
September 27, 2018

Wendi A. Horwitz, Esq.
Deputy Attorney General
California Department of Justice
Charitable Trusts Section
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

**Re: Proposed Change in Control and Governance of Dignity Health and Catholic Health Initiatives**

Dear Ms. Horwitz:

The undersigned organizations appreciate this opportunity to comment on the proposed change in control and governance of Dignity Health (DH) and Catholic Health Initiatives (CHI).

Our organizations have actively participated in over a dozen California health system transactions involving Catholic hospitals, and have significant expertise in the impact of these transactions on access to high-quality reproductive health care services, as well as access to health care for LGBTQ individuals and families, and low-income communities.

We urge the Attorney General to ensure that if he approves any change in control and governance of DH and CHI, that approval is accompanied by robust and enforceable conditions that protect the community interests. In particular, we urge conditions that ensure community members can access the health care services they need, including reproductive health services, health services for LGBTQ patients, and services for low-income and underserved communities, which includes uninsured patients, patients on Medi-Cal or Medicare, and patients who may access the hospitals' charity care and community benefit services.

Ensuring parity of access to reproductive health services

DH acknowledges that some of their hospitals follow the Ethical and Religious Directives for Catholic Health Care Services (ERDs). The ERDs are a religious document promulgated by the U.S. Conference of Catholic Bishops that forbids 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.

We also know that not all of the hospitals in this transaction strictly follow the ERDs, and that some instead follow DH's "Statement of Common Values." The Statement of Common Values is also a nonmedical document that prohibits "direct" abortion, reproductive technologies including in vitro fertilization, and physician-assisted suicide, and is silent on other services.

However, even among hospitals that follow the ERDs and among those that follow the Statement of Common Values, there are still differences in the services provided. The data in the health impact statements helps to illustrate this variation between and among hospitals. Hospital practice varies as to whether they perform tubal ligations after Cesarean sections, which is widely understood as the medical standard of care for patients who opt for sterilization. The hospitals apply uneven rules to treatment of other potentially life-threatening reproductive health diagnoses, including second trimester bleeding with a pre-viable fetus, premature rupture of membranes, and ectopic pregnancies. We also know that in some instances, hospitals allow physicians to provide services, even as an exception to the ERDs, on a case-by-case basis.

This variation creates a disturbing situation for DH patients, in which an individual going to a DH facility could potentially receive very different treatment than elsewhere, and in many cases treatment that does not meet the medical standard of care. These treatment variations could depend not only on which DH facility the patient goes to, but potentially also on factors completely beyond their control, such as which hospital administrator happens to be making the decision that day about whether the service can be provided as an exception to the ERDs.

Patients obviously have no way of knowing ahead of time that their health conditions may be treated so differently from one facility to the next, and perhaps even one day to the next.[1]

For example, Mercy Medical Center Redding, a DH hospital that identifies as "Catholic" and follows the ERDs, has allowed some women to access postpartum tubal ligation, and has refused others the same service. The ACLU filed a suit in 2015 on behalf of patient Rebecca Chamorro and Physicians for Reproductive Health, arguing that withholding pregnancy-related care for reasons other than medical considerations is illegal in California. Chamorro, a patient at Mercy Medical Center Redding, decided with her doctor that she would get a tubal ligation during her scheduled C-section in 2015. But the hospital refused her doctor's request to perform the procedure, citing religious directives that classify sterilization procedures as "intrinsically evil." *See Chamorro v. Dignity Health*, S.F. Sup. Ct., CGC 15-549626.

We urge the Attorney General to ensure parity of access to reproductive health services at all DH hospitals. Where reproductive health services are currently being provided as exceptions to the ERDs or the Statement of Common Values, those services must be maintained. Where those services are being provided even on a case-by-case basis, the Attorney General must require that DH and CHI put protocols in place to make those services available equally and transparently to all patients at those facilities. If DH can and is providing a service to some patients, as a matter of law and policy, DH cannot be allowed to claim the ERDs require them to deny those services to other patients.

<u>Commit to treating LGBTQ patients with dignity and respect</u>

While the ERDs do not specifically discuss transgender and gender non-conforming patients, we know that patients have faced barriers in accessing basic health care services at DH facilities throughout the state. DH has claimed that medically necessary, life-saving gender-affirming care, such as a hysterectomy, is a "direct sterilization" and is thus categorically impermissible under the ERDs. For example, in a case filed by the ACLU in California, upon learning that he was transgender, DH prevented a patient from getting transition-related care the day before his long-awaited appointment. This patient, Evan Minton, is a transgender man who was scheduled to receive a hysterectomy in August 2017 at Mercy San Juan Medical Center, a DH hospital. Two days prior to the appointment, a nurse called to discuss the surgery and Minton mentioned that he is transgender. The next day, the hospital canceled the procedure. DH regularly allows hysterectomies for patients who are not transgender. Minton's doctor at Mercy San Juan Medical Center said this is the first time the hospital had prevented her from doing this surgery. It was clear that DH canceled the surgery because Minton is transgender. *See Minton v. Dignity Health,* S.F. Sup. Ct., CGC 27-558259.

