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2024 VT 38

No. 23-AP-290

In re Amendment #1 to FY23 Accountable Care Organization Budget Order (OneCare Vermont Accountable Care Organization, LLC, Appellant)	Supreme Court On Appeal from Green Mountain Care Board April Term, 2024

Owen Foster, Chair

Shapleigh Smith, Jr., Anne B. Rosenblum and Alexander Hunter of DINSE P.C., Burlington, for Appellant.

Charity R. Clark, Attorney General, and Patrick T. Gaudet, Assistant Attorney General, Montpelier, for Appellee Green Mountain Care Board.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **REIBER, C.J.** OneCare Vermont Accountable Care Organization, LLC brings this appeal from a decision of the Green Mountain Care Board, challenging two conditions that the Board placed on the approval of OneCare's amended annual budget. First, the Board required OneCare to obtain affidavits from its member hospitals, attesting that primary care provider incentive payments were in fact being used to fund primary care, and detailing the hospitals' historical and prospective use of the funds ("the hospital-affidavit condition"). Second, the Board required OneCare to cap the aggregate compensation for top executives at the median level of OneCare's internal compensation benchmarks, and to allocate any amounts above that to population health activities ("the executive-compensation condition").

¶ 2. OneCare challenges the conditions on five bases, relating to the Board's statutory authority, the Vermont Administrative Procedure Act (VAPA), procedural due process, the sufficiency of the evidence, and the Contracts Clause of the U.S. Constitution. We conclude that OneCare's arguments, save for those about statutory authority and due process, were not preserved for appellate review because OneCare failed to mention them during proceedings before the Board. For the two remaining issues, we conclude that the Board provided adequate notice and opportunity to be heard and that the Board acted within its statutory authority in imposing the budget conditions. Accordingly, we affirm.

I. Background

¶ 3. The Green Mountain Care Board is an independent oversight board created by the Legislature for the purpose of improving healthcare outcomes while reducing per-capita costs. 18 V.S.A. § 9372. Among its duties, the Board oversees accountable care organizations (ACOs) by certifying their eligibility for Medicaid and commercial insurance payments and by reviewing, modifying, and approving their budgets on an annual basis. Id. § 9382. An ACO is "an organization of health care providers that has a formal legal structure, is identified by a federal taxpayer identification number, and agrees to be accountable for the quality, cost, and overall care of the patients assigned to it." Id. § 9373(16). OneCare is currently the only ACO in Vermont. In its own words, it is organized as a "private 501(c)(3) organization, funded by its private nonprofit hospital members, with the charitable purpose of improving healthcare outcomes for Vermont residents while stabilizing healthcare costs."

¶ 4. The following descriptions are taken from the record and the Board's orders. This dispute arose out of the budget review process for OneCare's Fiscal Year 2023 (FY23) budget.[1]

[1] We note that while the subject of this case is the 2023 budget, which is no longer in effect, neither party raised any issues relating to potential mootness. Because the issue is not briefed, we lack a record on which to evaluate this question and cannot conclude that the case is moot. See State v. Stevens, 2004 VT 23, ¶ 8 n.*, 176 Vt. 613, 848 A.2d 330 (mem.) (reaching

Pursuant to its promulgated rules, the Board issued FY23 guidance to OneCare on July 1, 2022, OneCare submitted its proposed budget on October 1, 2022, and the Board held a series of hearings on the budget. However, just prior to the Board's vote on the proposed budget, OneCare's negotiations with Blue Cross and Blue Shield of Vermont (BCBSVT) failed, resulting in the loss of more than 83,000 individuals from OneCare's commercial-payer program. At the December 21, 2022 vote on the proposal, the Board still approved the budget but did so subject to numerous conditions, including that OneCare submit a revised budget without the BCBSVT contract and that it reduce operating expenses by 2%. OneCare submitted an updated FY23 budget without the BCBSVT contract on January 30, 2023, and a revised budget with a 2.6% reduction in operating expenses on March 31, 2023.

¶ 5. The Board held a series of public hearings on the revised budget. As the Board found, "OneCare's revised budget altered payments made to the network's primary care providers" and "[t]he loss of the BCBSVT contract resulted in a decrease in the number of" insured lives subject to coverage. Further, it found that, during OneCare's May 5, 2023 hearing for the revised budget, "the Board questioned OneCare about how it ensured OneCare [Primary Care Provider] incentive payments paid to hospitals for hospital-owned primary care-earned funds were being utilized for the intended purpose of supporting primary care." OneCare's representative "testified that OneCare did not track those payments" and could not do so unless it asked "for specific reporting" from member hospitals. The Board found that "to date, OneCare has not asked for that reporting." The Board also opened the revised budget to public comments and received seven comments, including three that suggested that OneCare's executive compensation was out of proportion to its performance.

