



State of South Carolina
Department of Mental Health

MENTAL HEALTH COMMISSION:

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Kenneth M. Rogers, MD
State Director

December 8, 2021

The Honorable Shane Martin
South Carolina Senate District 13
Post Office Box 142
Columbia, SC 29202
ShaneMartin@scsenate.gov

VIA: Email and U.S. Mail

Dear Senator Martin,

Thank you for your letter of December 6, 2021.

Before answering your specific questions, I would like to provide more context regarding the mission of SCDMH and its COVID-19 response. SCDMH currently operates three hospitals, four nursing homes and 16 comprehensive community mental health centers, with clinics and outreach services covering all 46 counties. Three of the Department's nursing homes serve State veterans and two additional State veterans nursing homes will open next year. In terms of the number of licensed beds (1904), and the number of patients and residents treated annually, the Department is one of the largest healthcare systems in the State of South Carolina and the state's only statewide health system.

As you realize, healthcare is a heavily regulated profession. Like all healthcare providers who accept Medicare and Medicaid reimbursement for its services, SCDMH is subject to regulations issued by the federal Centers for Medicare and Medicaid Services (CMS).

CMS published regulations on November 5th requiring all covered providers – including SCDMH – to ensure that all its employees and contract staff were fully vaccinated with an authorized COVID-19 vaccine by December 5, 2021, or were in the process of becoming fully vaccinated by that date. Along with other hospital systems in the State subject to the CMS regulations, SCDMH notified its employees and contractors of the new mandate and advised that SCDMH would be required to follow these regulations. In preparation for the deadline, SCDMH also began asking its employees and contract staff to provide written proof of vaccination to SCDMH

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human resources staff or submit a request for a medical or religious exemption before the December 5th deadline.

South Carolina joined other plaintiff states in litigation seeking an injunction against the CMS mandate. After filing the lawsuit, Attorney General Alan Wilson clarified for hospitals that until a court grants a stay of the CMS vaccine mandate, *hospitals are obligated to comply with federal law* (See Attachment 1, SCHA CEO Update, November 19, 2021). Last week, a federal court in Louisiana issued a temporary injunction blocking enforcement of the CMS mandate while the underlying lawsuit proceeds. In response, the federal government has appealed the temporary injunction to a higher court, but has also notified providers that it has suspended the regulations pending a final decision by the courts.

The day after the Court's ruling SCDMH, notified its employees about the court's ruling and that the Department was suspending the December 5th deadline for vaccination. At present, there is no SCDMH deadline or requirement for its staff to receive an authorized COVID-19 vaccine.

Since FDA authorized COVID-19 vaccines first became widely available, SCDMH has consistently encouraged staff to become vaccinated and will continue to do so because the authorized COVID-19 vaccines are safe, effective, and the best of the tools we have to prevent the spread of the virus. Protecting our staff, our patients, our residents, and their families is of the highest importance to SCDMH Leadership.

My answers to your specific questions appear, below:

- *You stated that you remain understaffed not because of money but because of private sector competition. Please confirm that the Commission discusses the impact on service delivery of terminating employees for their vaccination status.*

SCDMH has historically faced staffing shortages for many reasons, including private sector competition. In response, SCDMH has sought a workforce investment with each budget season for the past several years. The current pandemic, however, has seriously exacerbated a challenging hiring situation. We can assure you that the Commission discusses staffing challenges at every Commission meeting. The Commission specifically considered the impact the vaccine mandate might have on staffing and realized that some would resign. However, the Commission also considered that this was a no-win situation for the agency, and not one of its choosing. On balance, it was clear to the Commission that the risk of losing Medicare and Medicaid funding would have a far and away greater negative impact on the Department's staffing and capacity to provide patient care. Given the size and role of SCDMH's health system, if SCDMH loses CMS certification and funding, the many South Carolinians we serve would go without mental health treatment and needed nursing care. The dramatic loss of capacity would also occur at a time when there are increased mental health needs due to the stressors of the pandemic.

- *You stated that the Commission has not discussed the rumored mandate by your director for non-vaccinated employees to wear face shields and/or goggles in addition to masks. Please discuss this at your meeting and affirm or reject that directive by your director.*

At the time of the December 6th hearing, the Commission had not discussed the use of face shields and goggles because this issue came up three weeks after the Commission's November meeting. This issue was discussed at length during today's Commission meeting. From the phrasing of your question, there appears to be a misunderstanding about the use of face shields or goggles. In late November, CMS conducted a survey of SCDMH's Tucker Nursing Home. The surveyors indicated that guidelines from the federal Centers for Disease Control (CDC), which CMS incorporates by reference in its regulations, state that asymptomatic, *unvaccinated* staff who have had close contact with a COVID positive individual do not need to quarantine if they have been wearing both a mask and a face shield or goggles. As noted above, staffing remains a challenge for SCDMH. To prevent loss of staff due to an avoidable quarantine, we have required all inpatient staff to wear a face shield or goggles in addition to their masks. The face shields and goggles are required to be worn by all inpatient staff, regardless of vaccination status. In the outpatient setting, we have asked all staff to make use of face shields or goggles as available. It is required of unvaccinated staff and is a specific step that all staff (regardless of vaccination status) may take to further protect their health and minimize their risk of being required to quarantine (be out of work) should an exposure occur.