[1] M. Guiahi et al., 90 CONTRACEPTION 429–34 (2014). A sample of reproductive-age women completed an online survey in 2014. The majority expected their gynecologist to provide all family planning services, and they did not anticipate a difference in reproductive health care based on whether the institution was Catholic or secular.

Another refusal occurred in a Southern California DH hospital, where a patient who identified as trans-masculine (an individual who was assigned female at birth and later transitioned to male) was abruptly discharged from an emergency surgery and inpatient stay for a blood clot. This patient was subjected to life-threatening disruption in care that necessitated additional emergency care and treatment at an alternative, non-Catholic hospital.

In the transaction application, DH states that they will prohibit "discrimination with respect to any lesbian, gay, bisexual or transgender individuals at any hospital." The DH hospitals involved in this transaction should not only be held to their commitment not to discriminate, but encouraged to continue to improve their provision of services for LGBTQ Californians. Many hospitals throughout California have made strides in improving the quality of their health care services for LGBTQ patients, and providing access to a greater number of services. Transition-related care is recognized as a standard medical service. The Department of Managed Health Care, Department of Health Care Services, and Department of Insurance in 2013 confirmed that transition-related care must be covered in accordance with the California Insurance Gender Nondiscrimination Act and implementing regulations.[2] The Attorney General should secure from DH a commitment that all LGBTQ patients and their families will be treated with dignity and respect, and that they will all receive the medical standard of care that any other patient should receive. The Attorney General should also explicitly condition approval on the merging entities' commitment to allow providers to deliver care—gender-affirming and otherwise—to transgender, non-binary, and gender non-conforming patients. We request that the Attorney General include a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and for that reason prohibiting the merging entities from citing the ERDs or any other doctrine or document to prevent provision of such care.

Maintaining services, community benefits, and charity care

Many of the DH hospitals are located in the state's more rural areas. In some instances, these hospitals may be among the only available health providers in the area. Timely and adequate access to all health services is critical, and this is particularly the case when it comes to reproductive health services and other essential health services. The Attorney General should ensure that the conditions on any merger require that DH hospitals maintain at least the levels and types of reproductive health services and essential health services currently provided for a minimum of fifteen years post-merger.

It is also critical that DH and CHI establish and maintain robust charity care policies and meet measurable standards for the delivery of charity care. DH hospitals in California contribute more than $71 million in charity care (based on a 3-year lookback) and $135 million in community benefits each year. Any reduction in this care would have a serious deleterious effect on low-income community members. We support a condition that DH and CHI maintain at least the current level of charity care based on a 5-year lookback for a minimum of fifteen years post-merger.

[2] Cal. Health & Safety Code § 1365.5; Cal. Insurance Code § 10140; 10 C.C.R. § 2561.2.

We also ask that in calculating the maintenance level, that the Attorney General use a 5-year lookback period rather than the proposed 3-year lookback period. The hospitals drastically reduced their charity care after the implementation of ACA because the number of uninsured dropped, but at the same time the number of *underinsured* grew. Forgiving the medical debt of the underinsured can also be considered charity care. In addition, the hospitals largely grant charity care to uninsured patients coming in through the emergency room. We know there are still uninsured patients who need non-emergency specialty services. The hospitals need only partner with community clinics to find these patients.

Apart from the amount of money spent on charity care and community benefits, the Attorney General should require all hospitals to submit their hospital financial assistance policies and procedures for informing patients about their charity care and financial assistance programs to ensure the policies themselves are in compliance with and meet all the noticing and posting requirements of state law, including the Hospital Fair Pricing Act.[3] Compliant policies and procedures are critical to ensuring that the uninsured and underinsured low-income people served by DH and CHI facilities receive the charity or discount care they need. This is critical to prevent them from suffering unnecessary financial hardship or going into debt or bankruptcy simply because they are of limited means and they need medical care from a DH hospital. To the extent any hospital is out of compliance with state charity care requirements, the Attorney General should condition the merger on an increase in charity care to meet the required amount.

DH hospitals provide a vital source of care for the low-income populations in the surrounding areas, particularly individuals and families with Medi-Cal or Medicare coverage. As the state's largest provider of Medi-Cal services, DH is critical to the state's social safety net. DH and CHI's commitment to maintain the current level of Medi-Cal and Medicare participation for five years following the merger simply does not offer sufficient protection for low-income and elderly individuals. Thus, we urge the Attorney General to require that DH and CHI maintain their current levels of Medi-Cal and Medicare participation for at least fifteen years post-merger and continue to contract with Medi-Cal managed care entities. There is no indication that the number of individuals eligible for Medi-Cal in California will be dropping over the next 15 years and in fact, the trend is upward.