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merits of appellant's claims because "[t]he State has not contested this argument or claimed that the appeal is moot").

¶ 6. Following the hearings, the Board determined that OneCare's performance had "varied substantially from its budget" due to the loss of the BCBSVT contract and the addition of a new risk contract with the University of Vermont Health Network. Pursuant to Board Rule 5.407, the Board issued written notice to OneCare, requiring it to submit a formal request to modify its budget. OneCare submitted this request on May 30, 2023.

¶ 7. The Board held a public hearing on the amended budget proposal on June 14, 2023. At the hearing, Board staff noted that "additional information came to light during OneCare's revised budget hearing [on May 5] regarding the nature of primary care funds flowing through hospitals." In the words of one Board Member, OneCare "has distributed the dollars to hospitals, but cannot attest or account for where the money has gone within the hospitals." To address the Board's concerns about the lack of tracking, Board staff proposed a potential motion that would condition approval of the amended budget on "the requirement that OneCare obtain affidavits/attestations from its applicable hospital network participants to establish the use of PCP funds, both on [a] historical basis and prospectively."

¶ 8. At the June 14 hearing, one Board Member also introduced the "complicated, controversial topic of executive compensation." As per OneCare's Revised FY23 Budget, the Board found that "OneCare's total compensation for its executives at the VP-level and above . . . reflects a 62% increase from FY21 to budgeted FY23." Citing the substantial changes in the budget since the December approval, the Board Member proposed a second condition on the budget that would "set executive compensation . . . to the 50th percentile, at the median of national benchmarks for other executives for ACOs." Over the course of the hearing, the Board debated the executive-compensation condition, with two Board Members expressing reservations about adding such a condition midway through the year and without any prior guidance. Based on the discussion, Board staff drafted a proposed motion during a break in the hearing.

¶ 9. The interim CEO of OneCare also appeared at the hearing, testifying against the limitation on executive compensation. He pointed out that OneCare's Board of Managers has "purview in rule 5 to set [executive] compensation," and suggested that reapportioning funds from executive compensation "is not as simple as it might seem." He also testified that his job is to ensure that OneCare "set[s] actionable goals with realistic metrics and measures that we can report on later" and that he believed OneCare had "done that in historical fashion in voluminous ways."

¶ 10. At the end of the hearing, the Board voted on the two conditions and the amended budget, approving all three, with the executive-compensation condition passing by a 3-2 vote, and the two other items passing unanimously. Despite the vote, the Board did not issue any written decision at, or immediately following, the June 14 hearing. And despite its objections raised on appeal, OneCare did not make any objections to the conditions at the time, nor did it request any additional hearings, file any motions with the Board, request reconsideration, or appeal the June 14 vote.

¶ 11. The Board took no further action on the amended budget until August 2,[2] when the Board Chair introduced a motion to modify the executive-compensation condition to clarify that "the cap on executive compensation established in the condition shall be calculated and enforced on an aggregated basis, capping the total combined compensation for OneCare's executives . . . at the total combined amount of the median, 50th percentile, of the benchmark used by OneCare to establish" executive compensation. The purpose of the motion was to address "vagueness" in the initial language about whether the limit should be calculated "at the individual level or the aggregate level." The Board Chair opened the motion for public comment for one week, and the Board took no further action at the August 2 hearing.

[2] The Board held one additional public hearing on June 21, at which OneCare's CEO again appeared and testified. While the hearing touched on executive compensation, the focus of the hearing was establishing guidance for FY24, rather than addressing the amended FY23 budget.

¶ 12. The Board received two additional public comments on the August 2 proposal. The first comment encouraged the expansion of the compensation cap to other executives at OneCare. The other came from OneCare itself and raised two objections to the conditions. First, OneCare argued that the Board had introduced the motions at the June 14 and August 2 hearings "without providing any prior notice, even though the discussion and the prepared PowerPoint that accompanied it were clearly planned in advance." Second, OneCare argued that the executive-compensation condition exceeded "the GMCB's statutory and regulatory authority."

