



May 5, 2008

John Calabria, Director
Certificate of Need and Acute Care
Licensure Program
NJ Department of Health and Senior Services
P.O. Box 360, Rm. 403
Trenton, New Jersey 08625-0360

Re: CN No. FR 080303-20-01, Application for Closure of Acute Care
Services at Muhlenberg Regional Medical Center

Dear Mr. Calabria:

Please accept this written submission on behalf of New Jersey Appleseed Public Interest Law Center. Due to large number of residents, providers, and elected local officials expected to speak at tonight's public hearing (and the limited time in which they are able to speak), we decided to limit our comments and requests for conditions, if the Certificate of Need ("CN") application is approved, to those included in this letter.

In its Final Report, dated January 24, 2008, the New Jersey Commission on Rationalizing Health Care Resources (the "Reinhardt Commission") observed,

Citizens pay lip service to the power of markets and price competition. But then they wring their hands in astonishment and despair when hospitals favored by patients with the ability to pay thrive while hospitals with a largely poor clientele, many uninsured and Medicaid patients, for whom reimbursement rates are below full costs, are pushed to the brink of bankruptcy.

Final Report at 104. It appears on the face of this CN application, that the situation presented by Muhlenberg Regional Medical Center ("Muhlenberg" or the "Hospital") exemplifies or is the "predictable expression of this *cognitive dissonance*" as described by the Reinhardt Commission above. Facing operational losses of approximately \$16.5 million dollars in 2007 (representing more than three times its previous losses of \$2.9 million in 2006, and \$1.48 million in 2005), a patient mix of whom more than 70% are reimbursed by government payers or are uninsured, and stagnant occupancy rates due to

an inability to attract more suburban-based patients, Muhlenberg appears, on the information that it has presented, to be on the brink of bankruptcy unless the State is able to immediately infuse money into the Hospital, and over time, increase reimbursement rates for government insured patients and provide comprehensive health insurance for all its residents, including undocumented immigrants.¹

Notwithstanding this prescription, the Commissioner, at this time, must make her decision whether to permit Solaris Health System (“Solaris”) to close Muhlenberg Hospital as an acute care facility only after she (1) has analyzed the “essentiality” and “financial viability” scores of Muhlenberg using the software provided to her by the Reinhardt Commission, and (2) has undertaken, in dialogue with the Plainfield community, a comprehensive Community Impact Study that would include a health needs assessment as well as an analysis of other non-quantifiable social, economic and geographic factors. See Final Report at 165; “Looking at the Full Picture: Analyzing the Community Health Impact of Hospital and Insurer Transactions,” (Community Catalyst, November 2003)(previously submitted to the Department of Health and Senior Services). Furthermore, the Commissioner should require Solaris to share with the public several documents, including reports prepared by consultants and its 2007 audited financial statements, which are referred to and summarized in the CN application. Access to such documents is necessary for the public to better understand the situation facing the Hospital.

Should the Commissioner proceed without first conducting a Community Impact Study, and still decide to permit Solaris to close Muhlenberg as an acute care facility, New Jersey Appleseed for the reasons set forth below requests the Commissioner to condition her approval on the following requirements: Solaris (1) must retain its license to operate Muhlenberg for at least one year after closure; (2) appoint a health care monitor who would undertake a full community needs assessment in consultation with a newly-created Community Advisor Group, within three months of closure, to examine what health services, including acute-care services, must remain at the Muhlenberg site;² (3) undertake a broader community impact study that examines secondary economic consequences of closing, downsizing or otherwise transforming Muhlenberg Hospital; and (4) provide certain non-acute care services at the site for a minimum of eight years.³

¹ New Jersey Appleseed would like to state as a preliminary matter that this CN application is the most informative and professionally presented CN application we have reviewed over the past four years involving the sale and/or closure of an acute care hospital.

² During conversations New Jersey Appleseed has had with representatives of Solaris, they have indicated a willingness to undertake such a community health needs assessment.

³ In its application, Solaris states that the following services will remain at the Muhlenberg site after closure: a satellite emergency department; basic imaging and laboratory services, hemodialysis services, outpatient diabetes services, paramedic services (Mobile Intensive Care Units), transportation services, the Muhlenberg School of Nursing, a home health agency, and non-clinical medical record storage. We request that

Analysis Pursuant to N.J.S.A. 26:2H-8

Approximately two weeks ago, the New Jersey Supreme Court issued its decision in In re Application of Virtua-West Jersey Hospital Voorhees for a Certificate of Need (A-127-06)(April 23, 2008) (“In re Virtua’s CN”). What emerges from the decision are two legal principles that are relevant to the pending application: the Commissioner’s obligation to provide an analysis of the impact that a particular CN will have on the delivery of health care services in a region, and conversely, not just to accept the proffers of a petitioner (pp 28-31); and her obligation “to guard against severe or pervasive negative impacts on urban hospitals.” (p.32). See generally N.J.S.A. 26:2H-6.1(h)(“. . . [T]o protect the role of such institutions as urban hospitals, whose importance to the Statewide health care system is indisputable, and to guard against the closing of important facilities and the transfer of services from facilities in a manner which is harmful to the public interest.”)

