

DOUGLAS R. HOFFER  
STATE AUDITOR



STATE OF VERMONT  
OFFICE OF THE STATE AUDITOR

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Rep. Bill Lippert, Chair,  
House Health Care Committee

Sen. Ginny Lyons, Chair,  
Senate Health and Welfare Committee

115 State Street  
Montpelier, Vermont 05602

Re: GMCB Billback

The Green Mountain Care Board's response to our August 23 letter missed the point.

We did not claim to know legislative intent regarding the Board's billback implementation, nor were we suggesting the Board had not been transparent about how it planned to implement it.

Our point, which the Board did not respond to, is that **the statute does not permit the Board to billback as they are currently doing.**

18 V.S.A. § 9374(h) provides the Board's billback authority. It creates two mechanisms for two different types of expenses. The first [(h)(1)] creates billback authority and a mechanism by which it collects "from each regulated entity the actual costs incurred" to conduct the regulatory activities associated with hospital budget review, insurance rate review, and ACO certification and budget review.

The second [(h)(2)(A)] directs the Board to use a different mechanism to collect funds needed to cover "all other expenses." There is no way to read the term "all other expenses" to be inclusive of the expenses in (h)(1) related to regulatory duties.

We believe the Board misunderstands the statutory effect of the word "may" in (h)(1). Citing a Supreme Court decision, the Board's memo said, "When used in a statute, the word 'may' indicates discretion." However, the mere presence of the word "may" somewhere in a statute does not confer unrestrained discretion throughout that statute. The context is critical. A careful reading of the statute makes this clear.

*"The Board may assess and collect from each regulated entity the actual costs incurred by the Board, including staff time and contracts for professional services, in carrying out its regulatory duties..."* [18 V.S.A. § 9374 (h)(1), emphasis added]

The highlighted text authorizes the Board to "assess and collect" funds, a power that can only be conferred by the legislature. This conferral of authority is necessary in the absence of any other funding source and is not uncommon for regulatory bodies. But it can't be read in isolation since the second part of the sentence makes clear what is to be assessed and collected; namely, "actual costs" associated with hospital budget review, insurance rate review, and ACO certification and budget review. Nothing else.

If there is any doubt about this, the charge to assess and collect "actual costs" is repeated in the next subsection.

*“In addition to the assessment and collection of actual costs pursuant to subdivision (1) of this subsection and except as otherwise provided in subdivisions (2)(C) and (3) of this subsection, all other expenses of the Board shall be borne as follows... [18 V.S.A. § 9374 (h)(2)(A), emphasis added]*

This second reference to “actual costs” clearly reinforces the original language. In addition, that same subsection prescribes an explicit methodology for assessing and collecting funds related to “all other expenses”:

*“all other expenses of the Board shall be borne as follows:*

- (i) 40 percent by the State from State monies;*
- (ii) 30 percent by the hospitals;*
- (iii) 24 percent by nonprofit hospital and medical service corporations...*
- (iv) six percent by accountable care organizations...*

Thus, the statute makes clear that the 40/60 allocation is not to be used for costs related to regulatory duties described in (h)(1) but can only be applied to “all other expenses.”

The word discretion is only found in one subsection of the statute, but it does not provide discretion to apply expenses to either of the two billback mechanisms the Board chooses. The discretion is limited to “all other expenses.”

*“The Board may determine the scope of the incurred expenses to be allocated pursuant to the formula set forth in subdivision (2) of this subsection if, in the Board's discretion, the expenses to be allocated are in the best interests of the regulated entities and of the State.” [18 V.S.A. § 9374 (h)(3)]*

That the statute authorizes discretion in that one instance but not for the “actual costs” in (h)(1) is noteworthy.

Finally – the Board’s reference to fiscal notes and committee testimony does not change the plain text of the statute. The Board’s practice does not conform with the law.

Sincerely,



Doug Hoffer  
State Auditor