¶ 13. At the subsequent hearing on August 9, the Board voted to approve the modified executive-compensation condition, with two Board Members abstaining from the vote. The Board issued a written order on the same day, in which the two abstaining Board Members dissented in part.

¶ 14. In the written order, the Board set out twenty-seven findings of fact to support its conclusions. Relevant to the hospital-affidavit condition, the Board noted that during the May 5 hearing, OneCare had testified that hospital use of primary care funds was not trackable, that it had not attempted to do so, and that doing so was the responsibility of individual hospitals. The Board also found that OneCare made no attempt prior to the June 14 meeting to address concerns over the allocation of these funds. Relevant to the executive-compensation condition, the Board found that OneCare's performance results compared unfavorably to national comparison groups for ACO measures and that the total cost of care per beneficiary had increased in both absolute and relative terms. Despite the declining performance, the Board found that OneCare executives had received 100% of available variable pay in 2022, compared to only 52% in 2019 and 84% in 2021, and that overall executive compensation had increased by 62% from 2021 to 2023. Finally, the Board noted that it had received several public comments on the amended budget, with three comments specifically addressing the mismatch between increasing executive compensation and decreasing performance.

¶ 15. Applying these findings, the Board first concluded that OneCare's inability to track primary care funds "raise[d] serious questions about whether the funds presented as PCP funding actually support PCPs," particularly given "OneCare's poor—and declining—performance as compared to peer ACOs." As such, the Board required OneCare to "obtain attestations from hospitals that receive PCP incentive payments that provide a historical use and accounting of PCP funds that the hospital has received from OneCare in prior years." Second, the Board concluded that "a further reduction in OneCare's operation expenses is warranted based on the changes in OneCare's budget and its performance." The Board required OneCare "to achieve that operational expense reduction by capping the total compensation paid in FY23 to its top executives . . . at the median (50th percentile) of the benchmark that OneCare uses to establish compensation to those executives." The Board required that any additional funds be reallocated to population health initiatives of OneCare's choosing, "in a way that is fundamentally more beneficial to Vermonters."

¶ 16. Two Board Members dissented as to the executive-compensation condition. The dissenters argued first that the Board failed to provide due process because the FY23 budget guidance did not include specific targets for executive compensation, the process before June 14 did not provide adequate notice that the Board might cap compensation, and the Board did not provide a comment period prior to the June 14 hearing. The dissent also argued that there was an insufficient factual basis for the decision since there was little evidence of performance changes since the initial budget approval, there was no evidence whether the cap would improve OneCare's performance or would negatively impact productivity, and there was no evidence about salaries already paid that year.

¶ 17. OneCare timely appealed the August 9 written order to this Court on September 8,[3] raising the following arguments: (1) the Board lacked statutory authority to impose either of the

[3] At oral argument, the Board conceded that the August 9 written order was the final order and that OneCare's appeal of the order was timely. The Board does not argue that the June 14

conditions; (2) the two conditions were adopted without adequate notice, in violation of the VAPA; (3) the executive-compensation condition violated OneCare's right to procedural due process; (4) the Board lacked an adequate evidentiary basis to impose the executive-compensation condition; and (5) the executive-compensation condition unlawfully interfered with OneCare's contractual obligations, in violation of the Contracts Clause of the U.S. Constitution.

II. Preservation

¶ 18. Before reaching the merits of OneCare's arguments, we first consider whether OneCare properly preserved these arguments for appellate review. The Board suggests that of the five arguments raised on appeal, only the due process and statutory authority arguments were ever mentioned in the record. These two arguments were presented in a brief comment submitted on August 8. But in the Board's view, "a single conclusory, one-sentence argument is insufficient to preserve" an issue for appeal. (Quotation omitted). The Board contends that the remaining arguments—those relating to the VAPA, the sufficiency of the evidence, and the Contracts Clause—were all waived because OneCare failed to mention them at any time prior to appeal. The Board points to previous decisions of this Court in which we rejected similar claims for lack of preservation. See In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 10, 182 Vt. 340, 939 A.2d 504 (right to evidentiary hearing); Pratt v. Pallito, 2017 VT 22, ¶ 17, 204 Vt. 313, 167 A.3d 320 (insufficiency of evidence); Clark v. Menard, 2018 VT 68, ¶ 6, 208 Vt. 11, 194 A.3d 752 (constitutional claim).

