



July 16, 2013

**VIA U.S. MAIL AND ELECTRONIC MAIL**

Janis Sigman, Program Manager  
Washington State Department of Health  
Certificate of Need Program  
Mail Stop 47852  
Olympia, WA 98504-7852

**Re: Request for Department of Health to Decline to Issue Determination of Non-Reviewability Regarding Proposed Affiliation of Franciscan Health System and Harrison Medical Center**

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

Dear Ms. Sigman:

The ACLU of Washington and the undersigned organizations appreciate the important role of the Department of Health in protecting access to health care services, and we write to request that the Department decline to issue a Determination of Non-Reviewability for the proposed affiliation of Franciscan Health System (“Franciscan”) and Harrison Medical Center (“Harrison”).

As you know, the legislature has declared that the purpose of the CON program is to “promote, maintain, and assure the health of all citizens in the state, provide accessible health services ....”<sup>1</sup> We believe that the corporate restructuring proposed in the affiliation agreement is designed to evade CON review, even though the restructuring will result in a significant shift in control over health care assets and is likely to lead to restrictions on health care services based on religious doctrine. The CON program was specifically designed to address major changes such as these.

We strongly urge the Department to require the proposed affiliation to be reviewed pursuant both to CON and under the hospital conversion statute, RCW 70.45, as described below.

**A. The Department Must Subject the Proposed Affiliation to CON Review Because It Is Effectively a Sale and Will Result in Major Service Changes.**

RCW 70.38.105 provides that “[t]he sale, purchase, or lease of part or all of any existing hospital” is subject to CON review. The corporate restructuring contemplated by Franciscan and Harrison affiliation agreement is a transfer of assets that constitutes a sale or purchase within the meaning of the statute.

---

<sup>1</sup> RCW 70.38.015(1).

Harrison and Franciscan are Washington non-profit corporations. Franciscan is an affiliate of Denver-based Catholic Health Initiatives (“CHI”), another non-profit corporation, which is the sole corporate member of Franciscan. Currently, Harrison has no corporate members. After the close of this affiliation agreement, Harrison will have one corporate member: a newly-created Washington non-profit corporation called Franciscan Health Ventures (“FHV”).<sup>2</sup>

A close review shows that the proposed affiliation agreement sets FHV up to be a mere shell corporation through which Franciscan (and ultimately CHI, as its corporate parent) will control and operate Harrison.<sup>3</sup> Under the terms of the affiliation agreement, Harrison will have to seek FHV Board approval for various actions. In exchange for this substantial control over Harrison exercised through FHV, Franciscan promises to invest in capital improvements and implement an electronic health records system in Harrison’s various medical facilities.

This is an arrangement that, under any reasonable construction, constitutes the kind of change in control that the CON program and its underlying public policy were intended to subject to government scrutiny. The Department should reject Franciscan and Harrison’s thinly veiled effort to disguise the true nature of this transfer of assets—it is in reality a sale or purchase of a hospital and should be subject to CON review.

In addition, despite assurances within the affiliation agreement that FHV will maintain Harrison as a separate and secular entity,<sup>4</sup> this is unlikely to happen. FHV and Franciscan are effectively the same entity, and Franciscan is a religiously-controlled institution that requires adherence to the Ethical and Religious Directives for Catholic Health Care Services promulgated by the U.S. Conference of Catholic Bishops (the “ERDs”). As FHV is Harrison’s sole corporate member, Harrison is likely to be subject to the ERDs as well—a situation that will result in restrictions on the availability of reproductive care, end of life services, and care for LGBT families, among others.

Already, Harrison has announced that it has agreed to restrict health care services based on the religious mission of Franciscan.<sup>5</sup> Harrison will prohibit its physicians from

---

<sup>2</sup> Affiliation Agreement By and Among Franciscan Health System, Catholic Health Initiatives, Franciscan Health Ventures, and Harrison Medical Center § 2.1(a) [hereinafter “Affiliation Agreement”].

<sup>3</sup> FHV will come into existence as a Washington non-profit corporation upon the closing of the affiliation agreement. FHV’s Board of Directors will consist of the same directors as Franciscan’s (FHS’s) Board of Directors, and the affiliation agreement directs both Boards to take “any and all actions necessary” to ensure that Board compositions remain identical to each other. Should the Board compositions somehow fail to mirror each other, the affiliation agreement provides that any action taken by the FHV Board under these circumstances (i.e., when its directors are not identical to those of the FHS Board) will require approval from the FHS Board. In short, the affiliation agreement ensures that the FHS Board either is, or otherwise supersedes, the FHV Board. Despite these provisions, the affiliation agreement attempts to falsely distinguish the FHV and FHS Boards by preventing individuals on the FHV Board from being deemed agents or delegates of FHS or CHI. Affiliation Agreement, § 3.3.

