

November 18, 2021

VIA E-MAIL ONLY – DAVID.JONES@DHS.ARKANSAS.GOV

Arkansas Department of Human Services,
Division of Medical Services
Attn: Mr. David B. Jones, Assistant Director
P.O. Box 1437, Slot S401
Little Rock, AR 72203-1437

Re: Notice of Intermediate Sanction

Dear Mr. Jones:

We are in receipt of your November 16 letter to Mitch Morris, CEO of Empower Healthcare Solutions (“Empower”), which purports to impose intermediate sanctions against Empower, to begin on Friday, November 19 – just three (3) days after the date of your letter. This action is a clear *ultra vires* act by DHS, as it is both illegally and taken in bad faith.

By way of sanction, your letter purports to suspend all new assignments, enrollments, and voluntary transitions to Empower, including automatic mandatory assignments and enrollments, effective as of Friday, November 19. You claim as the basis for this intermediate sanction “Empower’s misrepresentation of information furnished to DHS.” To be clear, there was no misrepresentation, and as such, the claimed basis for sanction is erroneous and entirely without merit. Empower demands that DHS immediately retract the imposition of the sanction, which as you must know, will irreparably harm Empower. Absent this, Empower will be required to take all steps necessary to mitigate this harm, and as you know, DHS is not immune from suit for *ultra vires* acts such as this.

There are no “discrepancies” between Empower’s letter sent to DHS on **July 30, 2021**, advising DHS of transitional matters, and a lawsuit the Empower filed against Beacon Health Options (“Beacon”) on **November 2, 2021**, and there likewise is not the direct linkage between the lawsuit and readiness that you claim. You also completely fail to acknowledge that it was Empower who promptly informed DHS of the filing of the referenced lawsuit, including providing a copy of the lawsuit to DHS. This certainly is not a “gotcha moment” as you appear to allege.

As DHS must know, the purpose of the July 30 letter from Empower to DHS was to describe, in painstaking detail, the gaps in services that would be left by Beacon’s departure at year end, and how Empower will fill those gaps to avoid disruption in service to members. The letter is thorough, accurate, and candid in its assessment. Empower has been available since July

30 to clarify any information, as needed. Additionally, CEO Mitch Morris issued a personal offer on November 3 (after the lawsuit was filed) to share additional insight about Empower's structure and strategy. His offer was not accepted.

DHS has been informed of Empower's progress many times. Empower has been cooperative, forthcoming, acted in good faith, and acted in the best interest of its members. Empower also has previously communicated to DHS, on multiple occasions, that Empower may have to seek legal action based on Beacon's uncooperative behavior. The process leading up to the lawsuit was shared with DHS in real-time, as was the actual filing when the same became necessary.

Between the time period of July 30 and November 2, Beacon, unfortunately, has been less than fully cooperative with Empower in the transition and is, among other things, refusing to provide information to Empower **that belongs to Empower**. Beacon's lack of cooperation forced Empower to file the November 2 lawsuit. To equate these actions of Empower (three (3) months after the July 30 letter) with a "misrepresentation" to DHS in the July 30 letter is made in bad faith, outside of the authority of DHS, quite frankly, illegal.

The foregoing alone constitutes grounds to retract the inappropriate intermediate sanction, which will cause irreparable harm to Empower. However, we are taking this opportunity to also point out factual errors in your letter, as well as errors in DHS's understanding of Beacon's departure from Empower.

You mistake or ignore that most of the allegations you claim are inconsistent with the July 30 letter are historical in nature to provide context of Beacon's acrimony and uncooperativeness, but not included in the claims for relief, which can be summarized simply: turn over the phones, email domains and website.

Your letter alleges that "Empower does not have access to, or control of, its own policies, templates, member handbooks and training materials and historical business records relating to operational and compliance areas such as quality assurance, utilization management, grievances, fraud, waste and abuse and care coordination." To the contrary, Empower has demonstrated access and control of all necessary policies, templates, handbooks, manuals, etc. through the readiness review desk submission exercise. While Beacon has generally refused a willingness to share information, this has eased somewhat with each legal demand letter and as the lawsuit approached. Empower has all of the required polices, templates, handbooks, etc., in place, notwithstanding Beacon's lack of cooperation. In fact, DHS has reviewed and approved many of these materials.