¶ 19. We have previously recognized that parties are "generally limited on appeal to arguments preserved before the administrative agency." Pratt, 2017 VT 22, ¶ 12. "The purpose of the preservation rule is to ensure that the original forum is given an opportunity to rule on an

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order was a final order and that OneCare waived its challenges to the budget conditions by failing to appeal that order within thirty days. For reasons discussed infra, ¶¶ 27-28, we agree that the August 9 order was the final order for purposes of appeal.

issue prior to our review." Id. ¶ 14 (quotation omitted). "To properly preserve an issue for appeal a party must present the issue with specificity and clarity in a manner which gives the trial court a fair opportunity to rule on it. The same principle applies to appeals from administrative agencies." Vt. Transco LLC v. Town of Vernon, 2014 VT 93A, ¶ 16, 197 Vt. 585, 109 A.3d 423 (quotation and citation omitted).

¶ 20. As the Board suggests, the issues on appeal can be split into two categories: those that were raised in the August 8 comment, and those that were never mentioned below. Starting with the latter category, we conclude that OneCare failed to preserve its arguments related to the VAPA, the sufficiency of the evidence, and the Contracts Clause because it never mentioned them in proceedings or comments before the Board.

¶ 21. OneCare does not point to anywhere in the record that it made these arguments below. Instead, it argues that it should be relieved of the obligation to preserve these issues because the Board's rules set up a timeline that lacks any opportunity for formal objection. OneCare distinguishes the cases cited by the Board on this basis, since the "budget review process does not entail any formal introduction of evidence or provide for administrative appeal." However, we have previously rejected the argument that "the rule of preservation should not apply with equal force to public notice and comment proceedings as compared to adjudicatory proceedings," because "[t]he policy in favor of first affording the original forum the opportunity to correct its own alleged error is the same." Entergy Nuclear Vt. Yankee, 2007 VT 103, ¶ 18. Even if we accept OneCare's contention that it had no notice of the conditions until the June 14 hearing, OneCare could have lodged specific complaints at any time between then and the August 9 written order. The Board also held public hearings on June 21, August 2, and August 9, during which OneCare did not raise its arguments. Additionally, the Board provided a week-long comment period between August 2 and 9, during which OneCare did not raise additional issues. OneCare did submit a comment during this period, but only raised specific arguments related to due process

and statutory authority. We therefore conclude that OneCare's unraised arguments were not preserved.

¶ 22. OneCare also suggests that because the dissenting opinion below raised concerns about the lack of evidence to support the executive-compensation condition, OneCare's arguments to this effect should be considered preserved. OneCare argues that since the purpose of the preservation rule is to provide the tribunal with a fair opportunity to rule on the issue, "[w]hether a particular issue was identified by a Board Member or OneCare is immaterial to the purposes of preservation." But despite OneCare's arguments, the purposes of preservation were not adequately served here. The preservation rule requires not only that the forum entity have a "fair opportunity" to rule on the issue but also that the party present it "with specificity and clarity." Vt. Transco LLC, 2014 VT 93A, ¶ 16 (quotation omitted). As we have recognized, this rule serves several goals, "such as creating an adequate record for review, and allowing the trial court to correct any errors and rule on objections in the first instance." State v. Erwin, 2011 VT 41, ¶ 14, 189 Vt. 502, 26 A.3d 1; see State v. Sole, 2009 VT 24, ¶ 13, 185 Vt. 504, 974 A.2d 587 ("The preservation rule exists so that the trial court can address any correctable errors before they are presented here[] and develop an adequate record for any appeal."). By failing to raise the issue at any time during the proceedings, OneCare did not develop any factual record for appeal or provide the Board with an opportunity to address its alleged errors. In independently raising the issue, the dissenting board members did not develop such a record or provide the majority with a timely opportunity to seek out additional evidence. Accordingly, we conclude that the issue was not preserved.

¶ 23. Turning to the two remaining arguments—those relating to due process and statutory authority—we need not decide whether OneCare has adequately preserved these issues since, for the reasons discussed below, we conclude that neither argument holds merit. See State v. J.S., 2018 VT 49, ¶ 12 n.3, 207 Vt. 379, 189 A.3d 552 (declining to decide whether defendant adequately preserved issue for appeal "because we find no error"); In re C.N., No. 22-AP-105,

2022 WL 3448105, at *2 (Vt. Aug. 12, 2022) (unpub. mem.) [https://perma.cc/ZGD6-KFGV] ("We need not determine if the argument was preserved because we conclude it lacks merit."); State v. McGrath, No. 2011-167, 2012 WL 1980366, at *2 (Vt. Apr. 26, 2012) (unpub. mem.) [https://perma.cc/B4D9-GDE5] ("We do not reach the preservation issue because, even assuming that the issue was adequately preserved, we find no grounds for reversal.").

