medicaid patients was reduced. Based on these changes, and other related ones, the COPA Monitor waived the Ballad Health charity care requirement for fiscal year 2020. The waiver letter that includes additional details is posted on the TN Department of Health website and can be

accessed here: <https://www.tn.gov/content/dam/tn/health/documents/copa/2020-12-21-L-Fitzgerald-on-Charity-Care.pdf>.

- Monetary Obligations

The TOC requires that Ballad Health spend a minimum of \$308,000,000 over 10 years on initiatives for expanded access to healthcare services, health research and graduate education, population health improvement, and a region-wide health information exchange. Only new and incremental capital and operating expenditures paid by Ballad Health pursuant to state approved plans count toward satisfaction of the spending commitments.

The fiscal year 2019 monetary obligation was not met by Ballad Health. To cure the noncompliance of the monetary obligation, the Tennessee Department of Health Commissioner and Tennessee Attorney General required Ballad Health to establish a fund on its balance sheet to reflect its unmet monetary obligation. Ballad Health established a Board Designated fund for the fiscal year 2019 monetary shortfall. Additionally, Ballad Health was required to submit a revised Children's Health Plan to the TDH. At this time, the revised Children's Health Plan has not been submitted; therefore, the noncompliance for the spending shortfall for 2019 has not been cured.

The fiscal year 2020 commitment as set out in the TOC was \$18,000,000. Spending commitments were temporarily suspended for four months in fiscal year 2020 due to the Force Majeure event. Therefore, the fiscal year 2020 spending commitment was \$12,000,000 for the non-suspended eight months. Ballad Health did not spend \$12,000,000 in fiscal year 2020 as required by the TOC. Ballad Health notified the Tennessee Department of Health in its amendment to its fiscal year 2020, second quarter report, that Ballad Health did not anticipate achieving the spending obligation for fiscal year 2020. Additionally, Ballad Health gave notice on October 14, 2020, by letter from the Chairman and CEO, of the spending shortfall for fiscal year 2020. (These notifications are posted on the TN Department of Health website and can be accessed here: <https://www.tn.gov/content/dam/tn/health/documents/copa/2021-03-01-and-2020-02-28-Amended-Q2-Fiscal-Year-2020-Language-for-Item-G.pdf> and here: <https://www.tn.gov/content/dam/tn/health/documents/copa/2020-10-14-Ballad%27s-Response-to-TN-re-spending-shortfall-noncompliance.pdf>, respectively.) The action required by Ballad Health to cure the noncompliance with the fiscal year 2020 monetary obligation is under consideration by the State at this time.

V. COPA LOCAL ADVISORY COUNCIL (LAC) 2020 ANNUAL REPORT

There are no recommendations in the Local Advisory Council 2020 Annual Report directed to the COPA Monitor.

VI. ADDITIONAL FINDINGS

The COPA Compliance Office 2019 Annual Report discloses a material adverse event. It states, “A jury returned a verdict of \$58 million against Wellmont Health System in the lawsuit filed by Highlands Physicians, Inc.; that verdict is under appeal.” The verdict was upheld by the Tennessee Court of Appeals in 2020.**

VII. RECOMMENDATIONS

Follow-up on COPA Monitor recommendations to Ballad Health included in the fiscal year 2019 Annual Report

- In conversations with individuals over the last year about various Ballad Health topics, the COPA Monitor consistently heard concerns about a need for clearer communications. For example, a member of the community in the Ballad Health service area suggested that any communication about clinical matters should be delivered by a physician and not by an administrator. An important aspect of communications is listening. A constant refrain is that community residents do not feel that they are being listened to by Ballad Health. These comments are perceptions and not necessarily reality. **The recommendation is for Ballad Health to look for more ways to actively listen.**

It is notable that Ballad Health has communicated effectively throughout the community as the pandemic progressed. Clinical leaders took the lead in communicating clinical matters. There were weekly press conferences, and daily COVID scorecards were sent to community leaders, news outlets, and social media sites.

- There have been changes in the Ballad Health service area that were not predictable when the Children’s Health Plan was written. The TOC describes a process for proposing changes to the Plans. **The recommendation is that Ballad Health review the Children’s Health Plan and propose Plan changes to the COPA Monitor as permitted by the TOC as soon as possible.**

No Plan changes or amendments to the Children’s Health Plan were proposed to the COPA Monitor in fiscal year 2020. Additionally, the State required Ballad Health to submit a revised Children’s Health Plan to the TN Department of Health as one of two requirements to cure the fiscal year 2019 spending shortfall. The revised Children’s Health Plan has not been submitted at this time.

** On March 17, 2021, the Tennessee Supreme Court ruled that it would not review the appellate court’s decision. Ballad Health will be required to pay the \$58 million jury verdict plus attorney’s fees to Highland Physicians, Inc. This item was included as a liability in the Ballad Health June 30, 2020 audited financial statements.