Also, as mentioned in the July 30 letter, clinical, utilization management, and care coordination records / documentation will be retained through continued use of the same clinical platform in place today (Identifi via Evolent Health). Contrary to the allegations in your letter, the referenced July 30 letter states as follows:

- “All claims adjudication and provider claim payment has been, and will continue to be, provided by Evolent. Therefore, all historical claim data will be carried forward and claim performance statistics and reporting will continue to be provided by Evolent.
- “All enrollment file (834) processing and member data management has been, and will continue to be, provided by Evolent. All historical member data will be carried forward with no impact to file processing and enrollment services.”
- “Empower currently provides oversight and review / validation of each regulatory report, and that function and responsibility will continue throughout this transition.”

Empower has consistently described to DHS that Evolent Health will assume an expanded vendor scope of work which includes handling of grievances, as well as daily operations for fraud, waste, and abuse activity. DHS has also previously approved the Empower / Evolent agreement which includes these activities. However, because Empower retains final record of all state report deliverables, reported data and information relating to grievances and fraud, waste, and abuse activity (among others) are part of Empower’s existing business records.

Additional records are on-hand through various Empower committee proceedings, such as the Medical Quality Management Committee (MQMC) and the Quality Assurance and Performance Improvement (QAPI) Committee.

Empower currently provides oversight and review / validation of each regulatory report, and that function and responsibility will continue throughout this transition. Because Evolent currently provides enrollment processing, member and provider data management, claim processing, and care coordination/care management platforms, much of the existing operating structure relies on Evolent data today. Evolent will continue to produce those data and reports, as well as assume a larger reporting role as reflected in the forthcoming Evolent services contract and the information provided within this letter. Credentialing and network adequacy reports will be supplied by Access Health Services in similar manner as accomplished today (with the addition of BH / IDD provider support).

Another of your allegations is that “Empower does not have control of the landline phone numbers and related accounts, cell phone numbers and related accounts, care coordinator phone numbers and related accounts, an @empowerhcs.com email domain, network, account and system, and provider databases housing credentialing applications and verification documents for Empower’s network of facilities, clinics, practice groups and each member of their medical staff.” Beacon has refused to transition care coordinator cell phones and numbers. In response, Empower is (at material and unnecessary expense to Empower) replacing that equipment and information and preparing to directly notify each individual member of this change. Empower should not be having to take this action, but it is, because of Beacon’s lack of cooperation. A care coordinator directory will also be published on the Empower website for easy reference.

Also, related to this allegation, Empower's vendor, Access Health, provides credentialing support for all Empower medical / physical providers, and this will continue. Beacon historically provided verification support of primary source qualification data for all Behavioral Health and Development Disability (BH / DD) providers. Beacon has supplied necessary BH / DD provider credentialing data and applications, and all verification support of primary source qualification data has been presented to Empower's credentialing committee for acceptance/approval.

You also allege that "Empower does not have unrestricted access to, or control over, Empower's Business Data and Systems." However, as described above, Empower maintains direct ownership/control of business documents.

Another of your allegations is that "Empower does not have access/control of the email domain network, nor do they have access to the previous emails. Empower is not in control of the written history of beneficiary care."

It is true that Beacon has refused to transition care coordinator email accounts, which creates additional work for Empower that Empower should not be having to undertake. However, Empower is preparing new email / replacement email accounts for all care coordinators with plans to proactively notify members of this change and publish a care coordinator directory on the Empower website for easy reference.

As Empower has indicated several times to DHS, Evolent houses the care coordinator platform for patient care. Patient care is entered in this system. What Empower is doing vis-à-vis the lawsuit is out of an abundance of caution and desire to ensure a seamless transition for its members and the care coordinators who serve them. The email and text history in those systems likely will be useful to the care coordinators and members for continuity and will provide the best service and care.

As mentioned in the July 30 letter, clinical, utilization management, and care coordination records / documentation will be retained through continued use of the same clinical platform in place today (Identifi via Evolent Health). The complete written history of beneficiary care is housed within this clinical platform and will be available to Empower care coordinators and clinical staff moving forward.

You also allege, that "Empower does not have control of Empower's BHS Provider Network, Empower's Records and Empower's Business Data and Systems." Empower has successfully re-contracted the existing network of BH/DD providers to over 99% compliance with required PASSE standards. This work is ongoing with additional contracts completed on a weekly basis. As stated in Empower's July 30 letter, Access Health will continue to support Empower with the provision of a statewide medical/physical care provider network.