III. Due Process

¶ 24. Turning first to the due process claim, OneCare argues that the Board failed to provide adequate notice or opportunity to be heard prior to imposing the two budget conditions. It asserts that the "wide-ranging discussions" addressing executive compensation and primary care spending that occurred before the June 14 hearing did not provide "meaningful notice" of the specific conditions that might be imposed. And because it had inadequate notice of the conditions prior to June 14, OneCare argues that the opportunity for its CEO to testify at the hearing was insufficient to satisfy due process. At oral argument, OneCare characterized the June 14 hearing as the final order, suggesting that the subsequent two-month period prior to the August 9 written order could not cure the problem with the initial notice.

¶ 25. While we have said that "notice in an administrative proceeding need only be reasonable," the agency must at a minimum " 'inform the private party of the nature of the government action so as to allow an opportunity to challenge the action.' " In re Bombardier, 2018 VT 11, ¶ 24, 206 Vt. 450, 182 A.3d 1165 (quoting 2 C. Koch, et al., Administrative Law & Practice § 5:32[2] (3d ed.)). The touchstone in evaluating such claims is whether "the parties are sufficiently apprised of the nature of the proceeding so that there is no unfair surprise." In re Cent. Vt. Med. Ctr., 174 Vt. 607, 611, 816 A.2d 531, 537 (2002) (mem.) (quotation omitted). "The question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure." Id. at 611, 816 A.2d at 538 (quotation omitted).

¶ 26. Prior to the June 14 hearing, the Board made several references to issues with executive compensation and primary care spending. For example, in an order on March 30, the Board suggested that "OneCare consider possible reductions" in various budget areas, including "base and variable compensation." And at a public hearing on May 5, the Board repeatedly questioned OneCare about issues with executive compensation and primary care spending, with the Board Chair indicating that "it would be logical to me to tie executive comp[ensation] at the organization to improving" OneCare's performance on certain metrics. However, in its agenda issued prior to the June 14 hearing, the Board made no reference to possible budget conditions relating to these subjects. OneCare suggests that if prior questioning about a topic were sufficient to constitute notice, then "any question from the GMCB about any aspect of OneCare's budget would serve as notice that the GMCB could later exert direct control over any arguably related expense."

¶ 27. We need not decide whether the procedure leading up to the June 14 vote was sufficient to satisfy due process because we conclude that the Board issued no final order until its written order on August 9. Absent a written order, the Board's June 14 vote was not a final, appealable order because there was no "record sufficient to serve as the basis for judicial review." 18 V.S.A. § 9381(a). At the June 14 hearing, the Board voted on the two proposed budget conditions, but it issued no findings of fact to support its conclusions. These findings are critical to our evaluation of whether the Board acted within its statutory authority in imposing the challenged conditions. See In re J.R., 147 Vt. 7, 11, 508 A.2d 719, 721 (1986) ("[F]indings must indicate to the parties and to this Court, if an appeal is taken, what was decided and how the decision was reached."). Thus, absent a written order, we would be unable to evaluate OneCare's primary legal claim. Indeed, OneCare acknowledges the "uncertainty" as to "the final form of the GMCB's decision" that existed prior to the issuance of a "written order."

¶ 28. A contrary conclusion as to what constitutes the final order could lead to dismissal of OneCare's appeal altogether. Under 18 V.S.A. § 9381(b), "[a]ny person aggrieved by a final action, order, or other determination of the Green Mountain Care Board may, upon exhaustion of all administrative appeals available" under the Board's adopted rules, "appeal to the Supreme Court pursuant to the Vermont Rules of Appellate Procedure." As OneCare acknowledges, "the GMCB's procedures do not include a process nor a requirement for administrative appeal," so a final order is immediately appealable to this Court. Vermont Rule of Appellate Procedure 4(a)(1) requires that a notice of appeal be filed within thirty days after entry of the judgment or order appealed from. If the June 14 vote were considered a final order, then OneCare failed to bring a timely appeal since more than thirty days passed between the vote and OneCare's September 8 notice of appeal.