<sup>4</sup> Affiliation Agreement, § 3.1.

<sup>5</sup> Leslie Kelly, *Harrison CEO Tries to Calm Nerves About Upcoming Affiliation*, CENTRAL KITSAP REPORTER, June 20, 2013.

participating in Washington's Death With Dignity law, it will prohibit elective abortions, and it will not do stem cell research. Harrison's current practice is to refer patients seeking elective abortions or death with dignity arrangements to other providers, but it is unclear whether even these types of referrals will be allowed to continue under the proposed affiliation. These restrictions raise the likelihood of major changes in the services offered at Harrison. Given that the State's stated public policy goal of ensuring the accessibility of health services, the proposed affiliation should be subject to review pursuant to additional sections of the CON statute.<sup>6</sup>

**B. The Department Must Subject the Proposed Affiliation to Review Under the Hospital Conversion Statute.**

Under the hospital conversion statute, RCW 70.45, the state has a responsibility to protect the public interest in nonprofit hospitals by ensuring that its charitable assets are managed prudently and safeguarded consistent with their mission under the laws governing nonprofit corporations.<sup>7</sup> Consequently, certain acquisitions of non-profit hospitals must receive Department of Health and Attorney General approval. A review is required not only when a for-profit corporation seeks to acquire a non-profit, but also when a non-profit corporation is acquiring another non-profit and the acquiring entity does not have a substantially similar charitable health care purpose as the hospital it seeks to acquire.<sup>8</sup> As discussed above, despite the parties' efforts to characterize the proposed affiliation as mere corporate restructuring, it is actually an acquisition of a hospital that must be reviewed under RCW 70.45, with attention to the difference in purpose between Harrison and Franciscan.

In conducting that review, the Department should keep in mind the significant difference between the charitable missions of Franciscan and Harrison—one's mission is essentially religious, and the other's is secular. Franciscan has a distinctly religious health care mission that is reflected in its adherence to the ERDs<sup>9</sup>:

To nurture the healing ministry of the Church by bringing it new life, energy and viability in the 21st century. Fidelity to the Gospel urges us to emphasize human dignity and social justice as we move toward the creation of healthier communities.

In stark contrast, Harrison has a secular health care mission and does not restrict health care services<sup>10</sup>:

We make a positive difference in people's lives through exceptional healthcare.

---

<sup>6</sup> See, for example, RCW 70.38.105(4)(e) and RCW 70.38.105(4)(f).

<sup>7</sup> RCW 70.45.010.

<sup>8</sup> RCW 70.45.020(3).

<sup>9</sup> Franciscan Health System, Mission, Vision and Values, <http://www.fhshealth.org/About-us/Mission-Vision-and-Values/> (last accessed July 15, 2013).

<sup>10</sup> Harrison Medical Center, Our Mission, <http://www.harrisonmedical.org/home/mission> (last accessed July 15, 2013).

Given this pronounced difference in charitable mission, the Department should ensure that in order for this proposed affiliation to be approved, Harrison and Franciscan are required to demonstrate that the acquisition “will not detrimentally affect the continued existence of accessible, affordable health care that is responsive to the needs of the community” as required under RCW 70.45. Given the restrictions on health care services already announced by Harrison on the basis of religious doctrine, this is a threshold we do not believe this proposed affiliation can satisfy.

The Department serves a critical role in protecting public health and access to health care services pursuant to the CON and hospital conversion statutes and their underlying public policy. We urge the Department to ensure that this proposed affiliation and others like it are subjected to full review as required by state law to protect the public interest—and therefore to reject the parties’ request for a Determination of Non-Reviewability.

Sincerely,



Kathleen Taylor, Executive Director  
ACLU of Washington

Deborah Oyer, MD, Medical Director  
Aurora Medical Services

Robb Miller, Executive Director  
Compassion & Choices, Washington

Lisa M. Stone, Executive Director  
Legal Voice

Rachel Berkson, Executive Director  
NARAL Pro-Choice Washington

Janet Varon, Executive Director  
Northwest Health Law Advocates

Mary Kay Barbieri, Chair  
People for Healthcare Freedom

Mike Travis and Karen Gold, Co-  
Presidents  
PFLAG Washington State Council

Elaine Rose, CEO  
Planned Parenthood Votes Northwest

Jill Janow  
Vashon HealthWatch

CC: Bob Ferguson, Attorney General, State of Washington