

ENFORCEMENT UNDERTAKINGS

LICENSEE:

University Hospitals Birmingham NHS Foundation Trust ("the Licensee")
Trust Headquarters,
Queen Elizabeth Hospital Birmingham,
Mindelsohn Way,
Edgbaston,
Birmingham,
West Midlands,
B15 2GW

DECISION:

On the basis of the grounds set out below, and having regard to its Enforcement Guidance, NHS England 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 ("the Act").

GROUND(S):

1. Licence

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

2. Breaches of the Licence

- 2.1. NHS England 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(4)(a) to (c), FT4(5)(a), (c), (e), (f), and (g), FT4(6)(a) to FT4(6)(f), and FT4(7).

In particular:

Operational performance – breach of licence conditions FT4(4)(a) to FT4(4)(c), FT4(5)(a), FT4(5)(c), FT4(5)(e) and FT4(5)(f) and FT4(7)

Overall, recovery and improvement of operational performance has been exacerbated by the impact of the COVID 19 pandemic, however, the Licensee's operational performance position is one of the most challenged in the country and it is receiving mandatory national support to help it recover.

- 2.2. Elective - During covid, the elective waiting list increased significantly due to reduced ITU and surgical capacity and IPC requirements, and the ongoing implementation of a new IT system to manage the waiting lists. Despite significant improvements, elective activity and productivity has not returned to above pre-covid levels and there are risks to reaching a sustainable position.

2.3. Diagnostic capacity has been a constraint for the Licensee before and after the pandemic. Challenges with diagnostic recovery continue and considerable focus is required on the validation of diagnostic waiting lists and understanding the scale of capacity and demand. This is a considerable area of risk for the Licensee.

2.4. Cancer – during covid, capacity to treat cancer was constrained due to reduced ITU and surgical capacity and IPC requirements, cancer performance and activity dropped significantly during the pandemic. Further a lack of sufficient diagnostic capacity hampered recovery. Significant progress has been made with a much-reduced backlog but further improvements are required to reach a sustainable position against cancer standards.

2.5. UEC – the Licensee continues to experience challenges in relation to delivery of Urgent and Emergency Care performance; including delays to ambulance handover and poor flow within the UEC pathway and when discharging patients.

Culture – breach of Licence condition FT4(5)(g), FT4(6)(c) and FT4(6)(e)

2.6. Recent staff survey results for the Licensee's show a deteriorating trend (staff engagement and staff morale) and are below the England average for the benchmarking group across all nine elements. Further the most recent CQC inspection report (October 21) states that staff did not always feel respected, supported and valued.

Quality – breach of Licence conditions FT4(4)(a), FT4(5)(a) and FT4(5)(c) and FT4(6)(a) to FT4(6)(f)

2.7. The recent CQC inspection report (October 2021) rated the Licensee as Requires Improvement overall, a deterioration from good. This report identifies particular concerns in urgent and emergency care services, and that:

- 2.7.1. patients were not always protected from harm
- 2.7.2. leaders did not always run services well and did not always manage risk effectively.

2.8 A national Maternity diagnostic was recently undertaken by the Licensee. This diagnostic identified areas of good practice but also concerns in relation to services run by the Licensee and that significant improvements were required, particularly in relation to medical leadership and responsiveness.

3. Failings and need for action

3.1. These failings by the Licensee demonstrate a failure of governance arrangements including failure to establish and effectively implement systems or processes:

- 3.1.1. to ensure compliance with the Licensee's duty to operate efficiently, economically and effectively;
- 3.1.2. to ensure compliance with healthcare standards binding on the Licensee;
- 3.1.3. to identify and manage (including but not restricted to manage through forward plans) material risks to compliance with the Conditions of its Licence.

3.2. Need for action:

NHS England believes that the action which the Licensee has undertaken to take pursuant to these undertakings, is action required to secure that the failures to

comply with the relevant requirements of the conditions of the Licence do not continue or recur.

4. Appropriateness of Undertakings

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

UNDERTAKINGS

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

1. Operational Performance

1.1. *Elective, Cancer and Diagnostics Recovery*

1.1.1. The Licensee will take all reasonable steps to recover the operational performance to:

- 1.1.1.1. achieve sustainable compliance with the eradication of patients waiting over 104 and 78 weeks for elective treatment,
- 1.1.1.2. significantly reduce those waiting over 52 weeks for elective treatment and 62 days for cancer treatment in line with agreed recovery plan trajectories, and
- 1.1.1.3. achieve sustainable compliance with diagnostics targets, including delivering 120% of diagnostics activity compared to 2019/20.

