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January 8, 2016

Attorney General Ellen F. Rosenblum  
Oregon Department of Justice  
Attention: Kate Denison  
1515 SW Fifth Avenue, Suite 410  
Portland, Oregon 97201

**Re: St. Joseph and Providence Request for a Waiver from the Attorney General Standard Review Process**

Dear Attorney General Ellen F. Rosenblum,

The undersigned organizations appreciate this opportunity to comment on the request by St. Joseph Health (St. Joseph) and Providence Health and Services (Providence) (collectively, the Parties) for a waiver from the Attorney General's standard process for reviewing merger transactions.

We urge the Attorney General to reject the waiver request made by the Parties and to proceed with the standard review process laid out in Or. Rev. Stat. § 65.800 *et seq.* In

particular, we highlight the need for an independent health care impact statement to fully assess the current level of reproductive, end-of-life, and other health services available in the hospitals involved. Additionally, given the population covered by these hospitals, it is important that this transaction have adequate public input from all affected communities.

### **The Proposed Transaction is Subject to Or. Rev. Stat. § 65.800 *et seq***

In their waiver request, the Parties assert that “the literal wording of the statute does not cover the proposed transaction,” and that the “intent of the statute is fulfilled without the notice requirement.” This narrow reading of the statute leads to its misapplication.

While it is true that no transfer of assets occurs as a result of this proposed transaction, the Attorney General’s review process is critical to determining that the public will not be harmed as a result of the transaction. The intent of the statute is to not only ensure fair and reasonable terms for the non-profit hospital, but also to make certain that the transaction will not diminish availability or accessibility of health care services, and that the transaction is in the public interest.<sup>1</sup>

Prior to the proposed transaction, Providence was already the sixth largest nonprofit hospital system in the U.S.<sup>2</sup> This transaction will result in a very large health care system, covering six states. It also involves the creation of a new parent corporation which will control overall mission, vision, strategic, financial, and operational direction for the Parties. Even absent the transfer of assets, significant changes in health care delivery are likely to occur, and it behooves the Attorney General to undertake the full review process to ensure that this transaction preserves existing health care services and benefits the public interest.

### **Need for an Independent Health Care Impact Statement**

While the statute does not specifically require one, the Attorney General should prepare an independent health care impact statement which, among other things, specifically assesses the effect of the transaction on reproductive health services. Or. Rev. Stat. §§ 65.811(7-8) require the Attorney General to deny transactions if they are not in the public interest, or if the proposed transaction “significantly diminishes” the availability of health care services. Preparing an independent health care impact statement is in the spirit of the statute as it allows a full review of the health care services currently offered at the Parties’ hospitals. Gathering this baseline information will allow the Attorney General to make certain the proposed transaction is in the public interest by not hampering the availability of health care services.

St. Joseph and Providence are both Catholic health systems. Catholic hospitals must typically follow the Ethical and Religious Directives (ERDs) promulgated by the United

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<sup>1</sup> Or. Rev. Stat. §§ 65.811(7-8).

<sup>2</sup> Erin Marshall, *10 Largest Nonprofit Hospital Systems: 2015*, BECKER’S HOSPITAL REVIEW (Dec. 23, 2015, 11:48 AM), <http://www.beckershospitalreview.com/lists/10-largest-nonprofit-hospital-systems-2015.html>

States Conference of Catholic Bishops. The ERDs forbid all reproductive health services, including all birth control methods, sterilization, miscarriage management, abortion, the least invasive treatments for ectopic pregnancies, and some infertility treatments. The ERDs provide no exceptions for risks to a patient's health or even life. In addition, the ERDs limit medical end-of-life decision making of patients by specifically subjecting advanced directives, surrogate decision-making, and withdrawal of life sustaining procedures to Catholic moral principles.

Every patient who enters a hospital, clinic, doctor's office, or any other medical setting expects that she or he will receive treatment information and services that meet the standard of care. Yet, the restrictions the ERDs place on Catholic hospitals are severe limitations that violate basic evidence-based standards of care – accepted medical practice and as adopted by the major professional medical associations. The restrictions prevent willing providers from providing the standard of care to their patients. For example, even when a pregnant woman is miscarrying, treatment options to protect the woman's health are limited if the non-viable fetus has a heartbeat. See, for example, the research of Drs. Lori Freedman and Deborah Stulberg documenting practices that endanger the lives of pregnant women, and the ways in which Catholic hospital requirements prohibit physicians from practicing medicine in accordance with their training.<sup>3</sup>

Further, the Parties assert that this proposed transaction will “provide a platform for clinical integration and the sharing of ‘best practices.’”<sup>4</sup> Given the Parties' Catholic affiliation and the requirement they follow the ERDs, a full review is necessary to ensure that true “best practices” are employed and that the Parties adhere to the basic, evidence-based standards of care.

