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Assistant Attorney General Robert Romano  
NJ Department of Law and Public Safety  
Division of Law  
P.O. Box 112  
Trenton, NJ 08625-0112

Re: **Proposed Acquisition of Mountainside Hospital by  
Merit Health Systems**

Dear Assistant Attorney General Romano:

Please accept these written comments as a supplement to my testimony presented at the March 29, 2007 public hearing concerning the above-captioned matter. The comments are submitted on behalf of New Jersey Appleseed, AARP New Jersey, and New Jersey Citizen Action. Previous comments regarding our health concerns with this transaction were sent to the Commissioner of Health and Senior Services.

The Attorney General, acting as guardian of the charitable assets, must assure that any change in a hospital's structure preserves the public's interests in the charity. Our two main concerns are whether the non-profit healthcare entity will receive full and fair market value for its charitable assets and whether the transaction proceeds will be properly used once the conversion is complete. These concerns are mirrored in the NAAG Model Act, after which the Community Health Care Assets Protection Act ("CHAPA"), N.J.S.A. 26:2H-7.10 et seq., is patterned.<sup>1</sup>

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<sup>1</sup> Model Act for Nonprofit Healthcare Conversion Transactions, reprinted in National Association of Attorneys General, Resolution Adopting Legislation on Conversion of Nonprofit Health Care Entities to For-Profit Status, § 5.01(1), (2), (3), (9), & (11) (Summer 1998).

Protecting the value of the charitable assets is a condition precedent to its lawful use after conversion. Unless the assets are adequately safeguarded during the negotiation stage of the transaction and independent financial assessments are made by industry experts, the proper use of the transaction proceeds, the second major issue, is never reached. In this acquisition, the valuation was prepared months after the Asset Purchase agreement was entered into and Merit itself was requested to justify its valuation of the hospital's assets. Without the insistence upon proper valuation techniques from the outset<sup>2</sup>, no assets or inadequate assets remain to establish the corpus of the charitable foundation. Indeed, the NAAG Model Act envisions a public auction which generates multiple bidders as the ideal situation to ensure that the charitable assets should be sold at a maximum price. See Notes to the Proposed Model Act for Nonprofit Healthcare Conversion Transactions, reprinted in National Association of Attorneys General, Resolution Adopting Legislation on Conversion of Nonprofit Health Care Entities to For-Profit Status, § 5.01(1) (Summer 1998); see also Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (Sup. Ct. 1999) (court invoked the duty of obedience to hold that hospital directors had neglected their obligation to fully consider all options for avoiding closure of the hospital and had not received adequate value in the sale of its assets); <http://www.mdinsurance.state.md.us/documents/FinalMIAReport-CareFirst3-5-03.pdf> (Maryland Insurance Commissioner rejected application of CareFirst BlueCross BlueShield to convert, concluding that the bidding process, ending in a tie price, was "flawed and did not produce fair market value.")

Under the proposed acquisition, the Mountainside Foundation will receive, among other proceeds, the land under the nursing school. While we applaud the Atlantic Health System ("AHS") for stepping aside as the sole member of the Mountainside Foundation, we believe that the Foundation's governance and purpose must meet the standards contained in CHAPA. E.g., N.J.S.A. 26:2H-7.11 (c)(6); N.J.S.A. 26:2H-7.11 (h). Even if the Attorney General believes that CHAPA does not apply to the Mountainside Foundation, under the common law it should be broadly based, remain independent of the purchaser and parties to the acquisition, report annually to the Attorney General, and its funds remain in the community previously served by the

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<sup>2</sup>To this end, today New Jersey Appleseed has retained a forensic accountant to critique the March 2007 valuation submitted by the applicant. His report will be submitted before the end of this week.

Mountainside Hospital. E.g., Banner Health System v. Long, 663 N.W.2d 242 (S.D. 2003). The need for independence is especially relevant since AHS is assigning to the Foundation its limited right of first refusal.

One troubling aspect of the Asset Purchase Agreement is the provision for AHS to fight and fund disputes between Merit and the local property tax assessors regarding a future dispute that may arise between them. Not only is this obligation an unwarranted use of charitable dollars by AHS, desperately needed for the health care needs of their remaining hospitals, but also constitutes an unwarranted reserve or hold-back which could substantially reduce the proceeds available for the Mountainside Foundation or AHS, whatever the ultimate decision on the fair market value of the purchase price. See Commentary to the Proposed Model Act for Nonprofit Healthcare Conversion Transactions, reprinted in National Association of Attorneys General, Resolution Adopting Legislation on Conversion of Nonprofit Health Care Entities to For-Profit Status, at 8 (Summer 1998).

Another important factor in considering whether the proposed acquisition is in the public interest is the extension of a \$10 million Line of Credit to Merit by AHS. We call upon the Attorney General to carefully investigate "[w]hether charitable funds are placed at unreasonable risk, if the acquisition is financed in part by the nonprofit hospital." N.J.S.A. 26:2H-7.11(d)(2).

For the foregoing reasons, it is respectfully submitted that the consideration received for Merit's purchase be carefully scrutinized, and, if necessary, an independent valuation be conducted under either of CHAPA's two mechanisms, to insure that fair market value was paid for the assets being transferred.<sup>3</sup> Under CHAPA and the Common Law, steps must be taken to insure the independence and proper composition and functioning of the Mountainside Foundation. Finally, responsibility for property tax disputes should rest solely with the purchaser, Merit.

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<sup>3</sup>Regardless of his recommendation, the Attorney General is his decision should make it clear that the nonprofit hospital, at the time it makes its decision to dispose of its assets, should obtain an independent expert fair market valuation of the hospital before it seeks possible suitors for its assets. Such an explicit direction should also be incorporated into any regulations promulgated pursuant to N.J.S.A. 26:2H-7.11(n).

Respectfully submitted,

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NJCA, and AARP-NJ

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