

**COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
DIVISION OF ADMINISTRATIVE HEARINGS
HEALTH SERVICES ADMINISTRATIVE HEARINGS BRANCH
Case No. HSAHB CON 21-035**

**IN RE: UofL HEALTH- LOUISVILLE, INC.
d/b/a
MARY & ELIZABETH HOSPITAL
CON # 056-06-106(26)**

(Application to establish a 33 bed adult psychiatric program through the conversion of 33 acute care beds. Final CON bed complement: 33 psych beds, 265 acute care beds)

** ** *

FINAL ORDER

UofL Health – Louisville, Inc. d/b/a Mary & Elizabeth Hospital (hereafter “Applicant”), CON #056-06-106(26), seeks issuance of a Certificate of Need to establish a thirty-three (33) bed adult psychiatric unit in Louisville, Jefferson County, Kentucky, through the conversion of thirty-three (33) acute care beds currently located at its Louisville facility. If the application is approved, the final CON psychiatric bed complement will be thirty-three (33) new adult psychiatric beds at Mary & Elizabeth Hospital, with two hundred sixty-five (265) acute care beds remaining at the facility. A capital expenditure of \$10,459,378.00 will be required to implement this project.

“Psychiatric beds” are those licensed beds that are located in psychiatric hospitals or in units in an acute care hospital or a critical access hospital and are used for treatment of inpatients that require psychiatric or mental health care, including medical care and treatment of mental, emotional, and behavioral disorders.

2020-2022 State Health Plan (August 2020), p. 20.

The application was submitted pursuant to KRS Chapter 216B, which requires Certificate of Need analysis for the proposal. Accordingly, the Cabinet reviews the application for compliance with the criteria outlined in KRS 216B.040(2) and 900 KAR 6:070 § 2: consistency with the state health plan; need; accessibility; interrelationships and linkages; costs, economic

feasibility, and resources availability; and quality of services. The state health plan (“SHP”) provisions concerning adult psychiatric beds are reprinted below,¹ as they are individually addressed:

An application for psychiatric beds shall be consistent with this Plan if the following criteria are met:

1. *Licensed and approved adult and geriatric psychiatric beds in an ADD shall not exceed 0.2 beds per 1,000 geographic adult and geriatric population for the plan year. Licensed and approved children or adolescent psychiatric beds in an ADD shall not exceed 0.2 beds per 1,000 geographic child and adolescent population for the plan year. Statewide psychiatric care facilities operated or contracted by the Commonwealth shall not be counted in the existing bed count;*

At the time of this decision, the Kentuckiana Regional Planning & Development Agency Area Development District (“KIPDA”) is home to roughly 1.2 million residents.² Of this number, 22.9% are under 18 years of age,³ leaving a total of approximately 925,200 adult and geriatric residents. Under the formula provided by the SHP (allowing 0.2 beds per 1,000 residents), a total of 185 adult psychiatric beds may be licensed and approved. According to the most recent *Kentucky Annual Hospital Utilization and Services Report*, there are 626 adult psychiatric beds licensed within the KIPDA.⁴ After subtracting the 289 beds allocated to Central State Hospital and the Kentucky Correctional Psychiatric Center (as required by the SHP, since these facilities are operated or contracted by the Commonwealth), 337 beds are to be counted as existing within the Area Development District (“ADD”). This number is, of course, in excess of the 185 beds allowed by the SHP, and so it would seem that there is no allowance for the approval of additional

¹ Excerpts from the SHP are taken from the *2020-2022 State Health Plan (August 2020)*, pp. 20-22, which was the version of the SHP in effect at the time this application was placed on public notice. 900 KAR 6:070 § 2(1)(b)

² *Application*, p.6; *2017 American Community Survey 5-Year Estimates* data published at <https://kipda.maps.arcgis.com/apps/Cascade/index.html?appid=01fb34fe57014fab8dd8f1a9667f0958>

³ *2017 American Community Survey 5-Year Estimates* data published at <https://kipda.maps.arcgis.com/apps/Cascade/index.html?appid=01fb34fe57014fab8dd8f1a9667f0958>

⁴ *2020 Kentucky Annual Hospital Utilization and Services Report*, p.46.

beds within the region.

