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JEAN ROBINSON
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KATHLEEN TAYLOR
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Re: Comments on Department of Health Concept Draft of Proposed Changes to Certificate of Need Regulations, Implementing Governor's Directive 13-12

Dear Ms. Sigman:

The ACLU of Washington ("ACLU-WA") is pleased to offer the following comments on the Department of Health's ("DOH") Concept Draft of Proposed Changes ("Draft Changes") implementing Governor's Directive 13-12 ("Directive"). As you are aware, Gov. Inslee's directive was responsive in part to a letter from the ACLU-WA and ten other organizations dated May 21, 2013, in which we raised significant concerns over the unprecedented rate of mergers and affiliations involving religious entities currently taking place in our state. We reiterated those concerns in a letter to DOH dated July 16, 2013, in which we urged that the proposed affiliation between Franciscan Health System with Harrison Medical Center be subjected to full Certificate of Need ("CON") review.

In those letters and other communications, we have been clear as to the overarching goal—that all patients should have access in their local communities to a full range of lawful, best care medical services, and that no patient should be refused access to such services because of the religious doctrines of the organization controlling a hospital, clinic, or other medical facility. But religious hospital mergers in Washington have already resulted in policy changes that curtail the availability of such services, and further mergers raise the concern of further curtailments.

While we commend Gov. Inslee and DOH for moving forward rapidly to update the CON process, the Draft Changes are too narrow to address these significant concerns. We urge DOH to instead adopt the broad scope of review authorized by the Directive,

and in doing so to reference the Governor's own touchstones set forth there—to "promote, maintain, and ensure the health of all citizens in the state by providing accessible health services, health facilities, and other resources," and to apply CON based on its impact on "accessibility of health services, cost containment, and quality." To achieve those important goals, significant changes are needed to update the CON process and ensure it performs its intended function of government oversight over a critical need and right for Washington's residents.

A. DOH Must Update the CON Process to Ensure Meaningful Government Oversight that Serves the Interests of All Washingtonians.

To ensure a meaningful update of the CON process, DOH should begin with the legislature's stated public policy underlying that process:

> ... [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 ...."[1]

That policy, in addition to the concerns set forth in the Directive, sets forth a broad scope of review for DOH. The need for such a broad review becomes painfully obvious considering that the CON framework was developed over 30 years ago and has not been updated to recognize subsequent key trends in the organization of health care delivery systems—a fact recognized by the Governor in his Directive. DOH's CON update must ensure that CON review is applied appropriately to transactions that impact the accessibility and affordability of care; that clear and appropriate standards aiming to protect the public's interest in those criteria govern the CON process; that a clear process be set forth for enforcement of those standards even after a CON is granted; and that the process is applied transparently in a way that is understandable to the general public.

Scope: DOH must ensure that all transactions that significantly impact access and affordability in local communities to a full range of lawful, best care medical services be brought within the scope of CON review. That review now takes place in an increasingly consolidated, wholly different market environment from the decades-old one to which CON's antiquated rules currently respond. In the past, control of a single hospital did not mean control of the entire community's health care market—but that has changed due to consolidation of hospital ownership under fewer and fewer owners, and vertical integration where hospitals employ the vast majority of the physicians that work in a community. That consolidation makes a huge difference to Washington's health care consumers, particularly those in rural communities. It results 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 huge problem when providers restrict or deny services based on

[1] RCW 70.38.015(1).

religious doctrine. Transactions that create such anti-competitive and anti-consumer results should not escape state oversight.

Standards: Once CON applies to appropriate cases, the next step is to ensure that appropriate standards apply to protect Washingtonians' interest in accessible and affordable health care. Some of these standards may be integrated into the review process under existing criteria, such as "Need" and "Quality." However, DOH must ensure not only that the *questions* asked of entities proposing mergers are clear (those questions are set forth in the Certificate of Need application form, which asks a standard set of questions), but that the minimum standards to which the *responses* to those questions must conform in order for a CON to be granted are set forth in a transparent and understandable manner. Even more important, criteria by which CON applications might be *conditionally* granted—in other words, where DOH imposes conditions that protect the public interest—should also be spelled out. Unfortunately, no such clear, understandable standards currently exist, and it is critical that DOH create them.