- The Ballard Health Annual Report was prepared consistent with the TOC requirements. However, the report contains a significant amount of technical data that requires a thorough knowledge of health care to analyze and is difficult for the general public to understand. Therefore, to understand such a report is difficult. **The recommendation is that the State and Ballard Health collaborate to make the 2020 report more understandable for the citizens.**

Ballad Health and both states worked together to change the Ballard Health Annual report for fiscal year 2020. I believe the fiscal year 2020 Ballard Health Annual Report was much improved over the report in 2019. For further clarity, Ballard Health and the State will collaborate to make additional changes to the 2021 Ballard Health Annual Report.

- Since the Commonwealth of Virginia expanded its Medicaid program to provide coverage for patients who historically had been classified as charity, the Ballard Health charity care has been permanently reduced. It is highly probable that Ballard Health will never provide charity care above the base amount established in the TOC. **The recommendation is to reduce the TOC charity care minimum requirement that reflects the permanent changes made by the Commonwealth of Virginia.**

The TOC charity care minimum is being recomputed, and the new minimum will be based on the IRS Form 990 for fiscal year 2020. The filing of the IRS Form 990 is pending. The COPA Monitor wrote a waiver of the minimum charity requirement for fiscal year 2020, which is posted to the TN Department of Health website and can be accessed here:

<https://www.tn.gov/content/dam/tn/health/documents/copa/2020-12-21-L-Fitzgerald-on-Charity-Care.pdf>

The COPA Monitor has not received any complaints from the community suggesting that access to care at Ballard Health has been restricted based on the financial status of patients. The Ballard Health Financial Assistance Policy is posted on Ballard Health’s website. The Financial Assistance Policy is consistent with industry standards.

VIII. INFORMATION REQUESTED BY THE TENNESSEE DEPARTMENT OF HEALTH

The fiscal year 2019 Tennessee Department of Health Annual Report included the following recommendation to the COPA Monitor: “Department requests that the COPA Monitor review pre- and post- consolidation pricing. According to Ballard’s Annual Report, urgent care facilities were consolidated such that services were moved to the urgent care facility “that had lower pricing and thus saved consumers significant dollars.” This is a positive outcome that TDH would like the COPA Monitor to verify.”

I reviewed the pre-consolidation and post-consolidation pricing for the urgent care centers that

were consolidated. The review I completed supports the statement made in the Ballad Health Annual Report.

Fiscal year 2020 COPA Monitor recommendations

- Ballad Health agreed to be regulated in return for the Certificate of Public Advantage being issued that permitted an inpatient monopoly. To document the regulations, Terms of Certification and the Virginia Order were signed for Tennessee and Virginia, respectively. These two documents are very similar, but there are differences that create extra work and expense for everyone involved. An example of a difference is that the charity guidelines are not exactly the same between the two states. Additionally, for Tennessee, there is a detailed scoring system that results in a numerical score indicating the degree of public advantage from the issuance of the Certification of Public Advantage. For Virginia, the evaluation of public advantage is a pass or fail decision made by the State Health Commissioner. **The recommendation is that leadership from both states work with Ballad Health leadership to modify the regulatory agreements to reduce differences in the regulations between each state. The objective of this recommendation is not to eliminate or minimize any regulation, but rather to make existing regulations more consistent between the two states.**
- The active supervision structure for Ballad Health includes a Local Advisory Council (LAC). The LAC has three duties and responsibilities including input to the TDH on how money deposited into the Population Health Initiatives Fund should be invested. In addition, the LAC hosts an annual public meeting when comments on the Ballad Health Annual Report and the ongoing performance of Ballad Health are presented. The final responsibility is to publish the Local Advisory Council Annual Report about community feedback from the public meeting.

To achieve more efficiency with a majority of the duties and responsibilities of the LAC, the TDH should host an annual public meeting and include in the TDH Annual Report the comments from its public meeting rather than asking community representatives to perform these functions. The Population Health Initiatives Fund obtains funding from remedial contributions levied on Ballad Health by the TDH. The TDH has not levied any remedial contributions on Ballad Health at this time. If the TDH requires a Ballad Health remedial contribution in the future, the LAC should advise the TDH on how to invest the money. However, to perform this duty, it would necessitate the formation of the LAC on an ad hoc basis.

I recommend a revision to the TOC requiring the TDH to perform the duties set forth for the LAC. Furthermore, I recommend the TOC require the formation of a LAC on an ad hoc basis for advice on the investment of the Population Health Initiatives Fund if money is available in the Fund.

IX. SUMMARY

Fiscal year 2020 is the second full fiscal year of operations for Ballad Health under the regulations and rules of the COPA and TOC. However, a number of TOC requirements were temporarily suspended as a result of the Force Majeure event. The recommended Index score of 92 is an indication of clear and convincing advantage to the public from the merger that created Ballad Health. There were two violations of the TOC; charity care and spending. A waiver was written for the charity care shortfall from the minimum dollar requirement. The 2019 spending shortfall has not been cured, and the cure for the 2020 spending shortfall has not been determined by the State.

Overall, I would note that the management of Ballad Health is responsive to my questions and is cooperative with me in all respects.

Larry L. Fitzgerald
COPA Monitor