We know that some St. Joseph and Providence hospitals are non-Catholic, and do currently provide some reproductive health services. Swedish Medical Center is a secular group of hospitals in Washington that affiliated with Providence in 2012. Even after their affiliation, the Swedish hospitals continue to provide birth control services such as tubal ligations and vasectomies. Their written policy also allows for terminations of pregnancy “[w]hen necessary, on an emergency basis.”<sup>5</sup> They also continue to allow physicians to prescribe medication pursuant to state death with dignity statutes, but are barred from allowing patients to self-administer such medication on premises.

We also know that there are some reproductive health services being provided even among the St. Joseph and Providence Catholic hospitals. For example Providence Portland Medical Center provides postpartum tubal ligations on a case by case basis,

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<sup>3</sup> Lori Freedman et. al., *When there's a heartbeat: miscarriage management in Catholic-owned hospitals*, Am J Public Health (Oct. 2008), Deborah Stulberg et. al., *Tubal ligation in Catholic hospitals: a qualitative study of ob-gyns' experiences*, Contraception (May 2014).

<sup>4</sup> Letter from Robert Schuchard, Attorney, Davis, Wright, Tremaine LLP to Ellen F. Rosenblum, Attorney General, State of Oregon (Nov. 30, 2015).

<sup>5</sup> Swedish News, FAQ: Swedish Reproductive and End-of-Life Care, April 9, 2014, <http://www.swedish.org/about/swedish-news-blog/2014/04/faq-swedish-reproductive-and-end-of-life-care>

based on medical necessity,<sup>6</sup> while other St. Joseph and Providence Hospitals do not provide tubal ligations under any circumstances.

Outside of Oregon, Alaska Women's Health, Providence Campus, is affiliated with Providence Alaska Medical Center, and provides infertility care and family planning, including emergency contraception, vasectomies, tubal ligations, and various types of birth control.<sup>7</sup>

As is evident from the above examples, the fact that St. Joseph and Providence are both Catholic health institutions is not dispositive as to the provision of reproductive health services within their hospitals. Here, we simply do not have a complete understanding of the health services being provided at each of the Oregon hospitals involved in this transaction. The Attorney General is charged with protecting the public interest, and one aspect of this duty is ensuring that health services currently being provided are not diminished or eliminated as a result of this transaction. Yet before the Attorney General can adequately guarantee that reproductive health services not be diminished or eliminated as a result of this transaction, we first need an independent assessment of precisely what those reproductive health services are.

While we acknowledge that the Parties state in their request for a waiver that "there will be no impact from the transaction on the service offerings in the Oregon communities and populations served by the 8 hospitals owned and operated by Providence," such a guarantee means little in the absence of a baseline to establish what current reproductive health services are actually available. An independent health care impact statement would provide the Attorney General with an up to date evaluation of the reproductive health services currently being provided at each of the hospitals involved in this transaction. This in turn would help ensure that any decision made about the proposed transaction take into full account the protection and maintenance of critical reproductive health services in each of the hospitals involved.

## **Public Meetings and Community Input**

Or. Rev. Stat. 65.807(1) requires that the Attorney General conduct a public hearing on the proposed transaction. The purpose of the public meeting is to receive input and comments from the immediate community to be directly affected. This critical step in the review process should not be waived.

This proposed transaction involves eight hospitals across Oregon, and a total of almost 50 hospitals across six states. The sheer reach of the two health entities involved is massive and thus has a potential impact on health services for a significant population.

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<sup>6</sup> Conversation with physicians who previously worked at Providence Portland Medical Center. Medical necessity is determined by the treating physician, who submits a letter to the nuns, who either approve or deny the request.

<sup>7</sup> Alaska Women's Health, PC, Family Planning/Birth Control Services, <http://www.akwomenshealth.com/family-planning-and-contraceptive-counseling.html>

Paramount in the Attorney General's considerations of whether to deny a waiver is impact to the public and affected community, including that the proposed transaction is "in the public interest," as per the requirements of Or. Rev. Stat. 65.811(8). Public testimony, input, and comment, is vital to ensuring that the Attorney General can make a fully informed decision about this transaction in a way that best protects the availability of health services and the public interest. Given the number of hospitals involved, granting a waiver would simply not allow all the affected communities adequate input to voice their health care services needs and any concerns about the transaction.

Thank you for considering these comments. If you have any questions or need further information, please contact Susan Berke Fogel at [fogel@healthlaw.org](mailto:fogel@healthlaw.org) or 310-736-1658, or Amy Chen at [chen@healthlaw.org](mailto:chen@healthlaw.org) or 310-736-1782.

Sincerely,

Susan Berke Fogel  
Director, Reproductive Health,  
National Health Law Program

ACLU of Oregon

Asian Pacific American Network of Oregon

Catholics for Choice

Compassion & Choices

Lambda Legal Defense and Education Fund

Legal Voice

Lois Uttley  
Director  
MergerWatch

Michele Stranger Hunt  
Executive Director  
NARAL Pro Choice Oregon

Northwest Health Law Advocates

Physicians for Reproductive Health

Pride Foundation

Western States Center