August 15, 2017

Via Electronic Mail

Tim Farrell
Director of Policy and Communications for Health Systems Quality Assurance
WA State Department of Health
101 Israel Road SE
Tumwater, WA 98501

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
901 5TH AVENUE, SUITE 630
SEATTLE, WA 98164
T/206.624.2184
WWW.ACLU-WA.ORG

JEAN ROBINSON
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: Certificate of Need

Dear Mr. Farrell,

The undersigned organizations are pleased to offer the following suggestions on how best to improve the Certificate of Need ("CON") program. We appreciate the Department of Health's ("DOH") and the Legislature's interest in reviewing the CON program. Such a review is both timely and necessary.

Health system consolidations impact cost, quality and access to health care for patients. However, unlike in other states, there is very little oversight of health system consolidations in Washington. The Legislature established the CON program to "promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources while controlling increases in costs." This laudable goal has unfortunately been derailed by dramatic changes in the health care marketplace which have resulted in health system consolidations evading CON review and hospitals failing to abide by conditions imposed by DOH during CON reviews.

To ensure that Washington residents have access in their local communities to a full range of affordable quality health care we strongly recommend: (1) expanding the scope of CON review; (2) adopting clear CON standards and incorporating independent health care impact statements into the CON process; and (3) creating better oversight and enforcement mechanisms. Health system affiliations in Washington state have already resulted in reducing patient access to health services. The CON review process must be updated to ensure this does not continue to happen.

The Changing Health Care Landscape

The health care landscape has undergone dramatic changes over the last 30 years. The passage of the Patient Protection and Affordable Care Act (ACA), the rapid development of electronic medical technology, and the creation of integrated care

systems (e.g. accountable care organizations) have fundamentally changed the nature of hospital consolidations.[1] Further, while the rate of hospital consolidations began increasing in the late 1990s, there has been a significant rise in consolidations since 2010. Hospital transactions grew from 66 in 2010 to 95 in 2014 and to 112 in 2015.[2] From 2001 to 2016 the nation's 25 largest health systems went from controlling 916 hospitals to 1,189 hospitals.[3] Washington state has itself seen a significant number of health system consolidations. To name a few examples:

- In 2011 Southwest Washington Medical Center and United General Hospital affiliated with PeaceHealth
- In 2012 Swedish Health Service became an affiliate of Providence Health & Services
- In 2013 Highline Medical Center became part of the Franciscan Health System
- In 2013 Harrison Medical Center became part of the Franciscan Health System
- In 2016 Providence Health & Services and St. Joseph Health System affiliated to become Providence St. Joseph Health
- In 2017 CHI Franciscan and Virginia Mason formed a strategic affiliation.[4]

As hospital ownership consolidates under fewer and fewer owners, these transactions have an increasingly significant impact on Washington health care consumers, particularly those in rural and low-income communities. Such consolidations result not only in a lack of price competition within a community or geographic region, but also a lack of any meaningful choice among health care providers for the consumer – a serious problem when providers restrict or deny services. In addition, consolidations have resulted in some hospitals' failure to abide by state charity care requirements to provide care at reduced costs to low-income individuals, despite explicit conditions in their CONs.

---

[1] Khaikin, Christine, & Uttley, Lois. (2016). State Oversight of Hospital Consolidation: Inadequate to Protect Patients' Rights and Community Access to Care. *AMA Journal of Ethics*, 18(3), 272-278. http://journalofethics.ama-assn.org/2016/03/pfor3-1603 html. *See also* Creswell, Julie & Abelson, Reed. (2013, August 12). New Laws and Rising Costs Create a Surge of Supersizing Hospitals, *The New York Times.* Retrieved from http://www.nytimes.com/2013/08/13/business/bigger-hospitals-may-lead-to-bigger-bills-for-patients html?_r=0.

[2] *Id.*

[3] Khaikin, Christine, Uttley, Lois & Winkler, Aubree. (2016). When Hospitals Merge: Updating State Oversight to Protect Access to Care. Retrieved from http://whenhospitalsmerge.org/our-report.

[4] Notably, consolidations are not only occurring in the hospital context but are also impacting clinics and laboratories, increasing the overall impact upon patient care. For example, in 2015 Pacific Medical Centers affiliated with Providence Health & Services and in 2016 the Doctors Clinic in Kitsap County affiliated with CHI Franciscan Health,

To further complicate the issue, in Washington state many of the recent health care system affiliations have occurred between secular health systems and systems governed by Catholic doctrine. This is especially concerning as Catholic health systems are required to follow the Ethical and Religious Directives (ERDs) promulgated by the United States Conference of Catholic Bishops. These directives forbid or significantly restrict many reproductive and end-of-life health services. Facilities that affiliate with Catholic health systems are often required to restrict health services and information on the basis of religious doctrine (examples below).