1.1.2. The Licensee will, by a date to be agreed with NHS England, which aligns to the Birmingham and Solihull system improvement plan, ensure that there are robust improvement plans in place to meet the requirements of 1.1.1, which have been agreed with NHS England.

1.1.3. The Elective, Cancer and Diagnostics improvement plan (“the Elective, Cancer and Diagnostics plan”) will, in particular:

- 1.1.3.1. Include the actions required to meet the requirements of paragraph 1.1.1, with appropriate timescales, key performance indicators and resourcing;
- 1.1.3.2. Include an associated trajectory, as agreed with NHS England and which is in alignment with the agreed Birmingham and Solihull system trajectory, for the Licensee to meet national expectations in relation to the elective, cancer and diagnostics targets on a sustainable basis;
- 1.1.3.3. Describe the key risks to meeting the requirements of paragraph 1.1.1 and mitigating actions being taken;
- 1.1.3.4. Be based on realistic assumptions;
- 1.1.3.5. Reflect collaborative working with key system partners and other stakeholders;
- 1.1.3.6. Set out the key performance indicators which the Licensee will use to measure progress against each action, and expected impact on overall elective, cancer and diagnostics waiting times and performance

1.1.4. The Improvement Plan, which will be a subset of the Birmingham and Solihull system plan, will be submitted to NHS England by 31 March 2023.

1.1.5. The Licensee will incorporate any reasonable comments or amendments regarding the Elective, Cancer and Diagnostics plan made by NHS England, or a third party if

such assurance is requested by NHS England, and will send a revised plan by a date agreed with NHS England.

1.1.6. The Licensee will implement all the actions within its control in the Elective, Cancer and Diagnostics plan within the timescales set out in the plan, unless otherwise agreed by NHS England.

1.1.7. The Licensee will report to NHS England on the implementation of the Elective, Cancer and Diagnostics plan each month or at an alternative frequency determined by NHS England and notified to the Licensee, in a form to be directed by NHS England.

1.1.8. The Licensee will work with partners to contribute to and deliver a system elective, cancer and diagnostics recovery plan.

1.2. *Emergency Care*

1.2.1. The Licensee will take all reasonable steps to recover the operational performance and to achieve sustainable compliance with the urgent and emergency care standards as set out in agreed improvement trajectories, with the national expectation of eliminating handover delays of over 60 minutes, ensuring 95% of handovers take place within 30 minutes and ensuring 65% of handovers take place within 15 minutes

1.2.2. The Licensee will, by a date to be agreed with NHS England, which aligns to the Birmingham and Solihull system improvement plan, ensure that there is a robust improvement plan in place to meet the requirements of 1.2.1, which has been agreed with NHS England.

1.2.3. The Urgent and Emergency Care improvement plan (“the UEC plan”) will, in particular:

- 1.2.3.1. Include the actions required to meet the requirements of paragraph 1.2.1, with appropriate timescales, key performance indicators and resourcing;
- 1.2.3.2. Include an associated trajectory, as agreed with NHS England and which is in alignment with the agreed Birmingham and Solihull system trajectory, for how the Licensee will meet national expectations in relation to the UEC targets on a sustainable basis;
- 1.2.3.3. Describe the key risks to meeting the requirements of paragraph 1.2.1 and mitigating actions being taken;
- 1.2.3.4. Be based on realistic assumptions;
- 1.2.3.5. Reflect collaborative working with key system partners and other stakeholders;
- 1.2.3.6. Set out the key performance indicators which the Licensee will use to measure progress against each action, and expected impact on overall UEC performance

1.2.4. The Improvement Plan, which will be a subset of the Birmingham and Solihull system plan, will be submitted to NHS England by 31 March 2023.

1.2.5. The Licensee will incorporate any comments or amendments regarding the UEC plan made by NHS England, or a third party if such assurance is requested by NHS England, and will send a revised UEC plan by a date agreed with NHS England.

- 1.2.6. The Licensee will implement all the actions within its control in the UEC plan within the timescales set out in the UEC plan, unless otherwise agreed by NHS England.
- 1.2.7. The Licensee will report to NHS England on the implementation of the UEC plan each month or at an alternative frequency determined by NHS England and notified to the Licensee, in a form to be directed by NHS England.
- 1.2.8. The Licensee will work with partners to contribute to and deliver a system UEC recovery plan.
- 1.3. The Licensee will keep the improvement plans and their delivery under review and provide appropriate assurance to its Board regarding progress towards meeting the requirements of paragraphs 1.1 and 1.2, such assurance to be provided to NHS England on request.
- 1.4. The Licensee will notify NHS England as soon as practicable when it becomes aware of matters which materially affect the Licensee's ability to deliver the Improvement Plans, and the Licensee shall promptly update the Improvement Plan to address those matters. The Licensee shall submit any updated Improvement Plan within five working days to NHS England.
- 1.5. The Licensee will ensure that the delivery of all undertakings in relation to operational performance and other measures to improve quality and operational performance do not compromise its overall financial position. The Licensee will keep the financial cost of its quality improvements under close review and will notify NHS England as soon as practicable of any matters which are identified as potentially having a material impact on the Licensee's overall financial position.