Moreover, we ask that the Attorney General put in place mechanisms to ensure that DH and CHI hold to these service commitment levels. As such, we urge the Attorney General to require specific reporting to this end from each DH/CHI facility at a minimum of every three years post-merger.

<u>Impact of new restrictions in the updated ERDs</u>

In June of this year, the U.S. Conference of Catholic Bishops approved a new edition of the ERDs. This new edition broadened restrictions around "collaboration," which includes mergers

[3] Cal. Health & Safety Code § 127400, et seq.

like the one at issue as well as any business dealings between Catholic and non-Catholic entities (or any entities not governed by the ERDs). One addition to this section provides that any mergers, including the one at issue here, must be operated "in full accord with the moral teaching of the Catholic Church," including specific religious restrictions.

It is unclear from the merger application how DH and CHI may interpret these revisions, and in turn what impact this update could have on protections promised by DH and CHI or on any conditions put in place by the Attorney General to protect access to services. We remind the Attorney General that the ERDs document is non-medical, and that it is not legally binding. However, based on DH and CHI's historical adherence to this document, we urge particular caution. We urge the Attorney General to demand additional information from DH and CHI as to the impact that the broadened restrictions on collaboration in the updated version of the ERDs may have on any promises to maintain access to care provided in the merger agreement. We also urge the Attorney General to secure assurances from DH and CHI as to their willingness and ability to adhere to any conditions imposed by the Attorney General. If necessary, the Attorney General should secure additional legally binding and enforceable commitments from DH and CHI with respect to any conditions that your office may impose.

Potential loophole to escape Attorney General imposed conditions

As it stands, the Ministry Alignment Agreement for the DH and CHI merger contains a loophole by which specific facilities that run afoul of the ERDs could simply be cut loose from the broader health system—which could mean sudden death for a facility. If the local Bishops or other Catholic authorities unilaterally decide it is unacceptable that some DH hospitals provide services prohibited by the Church, they can force these hospitals out of the system. Thus, for example, if the Attorney General imposed conditions on the merger requiring certain DH hospitals to continue providing reproductive health care services they are currently providing even though those services are barred by the ERDs, then under this provision Catholic authorities could kick the facility out of the health system after the merger, effectively constituting an end run around the Attorney General's ability to impose enforceable conditions. We believe this is a dangerous loophole that would allow a merged DH entity to escape conditions that the Attorney General might place on the merger. We urge the Attorney General to require that DH and CHI remove this provision from the Merger Alignment Agreement, and if necessary, secure additional legally binding and enforceable commitments from DH and CHI with respect to any protections that your office may impose.

In sum, our specific recommendations are as follows:

1. Ensure parity of access to reproductive health services at all DH hospitals. Where reproductive health services are currently being provided as exceptions to the ERDs, those services must be maintained. Where those services are being provided but only on a case-by-case basis, the Attorney General must require that DH and CHI put

protocols in place to make those services available equally and transparently to all patients at those facilities.

2. Secure from DH a commitment that all LGBTQ patients will be treated with dignity and respect, and that they will allow providers to deliver the standard of care—gender-affirming and otherwise—to transgender, non-binary, and gender non-conforming patients. We ask the Attorney General to include a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and for that reason the merging entities are prohibited from citing the ERDs or any other doctrine or document to prevent provision of such care.
3. Require that reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts are maintained at least at their current levels based on a 5-year lookback for a minimum of fifteen years post-merger.
4. Require specific reporting on maintenance of reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts, at a minimum of every three years post-merger.
5. Demand additional information in writing and made publicly available from DH and CHI as to the impact that the broadened restrictions on collaboration in the updated version of the ERDs may have on any protections for access to care provided in the merger agreement. If necessary, the Attorney General should secure additional legally binding and enforceable commitments from DH and CHI with respect to any conditions that your office may impose.
6. Require DH and CHI to remove the section of the Merger Alignment Agreement that acts as a loophole to escape Attorney General imposed conditions. If necessary, the Attorney General should secure additional legally binding and enforceable commitments from DH and CHI with respect to any conditions that your office may impose.

Thank you for considering these comments. If you have questions or need further information, please contact Amy Chen at chen@healthlaw.org or 310-736-1782 or Ruth Dawson at rdawson@aclusocal.org or 213-977-5258.

Sincerely,

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And on Behalf of:

ACCESS Women's Health Justice
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Asian Americans Advancing Justice - Los Angeles
Asian Law Alliance
Bay Area Legal Aid
California Nurse-Midwives Association
California Women's Law Center
Democratic Women's Club of Santa Cruz County
Health Consumer Alliance (HCA)
Hollywood NOW
Legal Aid Society of San Mateo County
Legal Services of Northern California
NARAL Pro-Choice California
National Council of Jewish Women CA
The SIA Legal Team
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