¶ 29. Treating the August 9 order as the final order and reviewing "the fairness of the whole procedure," we conclude that OneCare was "given an adequate opportunity to prepare and respond to the issues raised," consistent with due process. Cent. Vt. Med. Ctr., 174 Vt. at 611, 816 A.2d at 538 (quotation omitted). Even assuming that there was insufficient notice prior to the June 14 hearing, that hearing informed OneCare that executive compensation and primary care spending would be the subjects of budget conditions. Following the June 14 hearing, the Board's August 9 written order imposing the two conditions cannot be considered an "unfair surprise" to OneCare. Id. at 611, 816 A.2d at 537 (quotation omitted). In the nearly two months between June 14 and August 9, the Board held three additional hearings—on June 21, August 2, and August 9—that touched at least somewhat on OneCare's budget. At any of those hearings, OneCare could have raised objections to the Board's conditions. And at any point prior to August 9, OneCare could have submitted a written motion or comment detailing its objections to the Board's procedures or requesting additional proceedings. Further, during the formal written comment period from August 2 to 9, OneCare did not submit a more detailed comment, containing its objections to the

conditions and citing to specific provisions in the law. Even after the August 9 written order, OneCare could have submitted a request for reconsideration, detailing its legal objections to the conditions. Considering, as we must, the entirety of the procedure, we conclude that OneCare was sufficiently informed of the nature of the proposed action "so as to allow an opportunity to challenge the action." Bombardier, 2018 VT 11, ¶ 24 (quotation omitted). Accordingly, it was not deprived of due process.

IV. Statutory Authority

¶ 30. We turn now to OneCare's argument that the Board lacked the statutory authority to impose either budget condition. While OneCare acknowledges that the Board has authority to "review and consider" various factors, including administrative costs, in evaluating an ACO's budget, it argues that the Board does not have the authority to "dictate and set limits on specific line items" or to "make the ACO collect retroactive reporting from third parties." On the hospital-affidavit condition, OneCare argues that the Board "directly regulates" the same hospitals from which it required OneCare to collect data and that the Board "could more easily request the information directly from the hospitals." On executive compensation, OneCare argues that the Board's budget modification power extends only to modifying the amount of the budget, and that OneCare itself must determine "how the ACO can meet the statutory and regulatory certification criteria while operating within that approved budget." OneCare also suggests that the Board's own rules reserve the authority to determine compensation to OneCare's board.

¶ 31. In evaluating claims that an administrative agency exceeded the scope of its statutory authority, "we look to its enabling legislation." In re Vt. Verde Antique Int'l, Inc., 174 Vt. 208, 211, 811 A.2d 181, 183 (2002). "While we presume the validity of agency actions . . . [t]here must be some nexus between the agency regulation, the activity it seeks to regulate, and the scope of the agency's grant of authority." Vt. Ass'n of Realtors, Inc. v. State, 156 Vt. 525, 530, 593 A.2d 462, 465 (1991). Agencies have "only those powers expressly granted

by the Legislature and those incidental powers as are necessarily implied for the full exercise of the legislative grant." SBC Enters., Inc. v. City of S. Burlington Liquor Control Comm'n, 166 Vt. 79, 82, 689 A.2d 427, 429 (1996) (quotation and brackets omitted). Accordingly, we have struck down agency action that was not "reasonably related to, or necessary for," the purposes of the enabling legislation. In re Agency of Admin., State Bldgs. Div., 141 Vt. 68, 93, 444 A.2d 1349, 1361 (1982).

¶ 32. The enabling legislation here requires the Board to consider various statutory factors in "reviewing, modifying, and approving the budgets of ACOs." 18 V.S.A. § 9382(b)(1) (emphasis added). These factors include "the character, competence, fiscal responsibility, and soundness of the ACO," "the extent to which the ACO provides incentives for systemic health care investments to strengthen primary care," "public comment on all aspects of the ACO's costs," and "information on the ACO's administrative costs, as defined by the Board." Id. § 9382(b)(1)(D), (G), (K), (M). The enabling legislation also requires the Board to "execute its duties consistent with the principles expressed" in the statute. Id. § 9375(a). These principles include that "[o]verall health care costs must be contained," that "[t]he health care system must be transparent in design, efficient in operation, and accountable to the people it serves," that the system "must be evaluated regularly for improvements in access, quality, and cost containment," and that there must be "mechanisms for containing all system costs and eliminating unnecessary expenditures, including by reducing administrative costs and by reducing costs that do not contribute to efficient, high-quality health services or improve health outcomes." Id. § 9371(2), (3), (9), (10).

