July 9, 2013

Board of Commissioners
Island Hospital
1211 24th Street
Anacortes, WA 98221

Board of Commissioners
Skagit Valley Hospital
1415 E. Kincaid
Mount Vernon, WA 98273

Board of Commissioners
Cascade Valley Hospital
330 S. Stillaguamish
Arlington, WA 98223

Re: Interlocal Hospital Proposal Decision

Dear Commissioners:

MergerWatch and the National Women's Law Center are writing to express our concerns regarding the potential partnering of the Island Hospital, Skagit Valley Hospital and Cascade Valley Hospital ("the Interlocals") to a religiously-sponsored health system. This type of partnership could negatively affect access to reproductive health care and end-of-life care in the counties of Skagit and Snohomish.

Our organizations have provided assistance to people in communities across the nation where nonsectarian non-profit or public hospitals have explored business partnerships with hospitals or health systems that restrict access to care based on their adherence to religious doctrine. We hope you find this information helpful as the Commissioners move forward in the search for a suitable health system to operate the Interlocals.

Overview of Our Concerns

We understand that the Commissioners have given authority to a joint steering committee composed of elected commissioners and unelected administrators from each of the Interlocals to review proposals submitted by interested health systems. A decision to choose a final bidder is expected in less than 60 days. According to the press, there are four bidders interested in partnering with the Interlocals: PeaceHealth, UW Medicine, Providence/Swedish and Virginia Mason Medical Center.[1] Given the current prevalence of religiously-sponsored health care in the northwestern region of Washington State, we are concerned that choosing a religious health system as a partner may result in a complete loss of comprehensive health care services in Skagit and Snohomish counties.

We believe it is vital that the Commissioners take the time to examine how health care access could be drastically diminished if the remaining secular hospitals in the area were to restrict certain services in order to comply with the religious demands of its operator.

[1] Gina Cole, *Hospital Partner Decision Possible in Next 60 Days*, SKAGIT VALLEY HERALD, June 22, 2013.

In addition, the Establishment Clause of the United States Constitution prohibits the imposition of religious restrictions on land or in a facility that is owned by a governmental entity or, at a minimum, require the parties to mitigate the effect of the religious imposition. A governmental entity has an interest in the operation of private, non-profit hospitals if a governmental entity owns the property and leases it to a private, non-profit hospital, or if a governmental entity provides substantial funding for indigent care to the hospital. Public officials in other states have recognized the conflict that can be created if a merger were to impose religious restrictions on a publicly-owned or operated hospital. For example, in 2012, Kentucky Governor Steve Beshear blocked a proposed merger between University of Louisville Hospital and Catholic Health Initiatives, which would have given control of the public University Hospital to CHI, a religious health system that adheres to religious doctrine. In his statement regarding the decision, Gov. Beshear explained that the risks of the proposed merger outweighed the benefits, citing the "constitutional and public policy questions about the influence of a religious entity on a publicly-owned institution, especially regarding reproductive issues," as one of the main points of concern.[2]

Further, an affiliation that would impose religious restrictions on a public hospital would be contrary to two Washington state laws: the Reproductive Privacy Act, which states that all individuals have "the fundamental right to choose or refuse birth control"[3] and that every woman has "the fundamental right to choose or refuse to have an abortion," and the Death with Dignity Act, which permits terminally ill adults seeking to end their life to request lethal doses of medication.[4] Washington has a longstanding and exemplary commitment to ensuring that individuals receive reproductive health services and aid-in-dying.