2. Governance and Board Oversight

- 2.1. The Licensee will ensure that it has in place:
 - 2.1.1. sufficient and effective Board, management and clinical leadership capacity and capability; and
 - 2.1.2. appropriate governance systems and processes, to enable it to address the issues specified in paragraph 3 (Failings and need for action).
- 2.2. The Licensee to submit an update of its revised governance and Board oversight arrangements to NHS England by 31 March 2023.
- 2.3. The Licensee will fully engage with the external NHS England well led review.
- 2.4. The Licensee will develop and submit a plan to NHS England, including key milestones, setting out the steps which it will take to comply with the review recommendations (the 'Board Effectiveness Plan') and a copy of the Board development programme. The Licensee will modify the Board Effectiveness Plan if instructed by NHS England.
- 2.5. The Licensee will deliver the Board Effectiveness Plan by a date to be agreed with NHS England and will meet the key milestones.

3. Culture and Organisational Development

- 3.1. The Licensee will submit a progress update in relation to the actions it has taken in response to the staff survey findings by 31 March 2023.
- 3.2. The Licensee will commission an external Cultural review by 31 March 2023 and will fully engage in the review.
- 3.3. The Licensee will develop and submit a plan to NHS England, including key milestones, setting out the steps it will take to comply with the Cultural review recommendations.
- 3.4. The Licensee will ensure that it creates a positive culture where people feel that they can speak up, that their concerns and voice will be heard and lead to learning and improvement. This will be by ensuring that there are effective processes to receive systemic staff feedback and that there is a review mechanism in place which ensures that concerns are identified and responded to appropriately.
- 3.5. In response to BBC Newsnight allegations, the Licensee will engage in the external patient safety review.
- 3.6. The Licensee will develop and submit a plan to NHS England, including key milestones, setting out the steps it will take to comply with the Patient Safety review recommendations.

4. Quality

- 4.1 The Licensee will develop and submit an improvement plan to NHS England including key milestones, setting out the steps it will take to comply with the maternity diagnostic review recommendations.

5. Improvement Director

- 5.1 If it is determined by NHS England that an Improvement Director is required, the Licensee will co-operate and work with any Improvement Director who will oversee and provide independent assurance to NHS England on the Licensee's delivery of the Improvement Plans, Governance and Board Oversight arrangements and Culture / Organisational Development progress.

6. Programme Management

- 6.1 The Licensee will implement sufficient capacity, capability, programme management and governance arrangements to enable delivery of these undertakings.
- 6.2 Such programme management and governance arrangements must enable the board to:
 - 6.2.1 obtain clear oversight over the process in delivering these undertakings;
 - 6.2.2 obtain an understanding of the risks to the successful achievement of the undertakings and ensure appropriate mitigation; and
 - 6.2.3 hold individuals to account for the delivery of the undertakings.

7. Access

- 7.1 The Licensee will provide to NHS England direct access to its advisors, programme leads and the Licensee's board members as needed in relation to the matters covered by these undertakings.

8. Meetings and Reports

8.1 The Licensee will attend meetings or, if NHS England stipulates, conference calls, at such times and places, and with such attendees, as may be required by NHS England.

8.2 The Licensee will provide such reports in relation to the matters covered by these undertakings as NHS England may require.

8.3 The Licensee will cooperate fully with all other regulatory reporting requirements ensuring that returns are submitted by required deadlines and have been through robust data quality / validation processes prior to submission.

Any failure to comply with the above undertakings will render the Licensee liable to further formal action by NHS England. 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 England is satisfied that the Licensee has given inaccurate, misleading or incomplete information in relation to the undertakings: (i) NHS England may treat the Licensee as having failed to comply with the undertakings; and (ii) if NHS England decides so to treat the Licensee, NHS England must by notice revoke any compliance certificate given to the Licensee in respect of compliance with the relevant undertakings.

THE LICENSEE

Signed



(Chair or Chief Executive of Licensee)

Dated

NHS ENGLAND

Signed



Rebecca Farmer

Director of Strategic Transformation (West Midlands) and member of the Regional Support Group (Midlands)

Dated 6th March 2023