¶ 33. We conclude that the power to "modify[]" an ACO's budget, 18 V.S.A. § 9382(b), combined with the mandate to contain systemic healthcare costs, id. § 9371, "necessarily implie[s]" the power to set budget conditions related to the statutory factors. See SBC Enters., Inc., 166 Vt. at 83, 689 A.2d at 429. We further conclude that there is an adequate "nexus" between the Board's grant of authority and its actions here, such that the Board acted within its authority.

See Vt. Ass'n of Realtors, 156 Vt. at 530, 593 A.2d at 465. In imposing the two conditions here, the Board made factual findings that directly relate to the statutory factors. Based on those findings, it imposed conditions that modify OneCare's budget to track expenditures, in a manner consistent with the principles expressed in the statute. 18 V.S.A. §§ 9371, 9382(b). The Board therefore acted within its authority.

¶ 34. Starting with the hospital-affidavit condition, the Board found that OneCare had testified that it was unable to track primary care payments without requesting specific reports from the hospitals, that it had not yet asked for that information at the time of its testimony, and that it had subsequently provided no updates to the Board. The Board cited to the requirement under 18 V.S.A. § 9382(b)(1)(G) to review OneCare's "systemic health care investments to strengthen primary care," and concluded that the hospital-affidavit condition was necessary to address "serious questions about whether the funds presented as PCP funding actually support PCPs." Requiring OneCare to provide this information is consistent with the Board's budget oversight role and mandate to regularly evaluate the healthcare system "for improvements in access, quality, and cost containment." 18 V.S.A. § 9371(9). It is also consistent with the Board's rules, adopted pursuant to 18 V.S.A. § 9382(b), which require OneCare to "completely, timely, and accurately report to the Board all data and analyses specified by the Board regarding the activities of the ACO, ACO Participants, ACO Providers, and any other individuals or entities performing functions or services related to ACO activities." GMCB Rule 5.000, § 5.501, https://gmcboard.vermont.gov/sites/gmcb/files/Rule%205.000.pdf [https://perma.cc/P3TN-Z5JP]. The rules specifically list "[p]rovider payments and incentives" among the types of data that the ACO might be required to report, and state that ACOs must "require ACO Participants to cooperate in preparing and submitting any required reports to the Board." Id.

¶ 35. OneCare argues that the Board should not be able to impose the hospital-affidavit condition because the Board directly oversees the third-party hospitals and can obtain the same

information more easily from them. But the fact that the Board has alternative authority to get the information from another source does not mean that it lacks the authority to get it directly from OneCare or that it should act so as to abandon its responsibility to review and approve the ACO budget. The purpose of obtaining the information is to review OneCare's budget proposal and performance. We therefore conclude that the hospital-affidavit condition was within the Board's statutory authority.

¶ 36. Similarly, in imposing the executive-compensation condition, the Board made several findings related to the statutory factors. Specifically, the Board found that total compensation for executives had increased by 62% between 2021 and 2023, even as OneCare's operational expenses per attributed life had greatly increased and OneCare had achieved "unfavorable results relative to national comparison groups for key ACO measures." The Board also referenced several public comments that "highlight the disconnect between OneCare's executive pay structure . . . and OneCare's results." These findings directly relate to OneCare's "fiscal responsibility," 18 V.S.A. § 9382(b)(1)(D), its "administrative costs," id. § 9382(b)(1)(M), and the "public comment[s]" received by the Board. Id. § 9382(b)(1)(K). Based on "the changes in OneCare's budget and its performance," the Board imposed the executive-compensation condition as a "further reduction in OneCare's operational expenses."

¶ 37. OneCare suggests that the Board's budget modification power extends only to modifying the amount of the budget, and that OneCare itself must determine "how the ACO can meet the statutory and regulatory certification criteria while operating within that approved budget." But holding that § 9382(b) grants the power only to "consider" the statutory factors, and not to "dictate compliance with them," (quotation omitted), would be inconsistent with the statutory scheme as a whole. See Vt. Verde Antique Intern., 174 Vt. at 211-12, 811 A.2d at 184 (looking to "context and structure of the statute as a whole" in determining scope of authority). As we said in In re Vermont Health Service Corp., "the reasonableness of a particular order must

