

COPA MONITOR ANNUAL REPORT

YEAR ENDING JUNE 30, 2021

LARRY L. FITZGERALD, COPA MONITOR

May 19, 2022

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

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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. The TOC can be accessed here:

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https://www.tn.gov/content/dam/tn/health/documents/copa/Executed-Second-Amended-and-Rescinded-Terms-of-Certification-2021-04-27.pdf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

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 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 constituted 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, 2021, portions of articles three, four, five and six of the TOC. 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>.

## 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 Index Score for 2021 is a pass/fail score based completely on 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. Ballad 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 2021 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>

TOC Section 5.04 Competing Services was temporarily suspended in its entirety. Additionally, TOC Section 5.05 (e) was temporarily suspended. TOC Section 5.05(e) limits the percentage of Ballad Health-employed physicians practicing at Ballad Health hospitals in Washington and Sullivan Counties in Tennessee.

The parts of Section V that were not temporarily suspended address relationships and contractual obligations with payors, physicians, and vendor contracts. Additionally, no part of Addendum One was temporarily suspended. Compliance with the not suspended parts of TOC Section V and Addendum One determine the pass/fail score for Ballad Health for fiscal year 2021.

Addendum One, COPA Managed Care Contract Pricing Limitations and Excess Payment Testing, provides limits upon price increases for facilities, employed physicians, and other services. It requires the COPA Monitor to approve Ballad Health's payor contracts that are newly signed or renegotiated after February 1, 2018. After completing an annual review of compliance with Addendum One, the conclusion was that Ballad Health complied with the pricing limits of Addendum One for fiscal year 2021. 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 that are trying to begin selling 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 Financial 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 nonsuspended 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

Complaints were filed with the COPA Compliance officer and with the COPA Monitor. However, after each complaint was reviewed it was determined none of the complaints were potential COPA complaints. 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 2021 was below the minimum amount required by the TOC for several reasons. The most important reason was that 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 2021. 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. Based on these changes, and other related ones, the COPA Monitor waived the Ballad Health charity care requirement for fiscal year 2021. The COPA Monitor waiver letter is attached as Exhibit B.

- Monetary Commitment

The TOC requires that Ballad Health spend a minimum of \$308,000,000 (the monetary commitment) over 10 years on initiatives for expanded access to healthcare services, health research and graduate education, population health improvement, behavioral health services, children's services, 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 monetary commitment.

The fiscal year 2019 monetary commitment was not met by Ballad Health. To cure the noncompliance of the monetary commitment, the Tennessee Department of Health Commissioner and the Tennessee Attorney General required Ballad Health to establish a fund on its balance sheet to reflect its unmet monetary commitment. Accordingly, Ballad Health established a Board Designated Fund for the fiscal year 2019 monetary commitment shortfall. Additionally, Ballad Health was required to submit a revised Children's Health Plan to the TDH. A revised Children's Health Plan was submitted and approved after June 30, 2021.



The fiscal year 2020 monetary commitment as set out in the TOC was \$18,000,000. Monetary commitments were temporarily suspended for four months in fiscal year 2020 due to the pandemic, Force Majeure event. Therefore, Ballad's fiscal year 2020 monetary commitment was reduced to \$12,000,000, the monetary commitment for the non-suspended eight months. Ballad Health did not spend \$12,000,000 in fiscal year 2020 as required by the TOC. To remedy the fiscal year 2020 noncompliance with the TOC monetary commitment, Ballad increased the Board Designated Fund by the amount of the shortfall.

During the period under temporary suspension of the monetary commitment, March 1, 2020, through June 30, 2021, Ballad continued to make investments toward the 10-year monetary commitment, even though there was no monetary commitment for that period of time. The audit of the spending for March 1, 2020 through June 30, 2021 has not been completed at this time.

The total TOC monetary commitment of \$308,000,000 was not reduced due to the temporary suspension of the monetary commitment. The annual monetary commitment for the remaining seven years was increased with the total monetary commitment for the 10-years remaining unchanged.

#### **V. CORRECTIVE ACTIONS**

There are no corrective actions recommended; however, the audit of spending toward the monetary commitment for the period of March 1, 2020, through June 30, 2021, has not been completed.

#### **VI. ENFORCEMENT MECHANISMS**

No enforcement mechanisms are required or suggested.

## **VII. SUBSEQUENT EVENT**

On December 3, 2021, the Commissioner of the Tennessee Department of Health and the Attorney General and Reporter issued a letter that sets forth the timing for reinstatement of provisions of the TOC that had been temporarily suspended. The temporary suspension was lifted for some TOC provisions effective on December 31, 2021, and all other temporarily suspended provisions will be lifted on June 30, 2022. The letter lifting the temporarily suspended provisions can be accessed here:

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

## **VIII. RECOMMENDATIONS**

Follow up on recommendations from prior year in COPA Monitor Annual Reports that remain open as of June 30, 2021:

In the COPA Monitor Annual Reports for 2019 and 2020, a recommendation was made for Ballad Health to review the Children's Health Plan and propose changes to the COPA Monitor as permitted by the TOC. Changes to the Children's Health Plan were made by Ballad Health and accepted by the TDH after June 30, 2021.

