



Independent Regulator  
of NHS Foundation Trusts

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26 November 2009

Richard Bourne  
Chairman  
Colchester Hospital University NHS Foundation Trust  
Turner Road  
Colchester  
Essex CO4 5JL

**By email**

Dear Mr Bourne

**Colchester Hospital University NHS Foundation Trust (the Trust)  
National Health Service Act 2006 (the Act): section 52 Failing NHS  
Foundation Trusts**

I write further to the letter dated 6 November 2009 from the Trust's Chief Executive and its enclosures, to our letter of 17 November 2009 to the Trust's solicitors, Capsticks, and to the telephone conversation earlier today between us.

As stated in those communications, Monitor's Board reconsidered in full the Trust's position at its regular monthly Board meeting held yesterday, including whether the Trust is in significant breach of any term or terms of its Authorisation and if so, what regulatory action if any may be appropriate in consequence.

Monitor's Board had full sight at that meeting of all relevant information received since the Trust's position was last considered by the Monitor Board at its meeting on 28 October 2009. Specifically, this information included the correspondence referred to above, together with the Trust's solicitors' letter of 9 November 2009 in response to Monitor's letter of 21 October 2009, and the letter also dated 9 November 2009 from Mr Nick Chatten to Monitor and its enclosures. This information was added to the 'bible' of key documentation as sent to the Trust and to its solicitors on 23 October 2009, which documentation Monitor's Board again reviewed.

### *Summary of Monitor's Board decision*

In summary, and as communicated to you in our said telephone conversation earlier today, Monitor's Board decided to remove you with immediate effect as Chairman of the Trust and to appoint with effect from 30 November 2009 Sir Peter Dixon as Interim Chair of the Trust for such period or periods, and on such terms with respect to remuneration and allowances, as Monitor may direct.

Monitor's Board determined that, on the basis of information available to it and having taken into account the Trust's representations, the Trust has contravened, and is failing to comply with conditions 2, 5(1), 6(1) and 6(2) of its Authorisation and that the contravention and failure are significant under section 52(1) of the Act.

Enclosed with this letter is the formal Notice of Monitor's exercise of its intervention powers under section 52 of the Act to this effect, together with the Annex to the Notice. I shall be grateful if you will ensure that the Notice and letter are shared immediately with your Board of Directors. The Trust will be aware that Monitor is obliged by law to make public the fact of this statutory intervention: the Notice will be on Monitor's website today, together with this letter. Sir Peter Dixon is also Chairman of University College London Hospitals NHS Foundation Trust and will continue in that role alongside his interim role at the Trust.

In reconsidering the Trust's position, Monitor's Board took full account of all relevant information and that there has been almost nine months of formal regulatory discussions and contact between Monitor and the Trust during which considerable period all issues relating to the breaches of the specified terms of Authorisation have been raised and debated in both meetings and correspondence.

Monitor's Board also noted that its executive team had shared with the Trust all the relevant information which the Board had also seen and taken into account. It further noted that over the last nine months of formal regulatory escalation and dialogue with the Trust, the Trust had had sufficient and therefore all reasonable opportunity to consider the issues it faced and was fully aware of the mounting regulatory concern expressed by Monitor, and also to make representations to Monitor, whether direct or through its solicitors. Those representations were taken into account by Monitor's Board during its reconsideration yesterday.

### *Details of Monitor's Board decision*

Monitor's Board observed in its reconsideration that Monitor uses metrics in the *Compliance Framework* to provide an indication as to whether or not a trust is well led and compliant with its terms of Authorisation.

Where any of these metrics are triggered, Monitor will review in more depth the overall governance of the trust. Specifically, Monitor will consider whether the

evidence supports a view that the trust Board is well led and whether there are systems and processes in place to identify potential risk to compliance with the Authorisation and, if breaches of any terms of the Authorisation occur, whether the Board has the capacity and competence to take effective action to rectify them on a sustainable basis and always to ensure that patients are properly protected.

As such, Monitor's focus is not purely on the delivery or otherwise of healthcare targets or, on an individual target basis, how one foundation trust may compare with another.

Monitor's Board considered that its regulatory remit and approach as set out in the *Compliance Framework* requires it to make a reasoned and balanced judgment on what a failure to meet one or more of the said metrics may indicate about the overall strength of leadership and fundamental effectiveness of governance at a foundation trust. Part of that judgment must be an assessment of whether use by the Monitor Board of its statutory powers of intervention will be likely to occasion appropriate change to remedy identified failings and weaknesses such that the trust is able to return to compliance and then comply in full with its terms of Authorisation on a sustainable basis.

