ENFORCEMENT UNDERTAKINGS

LICENSEE:

Medway NHS Foundation Trust
Medway Maritime Hospital
Windmill Road
Gillingham
Kent
ME7 5NY

BACKGROUND

NHS Improvement accepted undertakings under section 106 of the Health and Social Care Act 2012 ("the Act") from the Licensee in May 2019, having had reasonable grounds to suspect that the Licensee had provided and was providing health care services for the purposes of the NHS in breach of the conditions of its licence set out in those undertakings. Due to the passage of time and intervening events, the undertakings are deemed to be no longer effective as a means of securing compliance with the conditions of the licence.

In place of the earlier undertakings, NHS Improvement is now proposing to take regulatory action in the form of these undertakings for the reasons set out below. These undertakings replace and supersede the undertakings agreed in May 2019 which cease to have effect from the date of these undertakings.

DECISION

On the basis of the grounds set out below, and having regard to its Enforcement Guidance, NHS Improvement has decided to accept from the Licensee the enforcement undertakings specified below pursuant to its powers under section 106 of the Health and Social Care Act 2012 ("the Act"). In this document, "NHS Improvement" means Monitor.

GROUNDS

1. Licence

1.1. The Licensee is the holder of a licence granted under section 87 of the Act.

BREACHES

2. Breaches

2.1. NHS Improvement has reasonable grounds to suspect that the Licensee has provided and is providing healthcare services for the purposes of the NHS in breach of the following conditions of its licence: FT4(5)(a) to (f); FT4(6)(c), (d) and (f); FT4(7); and CoS3(1).

2.2. In particular:

Financial Management

2.2.1. The Licensee had incurred significant and deepening operating deficits in every financial year between 2009/2010 and 2019/2020 when national funding mechanisms

have been temporarily changed to fund providers for costs incurred related to the COVID pandemic. National planning expectations and contracting rules for 2022/23 are in development but are expected to revise the approach to COVID funding, drive more collaborative local system working and revert to more traditional contracting mechanisms as were in place pre-pandemic;

2.2.2. For Half 1 (H1) in the 2021/22 financial year the Licensee submitted a breakeven plan with £4.2m of risks flagged reflecting national funding available for the COVID response. The Licensee delivered its H1 plan, however a number of the risks particularly the delivery of efficiencies present ongoing concern into Half 2 (H2) planning. H2 of 2021/22 requires increased levels of efficiency to be delivered than in H1, and more work is needed by the Licensee on Cost Improvement Programmes ("CIPs") to remain on-track and to underpin a sustainable financial position;

2.2.3. NHS Improvement Use of Resource review published on 30 April 2020 resulted in a 'Requires Improvement' rating. This has shown improvement from a previous rating of 'Inadequate' on 30 April 2018 but the CQC found there were still further opportunities for the Licensee to improve its productivity across all key lines of enquiries to impact its operational performance, deliver sustainable services and materially reduce its reported financial deficit.

Quality

2.2.4. The CQC carried out a routine inspection between December 2019 and January 2020, publishing its report in April 2020. The inspection rating remained at "Requires Improvement" overall. Six core services were inspected and the rating for safe went down to 'inadequate' in medical care and remained at 'requires improvement' in emergency and urgent care services, surgery and services for children and young people. The rating for effective services also went down to 'requires improvement';

2.2.5. The 2020 CQC report found 24 breaches of legal requirements ("must do" actions) and 19 "should do" actions to prevent it failing to comply with legal requirements in future, or to improve. They issued a warning notice to the trust and seven requirement notices. This action related to breaches of three legal requirements at a trust-wide level and 21 in four core services;

2.2.6. A follow up inspection of the trust's medical care service and a focused inspection of its children and young people's service took place between April and June 2021. The report from this inspection showed improvement: the rating for safe in medical care was changed to 'Requires Improvement' and 'Good' for services for children and young people, both services had an overall rating of 'Requires Improvement';

2.2.7. The most recent CQC report dated 30th July 2021 found 8 breaches of legal requirements ("must do" actions) and 10 "should do" actions to prevent it failing to comply with legal requirements in future, or to improve.

2.2.8. Two Never Events were reported in 2019/2020 and two appear in the provisional report of Never Events occurring between 01 April 2020 and 31 March 2021.

Operational Performance

2.2.9. The Licensee is in the third quartile of trusts regionally for the 18 week Referral to Treatment Time standard ("RTT") and remains consistently below the standard. The Trust have reduced the number of patients waiting over 52 weeks from referral (from 500 in April 2021 to 228 in September 2021) however their overall position is likely to be further affected by growth in elective referrals and increase in the size of their RTT waiting list (c.26.5k in August 2021).

