

COPA MONITOR ANNUAL REPORT

YEAR ENDING JUNE 30, 2022

LARRY L. FITZGERALD, COPA MONITOR

March 21, 2023

Tennessee Department of Health Commissioner Ralph Alvarado, MD, FACP

Attorney General, Jonathan Skrmetti

Deputy Attorney General, Kevin Kreutz

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Joe Hilbert, Deputy Commissioner Virginia Department of Health

Alan Levine, Ballad Health, Executive Chairman, President and Chief Executive Officer

Dr. Brian Noland, Vice Chair/Lead Independent Director

David Lester, Ballad Health Board Treasurer

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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 would 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. The TOC can be accessed here:

<https://www.tn.gov/content/dam/tn/health/documents/copa/Executed-Second-Amended-and-Restated-Terms-of-Certification-2021-04-27.pdf>

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 Sub-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 the life of the COPA.

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 two distinct functions: 1) COPA Compliance Office and (2) 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 and Ballad Health; and makes recommendations to the Commissioner of Health, the TDH, and the Attorney General.

This report is the fifth 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 constituted a national emergency beginning March 1, 2020. The declaration of state and national emergencies due to the COVID-19 pandemic constituted a “Force Majeure Event” for purposes of the TOC. The Commissioner for the Tennessee Department of Health and the Tennessee Attorney General temporarily suspended portions of articles three, four, five and six of the TOC. The temporary suspension was lifted for some provisions as of January 1, 2022 and for all remaining provisions as of July 1, 2022. 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>.

<https://www.tn.gov/content/dam/tn/health/documents/copa/2021-12-03-AG-and-TDH-Reasonable-Recovery-Letter-to-Ballad.pdf>

III. INDEX SCORE

As part of the TDH’s exercise of active supervision, an Index Score to annually track demonstration of ongoing public advantage is computed. Due to the temporary suspension of some articles in the TOC due to the Force Majeure Event, the only score this year that will be measured is the Economic Sub-Index. The Economic Sub-index consists of measures to verify a minimization of economic disadvantages resulting from a reduction in competition or degree of compliance with the TOC. Ballard Health’s ongoing compliance with the provisions of TOC Article V and Addendum One to the TOC constitutes the metrics within the Economic Sub-index. Some portions of TOC Article V have been temporarily suspended. The letter that authorized a change to the Index Score for fiscal year 2022 is posted on the TN Department of Health website, and can be accessed here:

<https://www.tn.gov/content/dam/tn/health/documents/copa/2021-10-27-TDH-letter-to-Ballad-RE-suspension-period-scoring-FY21-and-FY22.pdf>

The parts of TOC Section V that were not temporarily suspended address relationships and contractual obligations with payors, physicians, and vendors. Addendum One was only suspended to the extent that payors agreed to voluntarily prepay, or otherwise, financially support Ballard’s public emergency relief efforts. The primary purpose of Addendum One is to

limit the increase in payment rates to Ballad from payors to a percentage that is primarily based on the Centers for Medicare and Medicaid Services Market Basket Inflation Index. Compliance with the parts of Section V that were not suspended and Addendum One determines the fiscal year 2022 pass/fail score for the Economic Sub-Index.

Addendum One, COPA Managed Care Contract Pricing Limitations and Excess Payment Testing, requires the COPA Monitor to approve Ballad Health's payor contracts that are newly signed or renegotiated after February 1, 2018. Ballad Health complied with the pricing limits of Addendum One for fiscal year 2022. A separate report stating this conclusion was issued, "Annual Review of Terms of Certification - Addendum One," which is attached as Exhibit A.

In addition to pricing limitations for payor contracts, TOC Article 5.02:

- Requires Ballad Health to negotiate in good faith with all payors that are selling or plan to sell medical insurance in the Ballad Health service area.
- Provides that Ballad Health cannot require a payor to make it an exclusive provider for its products.
- Encourages Ballad Health to sign payor contracts that include provisions for improved quality and other value-based incentives.
- Prohibits Ballad Health from bargaining or insisting on a "most favored nations" clause in payor contracts.

The intent of TOC Article 5.02 is to prohibit Ballad Health from using its monopolistic power to discriminate against medical insurance payors that are selling products in the service area or those that are beginning to sell medical insurance products in the service area. Furthermore, it prohibits Ballad Health from discriminating against providers that are not owned or employed by Ballad Health.