In apparent acknowledgement of this, the Applicant argues that a different metric would be more appropriate. As correctly noted in the application, the SHP calculations make no differentiation between sub-categories of adult psychiatric beds. In the Applicant's experience, the region is suffering from a shortage of psychiatric beds for patients who also require treatment for an acute medical ailment, particularly during the COVID-19 pandemic. An example is given of one patient who was initially admitted for opiate withdrawal and suicidal ideation, but later found to have a fever and abnormal lab values. This patient could not be transferred to behavioral health due to his medical issues, and could not be sent to medical detox due to his suicidal ideation. The patient was ultimately admitted to a medical bed at Mary & Elizabeth Hospital, with someone present to monitor for any psychiatric issues. The Applicant further states that it was forced to discharge 597 patients to Our Lady of Peace Hospital during fiscal year 2021, as they required psychiatric care. If the proposed medical-psychiatric beds had been in operation during that year, some or all of these patients would have been able to continue their care at the Applicant's facility. By the Applicant's count, there are currently 66 psychiatric beds operating within the KIPDA which may house patients with acute medical illness, resulting in $.07^5$ medical-psychiatric beds available per 1,000 adult and geriatric residents. As a result, the Applicant argues that additional medical-psychiatric beds should be authorized in the region, in order to meet the local need.

The undersigned does not doubt that the COVID-19 pandemic has resulted in a major disruption to the typical demand for medical-psychiatric beds, as it has disrupted countless other

⁵ The application actually arrives at a figure of $.05$ medical-psychiatric beds per 1,000 residents. It appears, however, that this number was reached utilizing the 1.2 million *total* population of the region, and was not limited to adult and geriatric residents only (as required by the SHP calculations). Adjusting the calculations to omit children from the survey data yields the $.07$ figure printed above.

aspects of modern living. If the need for medical-psychiatric beds is as dire as stated in the application, revisions to the SHP methodology may indeed be warranted. This application essentially seeks to implement such revisions, as it requests grant of a Certificate of Need to address a perceived shortage of medical-psychiatric beds, even though the methodology presented in the SHP would dictate that no additional psychiatric beds are permitted.

Unfortunately, such revisions are not within the purview of this Hearing Officer. The State Health Plan is a central document within the Certificate of Need system, and has been incorporated into the governing regulations by reference.⁶ Kentucky law is clear that an administrative body may not modify or expand an administrative regulation by internal policy, memorandum, or any form of action other than the formal process for promulgation of regulations.⁷ “An agency must be bound by the regulations it promulgates... An agency's interpretation of a regulation is valid, however, only if the interpretation complies with the actual language of the regulation.”⁸ As such, the undersigned is not permitted to depart from the requirements of the SHP, or modify the Plan in any way.

For the foregoing reasons, the undersigned must conclude that the application fails to meet the requirements of State Health Plan criterion 1 for adult psychiatric beds.

2. *Any existing acute care facility or psychiatric hospital proposing the addition of adult psychiatric beds shall exceed the target occupancy rates shown in Table 1 below for its licensed and allocated adult psychiatric care beds for the most recent twelve (12) month period reported in the most recently published edition of the Kentucky Annual Hospital Utilization and Services Report unless all the proposed additional psychiatric care beds are being converted from licensed acute care beds;*

⁶ 900 KAR 5:020 § 2

⁷ KRS 13A.130

⁸ *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) (internal citations omitted).

Table 1

Facility Target Psychiatric Bed Occupancy Rates

| # Beds in Facility | Target Occupancy |
|--------------------|------------------|
| 1-50 | 60% |
| 51-100 | 65% |
| 101-200 | 70% |
| 201 and above | 75% |

This criterion is inapplicable because all of the proposed psychiatric care beds would be converted from acute care beds.

- Additional adult psychiatric beds shall not be approved for purposes of establishing a new facility or a new unit unless occupancy for each facility with licensed and allocated adult psychiatric beds in the ADD exceeds the target occupancy rates shown in Table 1 according to the most recent edition of the Kentucky Annual Hospital Utilization and Services Report;*

In response to this criterion, the application presents an excerpt from the *2019 Annual Kentucky Hospital Utilization and Service Report* describing utilization rates at existing psychiatric facilities within the KIPDA ADD. Of these facilities, two are recorded as experiencing occupancy rates beyond those described in Table 1 (above): Norton Hospital (with 23 adult psychiatric beds operating at 70.84% capacity) and University of Louisville Hospital (with 20 psychiatric beds operating at 91.64% capacity). Six other facilities are operating within the region, all with occupancy rates below those described in Table 1. The updated figures provided by the *2020 Annual Kentucky Hospital Utilization and Service Report* (published December 2021) do not reflect any significant change in occupancy rates within the region. Norton Hospital and University of Louisville Hospital remain operating above the occupancy rates in Table 1, with the remaining 6 providers operating below.