2.2.10. In relation to the Emergency Care standard, the Licensee continues to report a number of 12 hour trolley breaches and over 60 minute handover delays (average of 200 per month in 2021 – Jan-September). The Licensee is failing to meet the four-hour A&E standard (varying between 55-73%). This position is negatively impacted by increased attendances and admissions together with a lack of pathway provision for discharge.

Workforce

2.2.11. The Licensee has seen improvements in recruitment and retention rates since the previous undertakings (in 2019), but the last 12 months have seen figures remain largely static. Staff sickness rates are the highest in the region (5.0% in October 2021) and high in comparison to other regional averages and this is a sustained position. Staff survey response rates have been below average for the last 4 years with only 34.9% of staff taking part in 2020 which saw with the majority of relevant indicators falling below the national average (in 9 out of 10 themes), with many falling significantly below.

2.2.12. The latest CQC report from July 2021 stated that the Trust had not prioritised improvements to culture or staff satisfaction. They felt more could be done to appropriately engage with staff with particular protected equality characteristics and there was a limited approach to sharing information with, and obtaining the views of staff as well as service users, external partners and other stakeholders.

Governance and Programme Management

2.2.13. The CQC Well-Led rating in the 2020 report was lowered to 'Inadequate' from 'Requires Improvement' in the 2018 report. This was upgraded in the latest report dated 30th July 2021 (published 5th August 2021) but remains at 'Requires Improvement' as it was noted not all leaders had the necessary experience, knowledge, capacity or capability to lead effectively. Board members did not present a consistent view on the key risks, challenges and priorities for the trust. Some leaders were not able to demonstrate an awareness of key challenges and conveyed an overly optimistic view of current performance.

2.2.14. A high-level developmental review of the Board's effectiveness by Deloitte dated 7 May 2020 recommended a number of improvements and highlighted some concerns with leadership and governance. A further governance review had been commissioned by the incoming interim Chief Executive and the report signed off in October 2021 has listed 16 recommendations sitting under 3 key areas of governance

– Strategy, Structures and Processes; Culture of Learning and Safety; Information Flow and Business Management Systems – some of which have work already ongoing to deliver.

2.2.15. An interim Chief Executive has been appointed at the Trust, and there are a number of changes being made to the senior leadership team which include a new Chief Operating Officer, Medical Director and Chief Nurse which is a significant change for the trust and will require time for the individuals to get up to speed on the way of working and culture of the organisation.

2.3. These breaches by the Licensee demonstrate a failure of governance arrangements and financial management standards, in particular but not limited to a failure by the Licensee to:

2.3.1. establish and effectively implement systems and/or processes to ensure compliance with the Licensee's duty to operate efficiently, economically and effectively;

2.3.2. establish and effectively implement systems for timely and effective scrutiny and oversight by the Board;

2.3.3. ensure compliance with healthcare standards specified by the CQC;

2.3.4. obtain and disseminate accurate, comprehensive, timely and up-to-date information for Board and Committee decision-making;

2.3.5. identify and manage material risks to compliance with licence conditions;

2.3.6. ensure matters relating to governance specified in FT4(5)(a) to (f) are complied with;

2.3.7. ensure matters relating to qualify of care specified in FT4(6)(c), (d) and (f) are complied with;

2.3.8. ensure that matters relating to personnel within the organisation specified in FT4(7) are complied with;

2.3.9. establish and effectively implement systems and/or processes for effective financial decision-making, management and control (including but not restricted to appropriate systems and/or processes to ensure the Licensee's ability to continue as a going concern); and

2.3.10. adopt and apply systems and standards of corporate governance and of financial management which would be regarded as being suitable for a provider of Commissioner Requested Services provided by the Licensee and providing reasonable safeguards against the Licensee being unable to carry on as a going concern.

2.4. <u>Need for action</u>

NHS Improvement believes that the action, which the Licensee has undertaken to take pursuant to these undertakings, is action to secure that the breaches in question do not continue or recur.

3. Appropriate of Undertaking

3.1. In considering the appropriateness of accepting in this case the undertakings set out below, NHS Improvement has taken into account the matters set out in its Enforcement Guidance.