Certificate of Need Review

Scope of CON Review

Washington state's CON program has not kept pace with the significant changes occurring in the health care arena. In 2016 Washington state's CON program received a "C-" rating in a report produced by MergerWatch that analyzed CON programs across the country.[5]

As explained by the MergerWatch study, one of the foremost problems with the current CON program is the limited scope of what "triggers" CON review. In Washington state CON review of a hospital consolidation is triggered if there is a "sale, purchase or lease of part or all of any existing hospital . . . ." But in today's health market consolidations are rarely as simple as a traditional sales, purchase or leases. Rather modern consolidations are branded as "affiliations," "corporate restructurings," "mergers," strategic partnerships," "alignments," "joint ventures," etc. As such many health system consolidations in Washington state have evaded CON review by not using the term "sale, purchase or lease" to describe the consolidation. For example, the Swedish-Providence affiliation did not undergo CON review and the affiliation resulted in Swedish no longer providing "elective" abortions at its facilities.[6] The Harrison Medical Center affiliation with Franciscan Health System evaded CON review and now doctors at Harrison are no longer able to prescribe medications to assist with Death with Dignity.[7] Further, doctors in Kitsap County have advised that following the Harrison-Franciscan affiliation there has been an increase in costs for health care services.

By evading CON review health system consolidations in Washington state are evading governmental oversight and public input.[8] This is a serious problem as

---

[5] Khaikin, Christine, Uttley, Lois & Winkler, Aubree. (2016). When Hospitals Merge: Updating State Oversight to Protect Access to Care. Retrieved from http://whenhospitalsmerge.org/our-report.

[6] *See* Martin, Nina. (2013, Oct. 17). Catholic Hospitals Grow and With Them Questions of Care, *ProPublica*. Retrieved from *https://www.propublica.org/article/catholic-hospitals-grow-and-with-them-questions-of-*care; *See also* Swedish, Reproductive Health Care Position Statement, *available at* http://www.doh.wa.gov/Portals/1/Documents/2300/HospPolicies/SwedishRH.pdf.

[7] See Attachment A.

[8] Indeed when the Providence-St. Joseph affiliation occurred, in California the two health systems were required to submit binders of information to the Attorney General, health care impact statements were drafted, and at least eight public meetings were held before the Attorney General approved the affiliation. Providence is one of the largest health providers in Washington state and yet in

health system consolidations (by any name) can have a significant impact on communities' access to affordable quality health care services. It is therefore imperative that the scope of CON review be expanded to include all health system consolidations that significantly impact access to care.

To accomplish this goal we recommend three changes to the CON program: (1) include under CON review "affiliations," "corporate restructurings," "mergers," strategic partnerships," "alignments," "joint ventures" and other terminology used to describe consolidations in today's health care market; (2) ensure that any transfer of control, responsibility or governance of a material amount of the assets or operations of a hospital or hospital system triggers CON review; and (3) revise the CON program so that hospitals seeking a determination of non-reviewability are required to provide notice of any curtailment of services or changes in policies that may occur as a result of a proposed consolidation. If any curtailment of services or significant policy changes are likely to occur, a determination of non-reviewability should not be granted.

CON Standards and Health Care Impact Statements

The Legislature has asked for suggestions to modify the CON program "to increase the number of successful applications" including adding psychiatric beds. We recommend that once CON applies to all appropriate cases, DOH ensures that (1) the program has clear standards; and (2) through the CON process all necessary material is collected to allow DOH to make informed decisions.

In creating clearer standards we recommend an increased focus on the three touchstones of the CON program: quality, affordability and access. These standards may be integrated into the review process under existing criteria such as "Need" and "Quality." Clear standards should make it easier for hospitals to successfully complete the CON process as they will have a better understanding of CON requirements. DOH should also provide trainings and materials that enable hospitals participating in the process to be well-informed and prepared to engage in CON review under these standards. These trainings and materials should also support community-based organizations and individuals seeking to participate in the CON process.

Washington there was no public input or DOH oversight of the affiliation as the affiliation evaded CON review.

Further, it is our understanding that CON reviews are not always as thorough as state public policy requires. Indeed, in the past some of our organizations have reviewed documents related to completed affiliations (through filed public records requests) and found the volume of documents reviewed by DOH to be quite thin. To adequately protect Washington residents' access to care we recommended incorporating independent health care impact statements into the CON review process. These statements should include an assessment of the effect of the agreement on the availability and accessibility of health care services, including reproductive and end-of-life services. These statements should also assess how any changes would impact communities, especially rural communities and underserved and vulnerable populations. Obtaining this information will assist DOH in determining whether a consolidation should move forward and should prove valuable when considering determination of need questions (WAC 246-310-210).

Oversight and Enforcement

Lastly, without adequate oversight and enforcement, DOH and the CON program do not effectively protect patient's access to health care services. DOH should regularly monitor health care facilities to ensure they are in compliance with representations made in their CON application and that they are abiding by any DOH imposed conditions on CON approval. Patient complaints to DOH regarding restrictions on health care services that were provided at a facility prior to consolidation or other noncompliance with CON conditions should trigger a DOH investigation. If a hospital is found to be violating the representations made in its CON application, there should be consequences in place that will sufficiently deter such behavior.