All the provisions of TOC Article 5.02 were reviewed with the Ballad Health Chief Administrative Officer who certified that each of the provisions had been followed. There have been no complaints filed with the COPA Monitor from any medical insurance payor. There is no evidence that Ballad Health has not complied with TOC Article 5.02.

TOC Section 5.05 established obligations for Ballad Health regarding physician services. In summary, the section has the following provisions:

- It prohibits Ballad Health from restricting nonemployed physicians from practicing in facilities not owned by Ballad Health.
- It prohibits Ballad Health from requiring a covenant not to compete against Ballad Health except with employed physicians, and then only during the term of their employment.
- It provides that Ballad Health will provide an open medical staff offering equal access to all qualified physicians according to the criteria of the Joint Commission and the medical staff bylaws.

In summary, the provisions of TOC Section 5.05 are written to protect independent providers from harmful actions by Ballad Health.

No complaints have been filed with the COPA Monitor from any physician that were determined to be a violation of the Terms of Certification.

There is no evidence that Ballad Health has not complied with TOC Section 5.05 - Physician Services.

Ballad Health cannot place restrictions on vendors from doing business with entities that compete with Ballad Health, which is one of several restrictions applicable to vendors and suppliers. No vendor has filed a complaint with the COPA Monitor that these provisions were violated by Ballad Health.

There is no evidence at this time that Ballad Health has not complied with the remaining non-suspended parts of TOC Section 5.

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

IV. COMPLIANCE WITH THE COPA AND TERMS OF CERTIFICATION

- Complaints filed with the COPA Compliance officer or the COPA Monitor

One Complaint was filed with the COPA Compliance officer that alleged the COPA and Terms of Certification had not been followed. After a review, it was determined that the complaint was not a violation of the COPA and the Terms of Certification.

Other complaints were filed that were determined to be related to subjects that were not in the scope of the COPA or Terms of Certification. However, each complaint was forwarded to the appropriate state agency or department of Ballad Health for followup.

- 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 2022 was below the minimum amount required by the TOC due to changes made in the Medicaid program in both states. The Commonwealth of Virginia expanded its Medicaid program after 2017; therefore, a number of Virginia residents whose care would have been classified as charity in 2017 qualified for Medicaid in 2022. Additionally, the Commonwealth of Virginia increased the amount paid by Medicaid for services by a significant amount after 2017, and thus the loss Ballad Health incurred for treating Virginia Medicaid patients was reduced. Additionally, payments made by TennCare to Ballad in 2022 were significantly greater than payments made in 2017. Based on the analysis provided by Ballad, I approve the request to waive the Terms of Certification minimum Total Charity Care requirement for fiscal year 2022.

- Monetary Commitment

The TOC requires that Ballad Health spend a minimum of \$308,000,000 (the monetary commitment) over 10 years on initiatives in six plan areas: Behavioral Health Services, Children's Services, Rural Health Services, Health Research and Graduate Medical Education, Population Health Improvement, and 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 monetary commitment.

Ballad Health computed a baseline spending amount for each of the six plan areas. The baseline is the average annual spending for the three years that ended June 30, 2017, in each of the six plan areas. Spending toward the monetary commitments is defined as being incremental spending after the baseline spending for the fiscal year has been met. Ballad Health exceeded its baseline spending obligations for each of the six plan areas in fiscal years 2019

and 2020. However, the baseline spending obligation was not met for Rural Health Services, Population Health Improvement, and Region-wide Health Information Exchange for fiscal year 2021. Further, the baseline spending obligation was not met for Rural Health Services and Region-wide Health Information Exchange for fiscal year 2022.

Ballad Health is required to prepare and submit for state approval a three-year plan to achieve goals and invest the monetary obligation for each of the six plan areas. The plans approved by the state in fiscal year 2019 expired on June 30, 2021. However, since the monetary obligations were under temporary suspension, the state permitted Ballad to refresh the three-year plans for fiscal year 2022 and delay the submitting of new three year plans until late spring of 2022. These six plans for the three-year period ending June 30, 2025, were submitted by Ballad Health and approved by the state in fiscal year 2023.