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.

2021 COPA Monitor recommendations:

Due to the Force Majeure Event, a number of the TOC provisions were temporarily suspended for 2021. There are no new recommendations for 2021.

## **IX. SUMMARY**

The only part of the Index Score that is measured for 2021 is the Economic 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 2021.

Ballad Health was faced with unprecedented challenges in fiscal year 2021 due to the pandemic. Management's focus was appropriately directed toward the constantly changing problems created by 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.

Many of the TOC provisions will continue to be suspended temporarily for fiscal year 2022. However, at this time, the plan is that all TOC provisions will be in full effect as of July 1, 2022.

Larry L. Fitzgerald  
COPA Monitor

## EXHIBIT A

### ANNUAL REVIEW OF TERMS OF CERTIFICATION - ADDENDUM ONE

TO: Commissioner Lisa Piercey MD, MBA, 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 29, 2022

SUBJECT: Annual Review of Terms of Certification - Addendum One

FROM: Larry L. Fitzgerald, 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 COPA Monitor is to monitor Ballad's payor contracts that are newly signed or renegotiated after February 1, 2018. 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 by Ballad to the Tennessee 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 2021 the COPA Monitor gave prospective approval for approximately ten 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 2021, Ballad complied with the pricing limits in the TOC for fiscal year 2021.

## 2021 CHARITY CARE WAIVER

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

February 16, 2022

Lisa M. Piercey, MD, MBA, FAAP  
Commissioner, Tennessee Department of Health  
700 James Robertson Parkway  
Nashville, TN 37243

Dear Dr. Piercey:

The Terms of Certification requires Ballad to provide Total Charity Care each year in an amount greater than what both Wellmont Health System and Mountain States Health Alliance provided in 2017 called Base Charity Care. 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.

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. The Commissioner of the Tennessee Department of Health and the Attorney General agree that the declaration constituted a Force Majeure Event as defined by the TOC. Many provisions of the TOC were temporarily suspended. However, the TOC provisions for charity care were not suspended.

The ongoing pandemic impacted Ballad and every hospital throughout America during 2021. Overall, hospital volume was down except for the treatment of COVID patients. Elective hospital services were temporarily suspended for portions of fiscal year 2021. The number of patients visiting the emergency department and clinics was down, all related to the pandemic. Ballad incurred significant extra cost in the effort to manage various problems caused by the pandemic. Due to the deep and wide impact of the pandemic on Ballad and the community in fiscal year 2021, it is difficult to compare Total Charity Care in 2021 to Base Charity Care in 2017.

Ballad reported to the COPA Monitors that fiscal year 2021 Total Charity Care is estimated to be \$56,000,000. The Base Charity Care minimum requirement for fiscal year 2021 is

\$104,000,000. Ballard fell short of its minimum Total Charity Care obligation by \$48,000,000. Ballard requested a waiver from the Total Charity Care requirement for fiscal year 2021.

There are three major changes, apart from the pandemic, that account for the decrease in Total Charity Care for fiscal year 2021 as compared to fiscal year 2017. First, 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 Ballard. Similar patients in fiscal year 2021 would have qualified for Medicaid coverage. Additionally, all Medicaid services were paid at a higher rate in 2021 as compared to 2017, so the loss from treating Medicaid patients was materially reduced. The two impacts noted above reduced the Total Charity Care at Ballard by \$39,000,000 in 2021 compared to 2017.

Second, there were some errors made in the computation of the 2017 Total Charity Care amount that account for \$2,000,000 of the difference in 2021 Total Charity Care compared to 2017.

Third, overall volume at Ballard has fallen in 2021 compared to 2017, so charity volume has also fallen accounting for the remaining reduction in Total Charity Care for fiscal year 2021 compared to fiscal year 2017.

The Ballard COPA Compliance Office performed a limited review of urgent care and physician practice sites to determine if access to care was impeded due to the financial status of patients. The review found Ballard was not restricting access to medical care for uninsured patients.

In 2021, 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.

Notwithstanding the pandemic, there will never be circumstances when a base year and a measurement year will be identical. Therefore, charity care will vary from year to year for numerous reasons, out of the control of Ballard. Nevertheless, the changes from the Base Charity Care established in fiscal year 2017 to fiscal year 2021 have been so significant due to changes in the Medicaid programs for both states, I recommend the Base Charity Care minimum obligation be recomputed based on IRS Form 990 for fiscal year 2020.

Based on the analysis provided by Ballard and the impact of the pandemic on Ballard in fiscal year 2021, I approve the Ballard request to waive the Terms of Certification minimum Total Charity Care requirement for fiscal year 2021.