In support of the application, the Applicant highlights the occupancy rates at Norton and

University of Louisville Hospitals as evidence that *medical-psychiatric* beds are being utilized at rates higher than those required by Table 1. As previously discussed in the analysis of criterion 1, the SHP makes no differentiation between medical-psychiatric beds and medical-only beds, and this tribunal is not authorized to insert one. Accordingly, criterion 3 requires that occupancy rates be considered at all existing facilities within the region with licensed and allocated adult psychiatric beds. As stated above, 6 of the 8 licensed facilities within the region are listed as operating below the occupancy levels set forth in Table 1: Baptist Health Louisville, Central State Hospital, Kentucky Correctional Psychiatric Center, The Brook – Dupont, The Brook Hospital – KMI, and U of L Health – Peace Hospital.

For the foregoing reasons, the undersigned must conclude that the application fails to meet the requirements of State Health Plan criterion 3 for adult psychiatric beds.

4. *Any existing acute care facility or psychiatric hospital proposing the addition of child or adolescent psychiatric beds shall exceed the target occupancy rates shown in Table 1 of Criterion 2 for its licensed and allocated child or adolescent psychiatric care beds for the most recent twelve (12) month period reported in the most recently published edition of the Kentucky Annual Hospital Utilization and Services Report unless all the proposed additional psychiatric care beds are being converted from licensed acute care beds;*

This criterion is inapplicable because the Application does not seek to add child or adolescent psychiatric beds.

5. *Additional child or adolescent psychiatric beds shall not be approved for purposes of establishing a new facility or a new unit unless occupancy for each facility with licensed and allocated child or adolescent psychiatric beds in the ADD exceeds the target occupancy rates shown in Table 1 according to the most recent edition of the Kentucky Annual Hospital Utilization and Services Report;*

This criterion is inapplicable because the Application does not seek to add child or adolescent psychiatric beds.

6. *If the most recent edition of the Kentucky Annual Hospital Utilization and Services Report indicates that the occupancy for existing psychiatric beds for an applicant's facility was*

seventy (70) percent or greater, an application to convert acute care beds to psychiatric beds shall be consistent with this Plan if the application meets either of the following conditions:

- a. The applicant meets criteria 1, 2, and 3 or criteria 1, 4, and 5; or*
- b. The applicant has existing licensed acute care beds and psychiatric beds; and:*
 - i. All of the proposed psychiatric beds are being converted from licensed acute care beds;*
 - ii. The occupancy of acute care beds is less than seventy (70) percent in the latest published utilization and inventory data; and*
 - iii. The additional psychiatric beds will be converted and implemented on-site at the applicant's existing licensed acute care facility;*

This criterion is inapplicable because the application seeks to establish a new service, and so there is no “occupancy for existing psychiatric beds for the Applicant’s facility.”

7. If the most recent edition of the Kentucky Annual Hospital Utilization and Services Report indicates that the occupancy for existing psychiatric beds for an applicant’s facility was seventy (70) percent or greater, an application to convert chemical dependency beds to psychiatric beds shall be consistent with this Plan if the application meets either of the following conditions:

- a. The applicant meets criteria 1, 2, and 3 or criteria 1, 4, and 5; or*
- b. The applicant has existing licensed chemical dependency beds and psychiatric beds; and:*
 - i. All of the proposed psychiatric beds are being converted from licensed chemical dependency beds;*
 - ii. The conversion will not impede access to appropriate care for patients needing treatment for abuse or addiction to chemical substances such as alcohol or drugs; and*
 - iii. The additional psychiatric beds will be converted and implemented on site at the applicant's existing licensed acute care or chemical dependency facility;*

This criterion is inapplicable because the application seeks to establish a new service, and is not seeking to convert chemical dependency beds to psychiatric beds.

8. *The maximum number of psychiatric care beds that may be approved shall be based on volume projected five (5) years from the filing of the application. Approval shall be based on the higher of:*
 - a. *The applicant's credible forecast of future utilization; or*
 - b. *A regression analysis projection of patient day trends over a five (5) year timeframe;*

In response to this criterion, the application presents a table projecting occupancy rates, patient days, and patients served during the first five years of operation of the proposed service. The Applicant states that the projections in the table are credible, and are based on the loss of 22 medical-psychiatric beds at Baptist Hospital, high utilizations of currently available medical-psychiatric beds, internal data which shows that Mary & Elizabeth Hospital had to refer 597 patients to Our Lady of Peace Hospital due to a lack of medical-psychiatric beds, and statewide trends showing a significant demand for medical-psychiatric beds.