be viewed with" the context of the "statutory purpose." 144 Vt. 617, 625, 482 A.2d 294, 298 (1984). There, we concluded that in light of the Legislature's clear mandate to minimize the costs associated with health insurance benefits and services, the Commissioner of Insurance and Banking acted within its authority in requiring an insurer to reform contracts with participating hospitals to "provide stronger financial incentives for provider economy and efficiency." Id. at 619-20, 625, 482 A.2d at 295, 298. We explained that a contrary holding would "place the commissioner in an untenable position" by requiring him "to ensure that subscriber rates were not excessive, inadequate or unfairly discriminatory," without granting "the means actively to bring this about." Id. at 625-26, 482 A.2d at 298-99. The same is true here. The statute requires the Board to act in accordance with various principles requiring the minimization of excess costs. See 18 V.S.A. § 9371 (requiring that "[o]verall health care costs" be contained, that healthcare system be evaluated for improvements in "cost containment," and that "unnecessary expenditures" be eliminated). If the Board did not have the authority to dictate compliance with the statutory factors, including by imposing reasonable limits on executive compensation, then its mandate to "execute its duties consistent with the[se] principles" would be meaningless because it would have no power to target those expenditures that it determines are unnecessary. See id. § 9375.

¶ 38. OneCare next argues that the Board's own rules and guidance conflict with its exercise of authority. OneCare first points to Rule 5.202(a)(4), which requires ACOs to maintain an identifiable governing body that "has ultimate authority and responsibility for the oversight and strategic direction of the ACO and for holding management accountable for the ACO's activities." OneCare argues that setting executive compensation "is a foundational tool for holding management accountable" and that the rule therefore reserves this power exclusively to OneCare. But as the Board argues, "OneCare's argument would undermine the very purpose of the Board," by limiting its ability to review, modify, and approve ACO budgets. See 18 V.S.A. § 9382(b). Under OneCare's reading of the rule, it would have "ultimate authority" not only to hold

management accountable by setting executive compensation but also for its own "oversight and strategic direction." Furthermore, if we were to apply the same reading to Rule 5.202(a)(3)—which grants the ACO's board "sole and exclusive authority to execute the functions of the ACO and to make final decisions on behalf of the ACO"—the Board would be unable to adjust an ACO's budget at all, since doing so would interfere with the ACO's "sole and exclusive authority" to make final decisions. We do not understand the Board to have enacted rules that so limit its own authority. Instead, we agree with the Board that Rule 5.202(a)(4) is intended to exclude other external entities, such as ACO participants, from interfering with an ACO's internal operations. See In re Stowe Cady Hill Solar, LLC, 2018 VT 3, ¶ 20, 206 Vt. 430, 182 A.3d 53 ("We will likewise defer to an agency's interpretation of its own regulation, as long as that interpretation is consistent with the statute that authorized promulgation of the regulation in question."). This is supported by Rule 5.202(a)(2), which requires that the ACO's governing body be "separate and unique to the ACO and not the same as the governing body of any ACO Participant."

¶ 39. OneCare also points to the guidance to Rule 5.203, which provides that "an ACO must structure its executive compensation to achieve specific and measurable goals that support the ACO's efforts to reduce cost growth." OneCare suggests that this language means that it has authority to structure its own executive compensation. But this rule does not limit the ability of the Board to regulate executive compensation; rather, it demonstrates the existence of this power. If an ACO had sole authority over executive compensation to the exclusion of the Board, then the Board would have no authority to require the ACO to structure executive compensation in line with "specific and measurable goals."

¶ 40. Finally, OneCare argues that "[t]aken to its logical conclusion, the GMCB's asserted power to 'modify' any component of an ACO's administrative costs would allow it to set ACO employee salaries, control retirement plans, manage profit-sharing, and adjust health benefits." We need not decide here what would constitute the outer limits of the Board's statutory

authority. We note merely that the same test would apply in such situations, requiring that the action be "reasonably related to, or necessary for," the purposes of the enabling legislation.[4] Agency of Admin., State Bldgs. Div., 141 Vt. at 93, 444 A.2d at 1361. For the reasons detailed above, we conclude that the Board's actions here satisfied this test.

¶ 41. In sum, we conclude that the Board acted within its statutory authority in imposing the two conditions on the approval of OneCare's budget. We further conclude that the Board did not violate due process in enacting the conditions because OneCare had ample opportunity to object to the conditions prior to the final written order. Finally, we decline to address OneCare's remaining arguments for lack of preservation. Accordingly, we affirm the Board's imposition of the two conditions.

Affirmed.

FOR THE COURT:

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Chief Justice

[4] We note also that, as with all agency actions, these hypothetical acts could be challenged as arbitrary and capricious or as an abuse of discretion.