The actual spending toward the baseline spending obligation and the monetary obligations reported by Ballad Health were audited by the Internal Audit Department. The COPA Monitor reviewed the work of the Internal Audit Department and performed additional verification work. The conclusions were that the monetary obligations for Children's Services, Population Health Improvement, and Health Research and Graduate Medical Education were met through June 30, 2022. However, the monetary obligations for Rural Health Services, Behavioral Health Services, and Region-wide Health Information Exchange were not met by June 30, 2022.

Ballad Health had a monetary obligation in fiscal year 2022; however, the monetary obligations were temporarily suspended until July 1, 2022. Therefore, the COPA Monitor does not have a recommendation for remediation of the spending shortfall.

V. CORRECTIVE ACTIONS

There are no corrective actions recommended.

VI. ENFORCEMENT MECHANISMS

No enforcement mechanisms are required or suggested.

VII. RECOMMENDATIONS

Follow-up on recommendations from prior year in COPA Monitor Annual Reports that remain open as of June 30, 2022 are the following:

In the COPA Monitor Annual Report for 2020, a recommendation was made to reduce the TOC charity care minimum requirement and base the new requirement on IRS Form 990 for 2020. This recommendation has not been completed.

In the COPA Monitor Annual Report for 2020, a recommendation was made that Virginia and Tennessee work with Ballad Health to reduce the differences in the regulations between the two states. The objective of the recommendation was not to eliminate or minimize any regulation, but to make existing regulations more consistent between the two states. Work is progressing on the recommendation.

2022 COPA Monitor recommendations:

Due to the Force Majeure Event, a number of the TOC provisions were temporarily suspended for 2022. There are no new recommendations for 2022.

VIII. SUMMARY

The only part of the Index Score that is measured for 2022 is the Economic Sub - Index. The recommendation is that Ballad Health be awarded a passing score for the Economic Index.

Ballad Health was not in compliance with the charity care minimum expense requirement. Based on a review of the subject matter, the COPA Monitor waived the charity care TOC provisions for 2022.

Ballad Health, like virtually all hospitals, was faced with operational and financial challenges in fiscal year 2022 due to the pandemic. Certain provisions of the TOC were temporarily suspended since state leadership made the decision that the public would be more advantaged if Ballad Health leadership was relieved from several TOC provisions on a temporary basis.

The temporary suspension of certain provisions of the TOC were all lifted on July 1, 2022.

Larry L. Fitzgerald
COPA Monitor

EXHIBIT A
ANNUAL REVIEW OF TERMS OF CERTIFICATION - ADDENDUM ONE

TO: Commissioner Morgan McDonald, MD, MPH, FACP, FAAP
710 James Robertson Parkway
Nashville, TN 37243

Janet Kleinfelter, Deputy Attorney General
P. O. Box 20207
Nashville, TN 37202

Joe Hilbert, Deputy Commissioner Virginia Department of Health
109 Governor Street
Richmond, VA 23219

DATE: January 9, 2023

SUBJECT: Annual Review of Terms of Certification - Addendum One

FROM: Larry L. Fitzgerald, Tennessee COPA Monitor

In order to protect patients, employers, payors and others that utilize the services of or contract with Ballad, The Terms of Certification (TOC) provides limits upon price increases for facility, physician, and other services. An important role for the Tennessee COPA Monitor is to monitor Ballad's payor contracts that are newly-signed or renegotiated after February 1, 2018. The Tennessee COPA Monitor performs this work on behalf of Tennessee and Virginia. However, the work is completed with collaboration with the Virginia Monitors.

The monitoring process occurs prospectively before a payor contract or contract amendment has been signed; concurrently, during the term of the payor contract; and, retrospectively, one year past the beginning of a new or renegotiated payor contract. Payor contracts are classified as Exempt, Value-based, Attestation, or Measured.

Exempt payers are those payors that do not negotiate any part of their managed care agreements or payment rates with Ballad. These are generally government-based payor contracts for programs such as Medicare. The rates are set by a government authority and Ballad, like all providers, accepts the rates.

Value-based payors are those payors with no fixed price increases. Price increases to Ballad are totally dependent on the achievement of mutually negotiated quality and/or cost goals. In effect, if Ballad had realized an increase in prices from a Value-based payor, the increase in

pricing to the community would be offset through reduced cost from improved quality and more appropriate utilization of facilities.