#### *Condition 6(1) and (2) of the terms of Authorisation*

Specifically, Monitor's Board reconsidered the evidence relevant to condition 6 of the terms of Authorisation (healthcare and other standards) that the Trust:

- *Shall put and keep in place and comply with arrangements for the purpose of monitoring and improving the quality of healthcare provided by and for the trust; and*
- *Shall comply with statements of standards in relation to the provision of health care published by the Secretary of State under the Health and Social Care (Community Health and Standards) Act 2003, as set out in the department of Health publication Health and Social Care Standards and Planning Framework (July 2004) as may be amended from time to time.*

In accordance with the summary tables at Appendix 1 to this letter, the Board noted the specific areas of performance concern, ranging from 18 weeks admitted patients waiting time target, A&E 4 hour waiting time target, 62 day cancer target, MRSA screening, patient safety including a consistently high Hospital Standard Mortality Ratio (HSMR) and patient experience, the evidence in support (as referenced to the 'bible' of documentation) and the key mitigations as available and provided by the Trust.

The failure by the Trust to meet healthcare targets as required gave rise to the direct concern that the Trust was breaching condition 6. The Board noted in particular that the Trust is red rated following its failure to deliver the 18 weeks target in three quarters from Q4 2008/09, that the Trust did not meet its 62 day cancer target in Q2 2009/10, the Trust had failed to improve the position on HSMR from 2007/08 to 2008/09 (remaining at the relatively high rate of 112) and

its Care Quality Commission's Annual Health Check (AHC) performance for quality of services had declined from excellent in 2007/08 to fair in 2008/09.

Monitor's Board took account of progress made by the Trust over the last six months to improve its performance against some but by no means all healthcare targets and that, for example, the Trust was compliant with the 18 week admitted target and its 4 hour A&E target since August 2009 and Q1 2009/10 respectively. However, Monitor's Board reflected upon the Trust's failure to proactively identify and properly manage the risk of breaches of a number of healthcare targets over a considerable period, the significant reliance by the Trust upon additional funding of activity from its commissioners in the delivery of some improvements to date, the important influence of external rather than Trust Board led pressure on the progress achieved, and the absence of material evidence to support a view that the Trust had changed and improved its Board leadership, processes and approach to mitigate a risk of future repeat breaches.

The Monitor Board also noted that the rate of the Trust's progress had been slower than expected and that even where targets are now being met, such as for the A&E 4 hour wait target, by the Trust's own admission, compliance is fragile and as such there must be the residual risk of future breach.

The Board agreed with the residual concerns of the executive as outlined in the Appendix and determined in consequence that the Trust was in significant breach of condition 6 of its Authorisation.

#### *Condition 5 of the terms of Authorisation*

Arising from and related to reconsideration of breach of condition 6(1) and (2), the Board also reconsidered whether there was a breach of condition 5(1) (governance) and if so, whether that breach was significant. By condition 5(1), the Trust shall:

- *Ensure the existence of appropriate arrangements to provide representative and comprehensive governance in accordance with the Act and to maintain the organisational capacity necessary to deliver the mandatory goods and services referred to in condition 7(1) and listed in Schedule 2 and the mandatory education and training referred to in condition 7(2) and listed in Schedule 3.*

Monitor's Board noted that the failure by the Trust to meet healthcare targets and other metrics in the *Compliance Framework* triggered the executive to consider in more detail wider governance issues at the Trust, in accordance with Monitor's regulatory approach as outlined above.

Taking account of the summary table at Appendix 1 to this letter, Monitor's Board noted the specific areas of governance concern relating to the Trust Board's accountability, assurance, capability, structure, information management, leadership, planning, engagement with the Trust, reactive behaviours and risk

identification. The Board also noted the evidence in support of the concerns raised, as reference to the 'bible', and the key mitigations.

Monitor's Board acknowledged that, as in relation to its reconsideration of condition 6(1) and (2), actions taken by the Trust since March 2009 have resulted in improvements against some of the *Compliance Framework* indicators. Monitor's Board also identified that evidence of non executive director challenge would not necessarily be evidenced by way, for example, of formal Trust Board meeting minutes.

However, Monitor's Board did not consider that the progress in itself provided sufficient evidence that the Board had taken all necessary steps to ensure that it has put in place Board leadership and governance processes and procedures to enable it to identify risks to its Authorisation, and in particular, to patient safety, or to design and oversee effective action to address these risks on a sustainable and ongoing basis.