Impact of *The Ethical and Religious Directives for Catholic Health Care Services*

Because PeaceHealth and Providence are sponsored by the Catholic Church, they must operate in accordance with the *Ethical and Religious Directives for Catholic Health Care Services* (the *Directives*). The *Directives* do not merely restrict particular services; they ban even the provision of information about, counseling on or referrals for the restricted services. These restrictions on services, counseling, information and referrals are inconsistent with the public health goals of Washington State. [5]

- Hospitals governed by the *Directives* are not permitted to provide abortion or contraception nor are they permitted to provide counseling about these services.[6] While hospitals are not often perceived as being delivery sites for family planning information and services, post-partum

[2] GOVERNOR BESHEAR'S STATEMENT ON PROPOSED HOSPITAL MERGER, http://www.wdrb.com/story/16418014/gov-beshears-statement-on-proposed-hospital-merger (last visited July 2, 2013).
[3] Reproductive Privacy Act, RCW 9.02.100 *et seq*
[4] *See* Washington State Department of Health, *Strategic Plan, 2012-2016* (May 2012), *available* at http://www.doh.wa.gov/Portals/1/Documents/1000/StrategicPlan2012-16.pdf.
[5] *See id.* at 61. The Strategic Health Plan Goals include "Goal 3: Everyone in Washington has improved access to safe, quality, and affordable care."
[6] United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (2009), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf. The *Directives* set forth principles that govern the delivery of health care services at Catholic-affiliated health care institutions. Each hospital's administration, the local diocese and the Bishop presiding over the hospital interpret these guidelines and establish their specific policies and practices.

counseling is a crucial factor in helping women with subsequent pregnancy planning and spacing. Furthermore, the *Directives'* prohibition on contraceptive services could interfere with required counseling of women participating in medical research and clinical trials on using highly-effective methods of contraception to prevent any unknown risks to a pregnancy.

- Some Catholic hospitals do not permit the treatment of ectopic pregnancies according to the accepted standard of care. The standard of care leaves the fallopian tube intact and may improve the chances of conception for patients who want to have children in the future, but it is forbidden under the most restrictive interpretations of the *Directives* because it is considered to be a "direct action" against the embryo.[7] Other Catholic hospitals allow treatment only if surgery is used to remove both the fallopian tube and the embryo,[8] which reduces a women's fertility by half.

- Surgical sterilizations (vasectomies for males and tubal ligations for females) are expressly forbidden by the *Directives*. This restriction is especially onerous for women who want a tubal ligation at the time of a cesarean delivery. By having an immediate post-partum tubal ligation, new mothers can avoid an additional surgery and recuperation period.[9] Any restriction at the Interlocals on post-partum tubal ligations also will add to the cost of health care, because it is far less expensive for women to have a tubal ligation immediately following delivery.

- Beyond abortion and contraception, the *Directives* also prohibit the offering of infertility services, counseling on the use of condoms to prevent HIV and other STDS, and the use of embryos, fetal tissue or stem cells in treatment or research.[10]

- In addition to interfering with the provision of reproductive health care, the *Directives* also affect end-of-life care. The United States Conference of Catholic Bishops has stated that "there is an obligation to provide patients with food and water, including medically assisted nutrition and hydration for those who cannot take food orally."[11] This *Directive* runs contrary to the constitutionally recognized right of a patient to refuse unwanted medical treatment, including artificial hydration and nutrition[12] and interferes with a patient's ability to invoke Washington's Death with Dignity Act, which permits a patient to request life-ending medication.[13]

Health care restrictions like these can lead to the denial of care which threatens the health of the citizens of Skagit and Snohomish counties and violates Washington State's strong commitment to

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[7] CATHOLIC HEALTH CARE ETHICS: A MANUAL FOR PRACTITIONERS 121-23 (Edward J. Furton et al. eds. 2nd ed. 2009).
[8] CATHOLIC HOSPITALS AND ECTOPIC PREGNANCY, http://www.chausa.org/docs/default-source/general-files/c6776764f3cc4624a8ea2a31037e9b111-pdf.pdf?sfvrsn=0 (last visited July. 2, 2013).
[9] Nikki Zite et al., *Failure to Obtain Desired Postpartum Sterilization: Risk and Predictors*, 105 OBSTETRICS & GYNECOLOGY 794 (2005).
[10] *Id.* The *Directives* set forth principles that govern the delivery of health care services at Catholic-affiliated health care institutions. Each hospital's administration, the local diocese and the Bishop presiding over the hospital interpret these guidelines and establish their specific policies and practices.
[11] United States Conference of Catholic Bishops, News Release, *Bishops Approve Items on Marriage, Reproductive Technologies, Medically Assisted Nutrition and Hydration* (Nov. 18, 2009), *available at* http://www.usccb.org/comm/archives/2009/09-242.shtml.
[12] *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990).
[13] Washington Death with Dignity Act RCW 70.245 *et seq*.