Oversight: Even after a CON application is granted, DOH must ensure ongoing oversight post-merger. Currently, there is no standard mechanism for monitoring compliance with the terms and conditions of a CON granted by DOH, and no clear consequences that might be invoked against entities that violate promises or representations made in their CON applications. This must change to ensure that there is continuing government oversight of mergers that leave communities dependent on a single organization to meet their health care needs—particularly where that organization has represented that no restrictions to previously available health care will result. Contravention of such representations should trigger significant consequences, potentially up to and including revocation of the CON.

Transparency: Finally, the entire CON process currently operates as a kind of "black box"—after an initial application is made, there is little or no way for the public to understand how and on the basis of what information DOH is making the decision. Even public disclosure requests with regard to specific CON decisions have turned up little evidence as to what kind of deliberation DOH undertakes with regard to these critical decisions. Both for the sake of a carefully considered decision that accounts for Washingtonians' health care interests, and for the public's confidence in the integrity of the decision-making process itself, DOH must make that process transparent and easy to understand for the lay public.

B. DOH's Draft Changes Must Reflect the Broad Scope of the Governor's Directive and the Significant Public Policy Concerns Raised by Religious Hospital Mergers.

The Draft Changes essentially do two things: (i) create a definition of "sale, purchase, or lease" and modify the definition of "person" to specify that public and private corporations are included; and (ii) create a new regulation requiring hospitals to

disclose certain information regarding services provided and not provided, and requiring DOH to post those policies on a website. While we commend DOH for speedily making public these Draft Changes, they are too narrow in scope and inadequate to address the significant problems identified above.

Change (i) appears to be directed toward ensuring that transactions cannot evade review based on the structure or terminology used in connection with the transaction. As discussed above, this is a critical goal. Unfortunately, there are now a multitude of creative models for transferring control over significant health care assets while evading CON review—for example, as we described in our letter regarding the proposed affiliation between Franciscan Health System with Harrison Medical Center, where a shell corporation would be set up to avoid review.

While we are still reviewing the language, it is not clear to us that change (i) would actually accomplish its intended effect, given the exceptional creativity with which attorneys for the parties involved in religious hospital mergers in our state have approached their task. We encourage DOH to review the many ways in which these transactions have been structured to evade review, as well as potential future ways that could be interpreted to fall outside the scope of the new proposed language. Creative writing by lawyers should not be the determinant of whether the government exercises its important oversight function in such transactions.

Change (ii) attempts to introduce transparency for consumers as to what services hospitals do not provide. And while this greater transparency in itself is positive for health care consumers, it fails to address the actual, underlying issue—accessibility of services. If a rural resident whose only accessible hospital has stopped providing reproductive or end-of-life services due to religious doctrine driven by a merger will now be able to read that fact on a website, that resident is no closer to actually having access to those services.

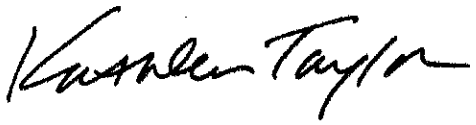
More broadly, the Draft Changes do not address many of the serious failings in the CON process identified in (A) above. In particular, DOH must put in place clear and appropriate standards that protect the accessibility and affordability of care, create a mechanism for ongoing enforcement of those standards, and build transparency into the CON process itself.

C. Our State's Agencies and Leaders Must Ensure Accessible, Affordable, Quality Health Care Unimpeded by Religious Doctrine.

Practices in our increasingly consolidated health care marketplace should be determined by the standard of best care and patient needs or interests, not by religious doctrine. The CON process is a critical tool for Washington's government and public officials to ensure that all people in Washington are able access medically appropriate health care in their communities. DOH should conduct a broad-brush review of the CON process in light of one critical public policy goal—to "promote, maintain, and

assure the health of all citizens in the state." We at ACLU-WA look forward to working with DOH and other stakeholders to give all of Washington's residents a CON process that advances that goal.

Sincerely,



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