Conclusion

The Legislature has created a narrowly-tailored, time-limited exemption to allow for the addition of psychiatric beds without a CON, which this year's Legislature has extended through June 2019 (ESHB 1547). The CON program should not be weakened beyond this; the current need for psychiatric beds is adequately addressed and should not undermine CON.

We appreciate the Legislature's interest in improving the CON process and its desire to increase the number of successful CON applications. However, given the current status of the CON program, we are not confident that increasing the number of successful CON applications will lead to increased access to quality health care. Rather, by expanding the scope of CON while simultaneously creating clear standards, information requirements and oversight and enforcement mechanisms the Legislature will strike the necessary balance of creating a more efficient CON application process while protecting and enhancing patients' access to care.

Sincerely,

Leah Rutman,
ACLU of Washington

Elaine Rose
Planned Parenthood Votes Northwest and Hawaii

Sally McLaughlin
End of Life Washington

Janet Chung
Legal Voice

Tiffany Hankins
NARAL Pro-Choice Washington

Janet Varon
Northwest Health Law Advocates

ATTACHMENT A

Elizabeth Pring

Subject: RE: Question about Harrison's policies on the Washington Death With Dignity Act

---

From: Scott Bosch [mailto:Scott.Bosch@harrisonmedical.org]
Sent: Wednesday, November 13, 2013 3:05 PM
To: 'rmiller@compassionwa.org'
Cc: Michael Anderson; Adar Palis; 'Glen Carlson'; 'Bill Morris'; 'Scott Ekin'
Subject: RE: Question about Harrison's policies on the Washington Death With Dignity Act

Mr. Miller, thank you for contacting me with your questions and concerns. Thru this process we have discovered that indeed, the policy that you reference is outdated and is now in the process of being updated. To answer your questions, while Harrison was initially neutral during the DWD campaign, once passed, we adopted a policy of not participating in the administration of the DWD drugs at any of our sites. This is consistent with many other hospitals in the state. Up until our affiliation with FHS, our employed physicians were allowed to write the prescription for the drugs. This changed Aug 1st, 2013 and HMC employed physicians are no longer able to write these scripts while on duty as an employed doc. These physicians can, if they wish and under their WA license, separately see patients and prescribe the drugs for the DWD. Under these circumstances, these physicians would also have to obtain separate malpractice insurance. Harrison continues to have the policy of full disclosure of patient end of life options with an aggressive palliative care program in place to assist patients and their families in making these difficult choices. One thing that would be very helpful to our providers would be to have a comprehensive list of area physicians that we could refer to that do participate in the DWD act. If you can help us with that, it would be much appreciated. I hope I have been able to clear up any remaining questions about Harrison's participation in the DWD process. Please let me know if you have additional ones. Thanks.

From: Robb Miller [mailto:rmiller@compassionwa.org]
Sent: Tuesday, November 12, 2013 10:46 AM
To: Scott Bosch
Subject: Question about Harrison's policies on the Washington Death With Dignity Act

Dear Mr. Bosch:

We are receiving questions from the community served by Harrison Hospital as well as the physicians and other medical providers you employ about your policies on the Washington Death With Dignity Act now that Harrison is affiliated with Franciscan, which strongly opposes Death With Dignity, prohibits its physicians from participating, and does not provide helpful information or referrals to patients who make inquiries.

Is the policy posted online in your patient handbook (www.**harrison**medical.org/file_viewer.php?id=5163) still valid?

Washington Death With Dignity Act (Initiative 1000). This act, which became Washington state law on March 5, 2009, allows terminally ill adults to request lethal doses of medication from medical and osteopathic physicians. The terminally ill patient must be medically diagnosed with six months or less to live and must be a Washington resident.
Harrison Medical Center respects the relationship between the provider and the patient, and has determined from voter preference that it is in the community's best interest to allow its healthcare providers to participate in the Washington Death With

Dignity Act if they so choose.

All providers at Harrison are expected to respond to any patient's query about life-ending medication with openness and compassion. Harrison believes our providers have an obligation to openly discuss the patient's concerns, unmet needs, feelings, and desires about the dying process. Providers should seek to learn the meaning behind the patient's questions and help the patient understand the range of available options, including but not limited to comfort care, hospice care, and pain control. Ultimately, Harrison's goal is to help patients make informed decisions about end-of-life care.

Harrison's position on the Washington Death with Dignity Act remains neutral, neither supporting nor opposing the option. We seek to make a positive difference in people's lives through exceptional healthcare at all points on the healthcare continuum. We seek to facilitate end-of-life care and provide comfort to our patients when they learn their lives may be affected by a terminal disease or condition.

If this is not still your policy, could you provide me with your new policy?

Thank you,

Robb Miller, Executive Director
Compassion & Choices of Washington
PO Box 61369
Seattle, WA 98141
206.256.1636
877.222.2816 toll-free
206.256.1640 fax
rmiller@CompassionWA.org
www.CompassionWA.org