public health.[14]

A Negotiation Will Not Solve the Problem

It has come to our attention that the Catholic bidders may try to negotiate a limited set of restricted services by instituting a "Statement of Common Values," which bans abortion and aid-in-dying but allows other services that are prohibited by the *Directives*. However, this strategy is not an acceptable compromise given the legal protections granted to these specific services.

In addition, we urge the Commissioners to recognize that this potential arrangement is vulnerable to outside intervention by Church authorities. In some cases, the local Diocese, Bishop and even the Vatican have taken action to review treatment protocols and order the discontinuation of services at Catholic-controlled hospitals under their jurisdiction.[15] For example, while the Interlocals may be allowed to continue providing tubal ligations and birth control provision, the local Bishop may disagree with these policies and order the Interlocals to ban these services.

Furthermore, the *Directives* are regularly revised, and the Bishops occasionally opine on their interpretation,[16] which could make the Interlocals vulnerable to further restrictions. Unfortunately, assurances that may be made by the religiously-sponsored bidders do not adequately protect patients' right to receive the standard of care or adequate information on their treatment options. Nor do these assurances prevent future actions that could drastically diminish patient care. Third-party oversight by Church officials must be considered during your review of potential bidders.

Recommendations

As this precedent indicates, the Commissioners' approval of an affiliation that allows a Catholic system to impose religious restrictions on patients, without certain conditions that protect all services, could give rise to a lawsuit alleging a violation of the Establishment Clause, [17] the Reproductive Privacy Act and the Death with Dignity Act.[18]

One way to address concerns regarding the prospect of limited, sectarian health care in the three hospitals would be to require the Interlocals to maintain a full menu of services. Policymakers in Connecticut did just that in 2010 ahead of the establishment of a University of Connecticut primary care institute inside a Catholic hospital. The legislative language specifically states that "the institute

[14] *See supra* note 4.
[15] In Carrington, ND, a Catholic hospital was given a "pastoral exception" so medical staff could provide tubal ligations when a woman's health would be harmed by a future pregnancy. When the Bishop who issued this exception to the *Directives* was replaced, his predecessor demanded that the practice cease. *See, e.g.*, http://www.mergerwatch.org/storage/pdf-files/ch_broken_promises.pdf.
[16] *See, e.g.*, United States Conference of Catholic Bishops, *supra* note 6 (voting to revise *Directive* addressing patients in a persistent vegetative state).
[17] *See, e.g., Nat'l Org. for Women v. City of St. Petersburg*, No. 8:00-CV-1698-T-26C (M.D. Fla. 2000) (unpublished, on file with the National Women's Law Center) (St. Petersburg, Florida, leased its hospital to an entity that entered into a partnership that required the hospital to restrict services due to the religious affiliation of one of the partners; advocates sued St. Petersburg for violating the Establishment Clause).
[18] Death with Dignity Act, *supra* note 15.

shall not be constrained by the Ethical and Religious Directives for Catholic Health Care Services."[19]

Another workable, but time-consuming and somewhat costly, solution is the establishment of a "hospital-within-a-hospital." This is a separately-incorporated legal entity that insulates patients from religiously-restricted health care and allows for access to comprehensive services that would otherwise not be permitted.[20]

Any other strategy being considered to lessen the impact of religious restrictions is vulnerable to revision or revocation by Church authorities and thus is not a long-term viable solution.

Thank you for your careful consideration of this matter. If you have any questions or would like further information regarding our analysis, please contact Lois Uttley at 212-870-2010 or Kelli Garcia at 202-588-5180.