An annual list of value-based payments received by Ballad is submitted annually by Ballad to the Tennessee Department of Health and the Virginia Department of Health.

Attestation Payors are those payors that execute a statement attesting that their new or amended payor contract with Ballad includes price increases that are below the annual increase to prices established by the TOC. Most of the large payors that are not exempt or value-based have signed the attestation statement. The COPA Monitor maintains copies of the annual attestation statements from each payor.

Measured payors are those payors that do not meet the definition of one of the three classifications listed above. All payors are measured payors unless the payor meets the specific definition of one of the groups discussed above.

The COPA Monitor reviews new-measured payor contracts and contract amendments following three steps. First, contracts are reviewed and approved by the COPA Monitor before Ballad signs a new payor contract or amendment to a payor contract. In fiscal year 2022, the COPA Monitor gave prospective approval for approximately eight new or amended payor contracts.

Second, the COPA Monitor reviews a sample of payor payments after a new or amended payor contract has gone into effect to determine that the price increase approved by the COPA Monitor was in fact effectuated.

Third, the COPA Monitor completes a retrospective annual review of the collections under each new and amendment payor contract. The objective of the third step is to provide further assurance that price increases were below the price limit established by the TOC.

The Ballad Chief Financial Officer certified Ballad's compliance with the TOC section titled Managed Care Contracts and Pricing Limitations.

Based on the reviews listed above that were completed in fiscal year 2022, Ballad complied with the pricing limits in the TOC for fiscal year 2022.

EXHIBIT B

2022 CHARITY CARE WAIVER

Larry L. Fitzgerald
COPA Monitor
6689 Hastings Lane
Franklin, TN 37069

January 13, 2023

Morgan McDonald, MD, FACP, FAAP
Interim Commissioner, Tennessee Department of Health
700 James Robertson Parkway
Nashville, TN 37243

Dear Dr. McDonald:

The Terms of Certification requires Ballad to provide Total Charity Care each year in an amount greater than Base Charity Care defined as the combined amount of charity care provided by Wellmont Health System and Mountain States Health Alliance in 2017 increased by inflation to the year being measured. If Total Charity Care is below Base Charity Care for any annual reporting period, the Terms of Certification (TOC) allows Ballad to include in its Annual Report an explanation of the reduction. The COPA Monitor will provide a decision about the appropriateness of the explanation provided by Ballad.

Ballad reported to the COPA Monitor that fiscal year 2022 Total Charity Care is estimated to be \$73,000,000. The Base Charity Care minimum requirement for fiscal year 2022 is \$108,000,000. Ballad fell short of its minimum Total Charity Care obligation by \$35,000,000. Ballad requested a waiver from the Total Charity Care requirement for fiscal year 2022.

Tennessee and Virginia have made significant enhancements to their Medicaid programs since 2017. The Medicaid programs in both Virginia and Tennessee have expanded the number of patients who qualify for Medicaid and the amount of payment for Medicaid services rendered. There is a significant number of patients in 2017 who would have been classified as charity patients with no payment for services provided by Ballad. However, in 2022, these patients would have qualified for Medicaid. Additionally, Medicaid services were paid at a higher rate in 2022 compared to 2017, thus the loss from treating Medicaid patients was materially reduced. Therefore, the impact of changes to the Medicaid program in each state accounts for the reduction in Total Charity Care provided by Ballad in 2022 as compared to 2017.

In 2022, the Tennessee COPA Monitor and the Virginia COPA Monitor did not receive any complaints from citizens suggesting care was not provided or delayed because the patient was uninsured.

There will never be circumstances when a base year and a measurement year will be identical. Charity care will vary from year to year for numerous reasons, beyond the control of Ballad.

The Medicaid program changes from the base period of fiscal year 2017 to fiscal year 2022 have been so significant that I recommend the Base Charity Care minimum obligation be recomputed based on a recent year that is more representative of the current charity environment.

Based on the analysis provided by Ballad, I approve the request to waive the Terms of Certification minimum Total Charity Care requirement for fiscal year 2022.

Sincerely,

Larry L. Fitzgerald
COPA Monitor