In addition, many of the Trust Board's actions had been reactive rather than proactive. Monitor's Board observed that a fundamental facet of good governance was anticipation of risk and the required remedial actions, and that this appeared from the available evidence to be fundamentally lacking on the Trust's part. The Board agreed with the residual concerns identified by the executive in the said summary tables, and determined that the Trust is in significant breach of condition 5 of its Authorisation.

#### *Condition 2 of the terms of Authorisation*

Further to its reconsideration of conditions 6(1) and (2) and 5(1), Monitor's Board reconsidered the requirement of the Trust under condition 2 to exercise its functions "*effectively, efficiently and economically*", the general duty.

The Board noted the summarised position in Appendix 1 and agreed that Monitor has no concerns as to the Trust's financial performance which was currently strong with a Financial Risk Rating (FRR) of 5.

With regard to the other requirements of the general duty in condition 2, Monitor's Board reconsidered whether the Trust has taken effective and timely actions to address the breaches of the various healthcare targets and governance concerns which had emerged as underlying those breaches.

The Board noted the residual concerns of the executive as set out in the Appendix and determined that the Trust was breaching its requirement to exercise its functions effectively and economically, and that in the context of the healthcare target breaches, the breach was significant.

#### *Other breaches of the terms of Authorisation*

Monitor's Board agreed on its reconsideration of all the issues that the Trust was specifically not in significant breach of conditions 18 (co-operation with other

healthcare bodies) and 24 (concerning dealings with Monitor), and other conditions of the Authorisation other than those set out above.

### *Statutory intervention*

Having determined that the Trust is in significant breach of conditions 2, 5(1) and 6(1) and (2) of its Authorisation, Monitor's Board reconsidered whether use of its statutory powers was appropriate, that is both reasonable and proportionate, and if so, in what way.

Monitor's Board acknowledged that any intervention under section 52 of the Act must be likely to result in a swifter and sustainable return by the Trust to compliance with its terms of Authorisation to safeguard prompt access to quality care by the Trust's patients.

In considering the use of its statutory powers, the Board also considered the main options for action and in each case the potential benefits and risks against the overall objective of the intervention. This included the setting of measures of progress towards the resolution of the breaches of the Authorisation, a requirement for the Board of Governors to oversee progress and to take specific action as appropriate, or for Monitor to take direct and timely action to effect change in the leadership of the Trust.

Taking full account of the nature and significance of the breaches of the three conditions of Authorisation and of the persistent and pervasive governance concerns, and of the possible intervention options, Monitor's Board decided that a fundamental change in Board leadership at the Trust was most likely to assist in delivering the Trust back to full compliance with its terms of Authorisation. Accordingly, your immediate removal as Chairman of the Trust and the appointment of an interim Chairman was both the most appropriate regulatory response and a fair exercise of Monitor's statutory powers in the Trust's current circumstances.

We have copied in the Trust's legal advisers and the Members' Council to this letter and its enclosures. The Governors will know that, by law, they have the power to appoint or remove the Trust's Chair. That power and those of Monitor to intervene at its discretion where there is a significant breach or breaches of the Trust's Authorisation do not, however, conflict.

Where justified by the evidence and circumstances, Monitor will move swiftly to use its regulatory powers to arrest failure, protect patient care and ensure that the Trust returns to a stable and well governed position from which it may properly discharge its range of healthcare duties. Monitor may only use its formal powers in the circumstances outlined above and any appointments made in consequence are interim only. Once the Trust is no longer in significant breach of its Authorisation, Monitor would expect the Trust's formal recruitment processes to commence and then supersede any interim arrangements at the appropriate time. Monitor will determine with the new Interim Chair what interim

term is appropriate in the context of the challenges faced by the Trust and in our discretion.

Finally, I consider it important to emphasise that this intervention relates to matters of strategic leadership capacity and capability. The aim of this formal intervention is to assist the Trust in acquiring and then securing the Board and leadership skills it will need to successfully recover its position to one of full compliance with its Authorisation.

Any questions should go to Edward Lavelle, Regulatory Operations Director (direct line 020 7340 2492).

Yours sincerely

A handwritten signature in black ink, appearing to read 'William Moyes', with a horizontal line drawn underneath it.

William Moyes  
**Executive Chairman**

Cc: Capsticks  
Trust Members' Council

Enc:  
Notice Under section 52 of the Act  
Appendix 1