Unfortunately, the application does not present the specific sources for the statistics utilized, the actual data contained in those statistics, or a methodology for converting the referenced statistics into its projections. As such, it is very difficult for the undersigned to make any determination as to the credibility of the projections – do these projections assume that all patients from the former Baptist Hospital facility would accrue to the Applicant's proposed service? What specific statistical trends support the projected year-over-year growth in occupancy? How was the number of medical-psychiatric beds (as opposed to psychiatric-only beds) determined, what are their occupancy rates, and how were those rates calculated? While it is true that there is no information in the record that would cast doubt upon the Applicant's projections, there is similarly no information presented to show that they are based upon sound analysis. Without more detail as to how the projections were reached, the undersigned is unable

to make a finding that they are credible.

For the foregoing reasons, the undersigned must conclude that the application fails to meet the requirements of State Health Plan criterion 8 for adult psychiatric beds.

9. *Notwithstanding criteria 1, 2, 3, 4, 5, 6, 7, and 8, an application to add psychiatric beds to an existing licensed psychiatric unit or psychiatric hospital shall be consistent with this Plan if the applicant demonstrates that its utilization of its existing psychiatric beds has reached functional capacity for the prior twelve (12) month period. In calculating functional capacity, consideration shall be given to the following:*
 - a. *The percentage of licensed acute care beds, psychiatric beds, or chemical dependency beds currently operational;*
 - b. *The type and level of psychiatric care being provided at the applicant's facility;*
 - c. *The historical performance as it relates to the utilization of psychiatric beds; and*
 - d. *The availability of other providers of psychiatric services in the ADD; and*

This criterion is inapplicable because the application proposes to establish a new service, not to add psychiatric beds to an existing service.

10. *Notwithstanding criteria 1, 2, 3, 4, 5, 6, 7, and 8, an application by a licensed psychiatric hospital for the conversion to psychiatric beds of the psychiatric hospital's licensed tuberculosis beds shall be consistent with this Plan if the conversion does not increase the total licensed bed capacity of the psychiatric hospital.*

This criterion is inapplicable because the Applicant is not a licensed psychiatric hospital seeking to convert tuberculosis beds to psychiatric beds.

As described above, the undersigned has found that the application fails to meet the requirements of State Health Plan criteria 1, 3, and 8, and all other State Health Plan criteria for adult psychiatric beds are inapplicable. Accordingly, the application fails to demonstrate consistency with the State Health Plan, as required by 900 KAR 6:070 § 2(1) and KRS 216B.040(2)(a)(2)(a). As compliance with the State Health Plan is mandatory for approval of an

application for Certificate of Need, it is not necessary to address the five remaining CON review criteria (need; accessibility; interrelationships and linkages; costs, economic feasibility, and resource availability; and quality of services) at this time.

Accordingly, it is **ORDERED** that the application of UofL Health – Louisville, Inc. d/b/a Mary & Elizabeth Hospital, CON #056-06-106(26), for issuance of a Certificate of Need to establish a thirty-three (33) bed adult psychiatric unit in Louisville, Jefferson County, Kentucky, through the conversion of thirty-three (33) acute care beds currently located at its Louisville facility is hereby **DENIED**.

Pursuant to KRS 216B.090(1), any party to the proceeding may file a request for reconsideration with the Cabinet for Health and Family Services, Office of Certificate of Need within fifteen (15) days from the date of notice of this decision.

Pursuant to KRS 216B.115, any of the parties to the proceeding may file an appeal to the Franklin Circuit Court within thirty (30) days from the date of notice of this decision or within fifteen (15) days from the date of notice of a decision to deny reconsideration or a decision on reconsideration.

Entered this 16th day of March, 2022.



SEAN CUTSHALL⁹
Administrative Hearing Officer

Distribution to be made by the Office of Inspector General.

⁹ In keeping with measures instituted by the Commonwealth of Kentucky in response to the COVID-19 pandemic, this Order has been electronically signed. Pursuant to the electronic filing rules of the Kentucky Bar Association, the electronic signature shall bear the same authority as an original.