UNDERTAKINGS

LICENSEE:

Medway NHS Foundation Trust
Medway Maritime Hospital
Windmill Road
Gillingham
Kent
ME7 5NY

UNDERTAKINGS

NHS Improvement has agreed to accept, and the Licensee has agreed to give the following undertakings, pursuant to section 106 of the Act:

1. Financial Management

1.1. The Licensee will take all reasonable actions to reduce the current deficit and achieve financial sustainability.

1.2. In meeting the requirements of paragraph 1.1., the Licensee will:

1.2.1. By a date to be agreed with NHS Improvement, develop and submit to NHS Improvement a medium-term system financial recovery plan ("MTSFRP") setting out realistic actions to stabilise and improve the Licensee's financial position, which will include actions to support and implement the plan for the next 5 years;

1.2.2. Ensure that the MTSFRP is refreshed and maintained to adhere to the latest available NHS planning guidance;

1.2.3. Ensure that the plan addresses the underlying drivers of the deficit;

1.2.4. In developing and implementing the MTSFRP, engage with its system partners and ensure that the plan is supported by underpinning demand and capacity modelling and aligned with clinical, workforce, estates and local system partners' transformation plans;

1.2.5. The Licensee will deliver the MTSFRP in accordance with the timescale outlined in that plan, or such dates to be agreed with NHS Improvement;

1.2.6. Provide to NHS Improvement on a monthly basis, or at such frequency as NHS Improvement specifies, an accurate 13 week rolling cash flow split into capital and revenue spend.

2. Distressed Funding

2.1. Where interim support financing or planned term support financing is provided by the Secretary of State for Health to the Licensee pursuant to section 40 of the NHS Act 2006, the Licensee will comply with any terms and conditions which attach to the financing.

2.2. The Licensee will comply with any reporting requests made by NHS Improvement in relation to any financing to be provided to the Licensee by the Secretary of State for Health pursuant to section 40 of the NHS Act 2006.

2.3. Where the Licensee receives payments from the Sustainability and Transformation Fund, the Licensee will comply with any terms or conditions which attach to the payments.

2.4. The Licensee will comply with any spending approvals processes that are deemed necessary by NHS Improvement.

3. Quality of Care

3.1. The Licensee will take all reasonable steps to rectify the concerns which are set out in the CQC reports dated 30th April 2020, 1st July 2021 and 30th July 2021, such that (by a date to be agreed with NHS Improvement) the Licensee will:

3.1.1. Within the timeframe required by the CQC, finalise and submit to the CQC and to NHS Improvement a plan setting out the steps which it will take to comply with paragraph 3.1. above, including key milestones and timescales (the "Quality Improvement Plan");

3.1.2. Ensure that the Quality Improvement Plan reflects the Licensee's clinical strategy;

3.1.3. Ensure that the Quality Improvement Plan addresses how the Licensee will improve patient experience;

3.1.4. Ensure that the Quality Improvement Plan addresses a clinical assessment and evaluation of risk and governance regarding the quality impact of CIPs;

3.1.5. Provide to NHS Improvement on a monthly basis, progress updates on the required actions set out in the CQC reports.

4. Operational Performance

4.1. The Licensee will take all reasonable steps to recover performance against the constitutional operational performance standards for A&E, RTT, cancer and diagnostics in a sustainable manner.

4.2. In meeting the requirements of paragraph 4.1, the Licensee will demonstrate that it can deliver the performance trajectories submitted in its Annual Operational Plan.

5. Strategic Workforce Planning

5.1. The Licensee will develop an updated workforce strategy ("the People Plan") linked to its objectives and taking into account clinical and quality strategies to include, but not limited to, medical, nursing, AHP and non-clinical workforce recruitment and retention strategies, workforce productivity, approaches to job planning and clinical safety. The People Plan will include an implementation plan and will be agreed by the Board, which will have oversight of delivery.

5.2. In developing and implementing the People Plan, the Licensee will ensure that the plan aligns to local and wider system partners' workforce transformation plans.

6. Development and Delivery of plans

6.1. The Licensee will ensure that the Governance Plan and Financial Recovery Plan and developed are delivered in a robust and coherent manner alongside the existing People Plan and Annual Operational Plan (together, the "Plans") are developed and delivered in a robust and coherent manner which enables the Licensee to meet the requirements of paragraphs 1.1, 2.1, 3.1, 4.1 and 5.1.

6.2. In meeting the requirements of paragraph 6.1 the Licensee will ensure that the Plans:

6.2.1. Form a single, coherent and integrated approach to addressing the challenges facing the Licensee, together with the Licensee's other key plans;

6.2.2. Include the actions required to meet the requirements of paragraphs 2.1, 3.1, 4.1 and 5.1, with appropriate timescales, resourcing and clear accountabilities to clinical and non-clinical action owners;

6.2.3. Describe the key risks to meeting the requirements of paragraphs 2.1, 3.1, 4.1 and 5.1 and mitigating actions being taken;

6.2.4. Describe how the Licensee will assess progress, including the measures to be used; and

6.2.5. Are submitted agreed by NHS Improvement, for discussion and agreement with NHS Improvement.

7. Corporate and Clinical Governance

7.1. The Licensee will take all reasonable steps (including but not limited to the actions in paragraphs 8.2 below) to ensure that it has appropriate and integrated corporate and clinical governance structures and processes in place, which would be reasonably regarded as appropriate for the supplier of a health care service in the UK.