- *You stated that you do not know if the discussion by various DMH personnel of personal medical information regarding the COVID shot violates HIPAA regulations. Please discuss this at your Commission meeting to determine if your director is violating federal law.*

First, I would like to reassure you that there is no discussion of employee vaccination status with any staff member who does not have a need to know. Employees report their vaccination status to human resources staff. The information is maintained in a file that is separate from the employee's personnel record to protect it from disclosure. Second, there is no risk of a HIPAA violation because HIPAA obligations only apply between a provider and a patient. Employees are not patients of SCDMH. Third, please note that all the steps taken by SCDMH to date relate directly to your stated concern about SCDMH not violating federal law. All SCDMH acts related to vaccination enforcement have been to comply with existing federal law, as Attorney General Wilson directed.

- *You stated that any Commissioner acting contrary to the wishes of the Governor, their appointer, should be willing to step down. Please confirm that among your Commissioners at the meeting.*

We want to confirm that this Commission is not trying to take a position at odds with the Governor. We welcome an option that both supports the Governor's opposition to vaccine mandates and protects agency's federal funding and CMS certification. In all of its decisions, the Commission is guided by its highest priority, patient care. The Commission is committed to continue to provide care for persons with a mental illness, as well as State veterans in need of nursing care, another important mission of the Department. We believe the Governor shares this viewpoint.

- *Also, please make sure we receive the federal funding breakdown that Sen. Corbin asked for.*

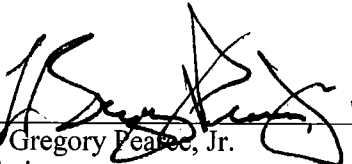
The breakdown of state and federal funds is attached to the letter as Attachment 2.

Thank you for your concerns about the dedicated staff at SCDMH.

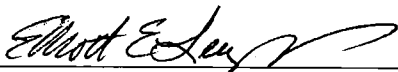
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Sincerely,

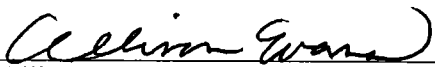
The South Carolina Mental Health Commission




L. Gregory Pease, Jr.
Chair



Elliott Levy, M.D.
Vice Chair



Allison Evans, Psy.D.



Crystal Maxwell, M.D.

Attachments (2)
Copy of Senator Shane Martin's Letter dated December 6, 2021

cc: The Honorable Henry D. McMaster

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CEO Update

Update on CMS Vaccination Requirement

As you may have seen on the news this week, several Upstate hospitals were targeted by protesters who oppose the CMS vaccination requirement for healthcare workers. I know from speaking to several Upstate CEOs that a few are considering a response to the protests, whether directed to staff or the media. In case it is helpful to you, I have spoken this afternoon with Attorney General Alan Wilson about the status of his legal challenge to the CMS requirement.

I shared with the Attorney General my concern that many healthcare workers believe they do not have to comply with the vaccine requirement, either because they perceive the temporary stay in the OSHA litigation also applies to the CMS rule, or because they believe the pending litigation has effectively suspended the requirement. Attorney General Wilson was understanding about the confusion, and he offered the following statement if it would be helpful to hospitals.

"The South Carolina Hospital Association has consulted with Attorney General Alan Wilson, and he is currently seeking to have a federal court stay the enforcement of the CMS vaccination requirement. Until a court grants that stay, however, hospitals are obligated to comply with the federal law."

If this statement is helpful as you communicate with your employees or your community, please feel free to use it.

ATTACHMENT ONE

SCDMH
 Revenue Source Breakdown
 FY June 30,2021

Revenue Source	\$	% of Total	% of Total
Medicare/Medicaid Funding			
Disproportionate Share	43,137,630	9.1%	
Medicaid	27,148,154	5.7%	
Medicaid MCO	48,163,641	10.1%	
Medicare	382,533	0.1%	
Veterans Affairs Funding	23,575,063	5.0%	
Federal Grants	28,102,048	5.9%	
Sub-Total			35.9%
State Appropriations	257,106,583	54.1%	
Other Funding	46,209,332	9.7%	
Sub-Total			63.8%
Prior Year Carry Forward	<u>1,458,340</u>	<u>0.3%</u>	<u>0.3%</u>
Total	<u>475,283,324</u>	<u>100.0%</u>	<u>100.0%</u>

Shane Martin
South Carolina Senate District 13
Greenville, Spartanburg and Union Counties

Committees

Corrections and Penology, Chairman

Finance

- Criminal Justice Subcommittee, Chairman

Medical Affairs

Rules



December 6, 2021

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Columbia, SC 29201

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State Director
S.C. Dept. of Mental Health

Dear Chairman Pearce,

Great seeing you today and thank you for helping us better understand the position of the South Carolina Department of Mental Health Commission. I committed to providing some questions for your commission to ponder at your next meeting on Wednesday, and please see them below. I look forward to you appearing before our subcommittee again following your commission meeting.

- You stated that you remain understaffed not because of money but because of private sector competition. Please confirm that the Commission discusses the impact on service delivery of terminating employees for their vaccination status.
- You stated that the Commission has not discussed the rumored mandate by your director for non-vaccinated employees to wear face shields and/or goggles in addition to masks. Please discuss this at your meeting and affirm or reject that directive by your director.
- You stated that you do not know if the discussion by various DMH personnel of personal medical information regarding the COVID shot violates HIPPA regulations. Please discuss this at your Commission meeting to determine if your director is violating federal law.
- You stated that any Commission acting contrary to the wishes of the Governor, their appointer, should be willing to step down. Please confirm that among your Commissioners at the meeting.
- Also, please make sure we receive the federal funding breakdown that Sen. Corbin asked for.

Thank you, again, for your time today. I will follow up with any other questions, and I look forward to seeing you at our next hearing following your meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Martin".

Shane Martin, Senator
District 13

SM: ph