Your letter also states that "there is a question as to whether Empower owns the BHS Provider Network." As indicated in a September meeting with Empower and DHS, Beacon

contracted with IDD and BH providers on behalf of Empower. Access contracted with medical providers on behalf of Empower. This has been the arrangement since the inception of the PASSE. Empower has directly, independently and separately contracted with BH/IDD providers and meets DHS network adequacy standards, as indicated above. The only thing changing is that Empower adopted its own credentialing policy in August. The credentialing policy created a review committee, per DHS / CMS regulation, to review and approve the submitted provider information so Empower could credential its network. Beacon somehow believed Empower was interfering with its network. This is not true. Beacon has simply served to provide an administrative function by conducting primary source verification information on behalf of Empower.

You allege that “Empower does not possess, or control, the individual provider credentialing information. There is a question to whether Empower owns the provider's information and Empower does not have the information to use without Beacon. Empower's subcontractor, Evolent, will no longer be able to utilize the provider information for performing claims management services after December 31, 2021.”

Access Health provides credentialing support for all Empower medical / physical providers, and this will continue. Beacon has historically provided verification support of primary source qualification for all Behavioral Health and Development Disability (BH/DD) providers. Beacon has, in fact, supplied all BH/DD provider credentialing data and applications, and all credentialing data has been presented to Empower's credentialing committee for acceptance/approval. Empower will maintain credentials and contracts for its own BH/DD network moving forward.

You allege that “Empower does not have administrator rights' access for the website, and the ownership of the website may be in question.” It is true that Beacon has refused to deliver administrative control of the existing Empower website, another action that has caused Empower to have to spend time, energy, and resources on matters that it should not have to. However, Beacon has agreed to transfer the existing getempowerhealth.com URL / domain to Empower control as of December 31, 2021. The lawsuit seeks a mandatory injunction requiring access prior to this date. A new/replacement website has been developed in an abundance of caution and the existing URL / domain will be used to ensure continuous and open access to all required elements and processes supported through Empower's web presence.

It is unconscionable that Beacon would argue that the Empower webpage somehow belongs to Beacon. However, at the first sign that Beacon was not going to give Empower administrative rights to the website, Empower hired GoDaddy to build another website, all at great and unnecessary expense to Empower. Empower believes, asserts, and will continue to assert that <https://www.getempowerhealth.com/> is unequivocally Empower's website. As an additional precaution, Empower has a backup website ready to go.

Finally, you allege that “Empower does not own the phone numbers, sim cards, accounts, and history of the care coordinators. Empower does not own, or have access to, the written history

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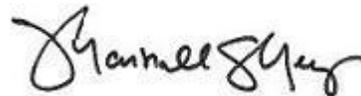
of care for approximately 20,000 beneficiaries. Empower does not own or have access to the care coordinator history of text and voice messages.”

Again, it is true that Beacon has unfortunately refused to transition care coordinator cell phones and numbers. In response, Empower is replacing that equipment and information and preparing to notify members directly of this change. A care coordinator directory will be on the Empower website for easy reference.

Also, as mentioned in the July 30 letter, clinical, utilization management, and care coordination records/documentation will be retained through continued use of the same clinical platform in place today (Identifi via Evolent Health). The complete written history of beneficiary care is housed within this clinical platform and will be available to Empower care coordinators and clinical staff moving forward.

The cited basis for sanctions against Empower is that Empower “misrepresented” certain matters to DHS in its July 30 transition update letter. As shown herein, that basis is unfounded. Moreover, DHS’s understanding of the “discrepancies” between the July 30 letter and the November 2 lawsuit are misguided. Empower demands that DHS refrain from imposing baseless sanctions on Empower on Friday, November 19 which will irreparably harm Empower. We reserve any and all rights to appeal DHS’s decisions, to seek injunctive relief with respect thereto, and to otherwise exercise any and all legal remedies available to Empower.

Sincerely yours,



Marshall S. Ney

cc: Governor Asa Hutchinson
Cindy Gillespie, Arkansas DHS
Dennis Smith, Arkansas DHS
Dawn Stehle, Arkansas DHS
Elizabeth Pitman, Arkansas DHS
Melissa Stone, Arkansas DHS

MSN:cec