Respectfully submitted:

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[19] HB 5027, An Act Concerning the University of Connecticut Health Center's Facilities Plan, Section 11. (Conn. 2010).
[20] Lois Uttley et al., "Merging Catholic and Non-Sectarian Hospitals: New York State Models for Addressing the Ethical Challenges," *New York State Bar Association Health Law Journal, Special Edition: Public Health Law and Public Health Ethics*, Volume 17, Number 2, Spring 2012.

Appendix

Imposition of Religious Restrictions at Publicly-Owned Hospitals

The following are examples of previous hospital transactions that raised issues of religious restrictions in publicly-owned facilities. In these cases, local and state authorities, advocacy groups and citizens have raised their concerns about the potential constitutionality of having a religious entity operating or otherwise influencing the operation of a once publicly-owned or operated hospital.

Pacific Communities Health District, Newport, Oregon[21]

In 1999, the Pacific Communities Health District, a municipal corporation of Oregon, began negotiating an Operating Agreement (OA) for a Catholic system, Providence Health System, to operate the Health District's hospitals and health clinics. In response to community concerns about access to reproductive health care, the Health District asked the state circuit court to determine whether or not the OA would pass constitutional muster. Providence filed a motion asking the court to uphold the OA as constitutional. The court found that the OA had a secular purpose, but requested testimony as to whether the OA created excessive government entanglement with religion and whether the facilities would be operated as religious institutions. Before the court could render a decision, Providence withdrew from the OA.[22]

Bayfront Medical Center, St. Petersburg Florida[23]

In 1968, the City of St. Petersburg leased a hospital it owned to a nonprofit corporation, the Bayfront Medical Center. With the City's consent, in 1997 Bayfront joined the BayCare Health Care System, which included two Catholic-affiliated hospitals. As a part of the system-wide joint operating agreement, Bayfront agreed to follow the *Directives,* but this aspect of the agreement was not widely known. Two years later, the City became aware of the service restrictions imposed at Bayfront due to the imposition of the *Directives*, and sued both the hospital and the BayCare system. The City claimed that the agreement violated the terms of Bayfront's lease and that the restrictions caused the City to be in violation of the Establishment Clause by subjecting patients to religiously-restricted health care. While the case was pending, the BayCare ousted Bayfront from the system.

Sutter Medical Center, Sonoma County, California

In 1996, Sonoma County entered into an agreement with Sutter Medical Center to operate the county hospital. This agreement required Sutter to provide care for the uninsured and other indigent residents of Sonoma County. In 2007, after suffering considerable financial losses, Sutter sought to close Sutter Medical Center and transfer its hospital services to Santa Rosa Memorial Hospital, a

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[21] *In re Hoagland*, No. 00-1227 (Or. Cir. Ct. 2000) (unpublished, on file with the National Women's Law Center).
[22] *Id*.
[23] For a detailed account of these cases, see Dina R. Lassow, *Hospital Mergers and the Threat to Women's Reproductive Health Services: Using the Establishment Clause of the Constitution to Fight Back* (National Women's Law Center, 2006) *available at* http://www.nwlc.org/resource/hospital-mergers-and-threat-womens-reproductive-health-services-using-establishment-clause-.

nearby Catholic-affiliated hospital,[24] which followed the *Directives* and did not provide the full range of reproductive health services.

In April 2007, the County Board of Supervisors rejected Sutter's plan to move services to Memorial Hospital, saying the pullout would violate Sutter's obligation to care for uninsured and other poor county residents, especially women in need of reproductive health care. In early 2008, Sutter and Santa Rosa Memorial ended their negotiations, citing staffing and "construction timeline" issues concerning Memorial's ability to care for Sutter's uninsured and indigent patients, as required by the agreement with Sonoma County.[25]

[24] *1,200 to Lose Their Jobs in Closing of Hospital*, L.A. TIMES, Jan. 9, 2007, at 4.
[25] Memorandum from Mike Cohill, CEO of Sutter Medical Center of Santa Rosa, to Employees and Physicians, *Memorial and SMCSR End Negotiations* (Mar. 11, 2008) (on file with the National Women's Law Center).