7.2. In meeting the requirements of paragraph 8.1. the Licensee will:

7.2.1. Consolidate the findings of the Deloitte report dated 7 May 2020 and the CQC Well-Led report dated 30 July 2021 and the recent NHSEI governance review from October 2021 into a comprehensive plan for improving the Licensee's principles, systems and standards of governance ("the Governance Plan"), to be agreed by the Board and NHS Improvement;

7.2.2. In providing the plan, demonstrate (using measurable KPIs and setting out milestones) that it can deliver the plan;

7.2.3. Take all reasonable steps to implement the Governance Plan;

7.2.4. The Licensee will monitor the capacity, capability and effectiveness of the Board and clinical leadership and will notify NHS Improvement of any material changes or intervening events which present a significant risk to the sustainability of the same.

8. Programme Management

8.1. The Licensee will implement sufficient programme management and governance arrangements to enable delivery of these undertakings.

8.2. Such programme management and governance arrangements must enable the Board to:

8.2.1. obtain clear oversight over the progress in delivering the undertakings;

8.2.2. obtain an understanding of any risks to the successful achievement of the undertakings and ensure appropriate mitigation of any such risks; and

8.2.3. hold individuals to account for the delivery of the undertakings.

9. Improvement Director

9.1. The Licensee will cooperate with any Improvement Director appointed by NHS Improvement to oversee and support the Licensee's delivery of these undertakings, including taking all reasonable steps to promptly provide the Improvement Director with the information required to carry out their role.

10. General

10.1. The Licensee will co-operate fully with NHS Improvement, health sector stakeholders (including system partners) and any external agencies or individuals appointed by NHS Improvement or the Licensee's commissioners to work with or support the Licensee.

10.2. The Licensee will provide regular reports to NHS Improvement on its progress in meeting these undertakings, including reporting against the KPIs (as may be agreed by NHS Improvement) in the Plans and will attend meetings or, if NHS Improvement stipulates, conference calls, to discuss its progress in meeting these undertakings. These meetings shall take place once a month unless NHS Improvement otherwise stipulates, at a time and place to be specified by NHS Improvement and with attendees specified by NHS Improvement.

10.3. The Licensee will keep the Plans and their delivery under review and make any necessary amendments. Where matters are identified which materially affect the Licensee's ability to meet the requirements of these undertakings, whether identified by the Licensee or another party, the Licensee will notify NHS Improvement as soon as practicable ascertaining what it has been unable to deliver and providing a plan of how it will deliver outstanding parts of the Plans. If requested by NHS Improvement, the Licensee will update and resubmit some or all of the Plans within a timeframe to be agreed with NHS Improvement.

10.4. The Licensee will comply with all additional relevant reporting requests made by NHS Improvement.

The undertakings set out above are without prejudice to the requirement on the Licensee to ensure that it is compliant with all the conditions of its licence, including any additional licence condition imposed under section 111 of the Act and those conditions relating to:

• compliance with the health care standards binding on the Licensee; and

• compliance with all requirements concerning quality of care.

Any failure to comply with the above undertakings will render the Licensee liable to further formal action by NHS Improvement. This could include the imposition of discretionary requirements under section 105 of the Act in respect of the breach in respect of which the undertakings were given and/or revocation of the licence pursuant to section 89 of the Act.

Where NHS Improvement is satisfied that the Licensee has given inaccurate, misleading or incomplete information in relation to the undertakings: (i) NHS Improvement may treat the Licensee as having failed to comply with the undertakings; and (ii) if NHS Improvement decides so to treat the Licensee, NHS Improvement must by notice revoke any compliance certificate given to the Licensee in respect of compliance with the relevant undertakings.

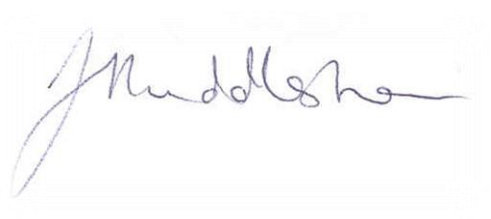
LICENSEE

Signed (Chair or Chief Executive of Licensee)

Dated: 7th December 2021

NHS IMPROVEMENT

Signed



[Chair *OR* Member] of the Regional Provider Support Group - South East
(Note: undertakings can be accepted/signed by a Locality Director where the RSG pass a resolution enabling the individual member to act for the Group pursuant to the RSG terms of reference)

Dated: 8th December 2021