As we have stated in our comments (and court submission) with respect to the closing of St. James and Columbus Hospitals, New Jersey Appleseed asserts that this mandate requires the Commissioner first to determine whether inpatient services at Muhlenberg are “necessary” (*i.e.*, essentiality prong set forth Final Report by Reinhardt Commission), and are financially sustainable (*i.e.*, financial viability prong set forth in Final Report by Reinhardt Commission), and second, to undertake a Community Impact Study that includes a community health needs assessment prior to determining whether to grant a CN to close a hospital with or without conditions. This is the case because the Commissioner simply cannot conclude whether there will be an adverse impact upon the persons served by the closing hospital, or identify which services are “necessary” and must be continued to prevent such negative impact merely by relying on the information provided by the applicant. Furthermore, the Supreme Court in In re Virtua’s CN has made clear that the Commissioner’s obligation pursuant to the CN process is to “satisfy the legislative preference for a regulatory review that will serve as a check on undue harm to [New Jersey’s] valuable, and vulnerable, urban hospitals,”—hospitals such as Muhlenberg. In re Virtua’s CN at 31-32.

In light of this legal framework and legislative purpose, we offer the following comments based on information presented by the applicant.

Is Muhlenberg an Essential Hospital?

Pursuant to N.J.S.A. 26:2H-8(1), the Commissioner must assess when considering a CN application whether the service, in this case all the services constituting Muhlenberg Hospital, are “necessary to provide health care in the area served.” Though not embodied in enforceable regulations, the criteria set forth in the Final Report for identifying essential hospitals is an appropriate guideline that should be used by the Commissioner (and modified based on individual circumstances if deemed appropriate)

the Commissioner compel Solaris to reconsider its failure to include prescreening and other mental health and psychiatric services.

when considering an application to close an acute care facility. See Final Report at 161-162 (setting forth the following criteria and metrics: care for financially vulnerable populations; provision of essential services; utilization). It appears from the data provided in the application, Muhlenberg does care for financially vulnerable populations, has a 60% occupancy rate (with a daily census of approximately 135 patients), and has a high number of people visiting its emergency department. Although Muhlenberg is not designated a trauma center, it has other services that upon closer examination may be considered essential to the population it serves, including but not limited to comprehensive OB and inpatient mental health services, elective angioplasty, and a diabetes center.⁴

Furthermore, we note that many of the hospitals serving persons within Muhlenberg's primary and secondary service area are not within the same Dartmouth Atlas-defined hospital service area thus requiring a modification to any analysis regarding utilization performed with the software provided by the Reinhardt Commission to the Department. Unlike Muhlenberg which is in the Morristown Hospital District, JFK Medical Center, Somerset Medical Center, St. Peter's University Hospital and Robert Wood Johnson University Hospital, are all within the New Brunswick Hospital Market Area.

In any case, it is the Commissioner's obligation to determine whether the Hospital is or is not essential.

Is Muhlenberg Financially Viable?

Within the context of an application to close an acute care facility, the Commissioner should apply N.J.S.A. 26:2H-8(2) to determine whether acute care services "can be economically [continued] and maintained" into the future at the facility applying for closure. Again, we urge the Commissioner to apply the three criteria employed by the Reinhardt Commission to determine a hospital's financial viability. See Final Report at 162-163 (*i.e.*, profitability, liquidity and capital structure). Although the public has been given audited financial statements for 2005 and 2006, we are unable to undertake any meaningful analysis without the 2007 data. We urge the Commissioner to perform such analysis with the most recent data.

On the face of the CN application, we are told that operational losses have leaped to \$16.5 million dollars in 2007. The source of such losses is not apparent from the application. In 2005 and 2006, Muhlenberg received a little over \$9 million in state subsidies from the New Jersey Health Care Subsidy Fund and special funds. Did that revenue flow stay the same in 2007 or did it decrease? Did Medicaid reimbursement rates go down? Did Muhlenberg incur higher labor or energy costs? See CN Application

⁴ See Letter dated May 11, 2007, from Solaris Health System to Reinhardt Commission commenting on criteria for determining essential and financially distressed hospitals (attached hereto).

at 5 (discussing applicant's position that Muhlenberg is not a financially sustainable hospital). In other words, the public is unable to understand the immediate financial crisis allegedly facing the Hospital, and the Department should require Solaris to provide to the Department and the public any and all documents that support its allegations.

Specifically, the Department should require Solaris to provide to the Department and the public its 2007 audited financial statements for Muhlenberg and all of its nonprofit and for-profit subsidiaries, the "external benchmarking and third-party evaluation of Muhlenberg's cost structure" mentioned in its application, and the analysis performed by its consultant regarding alternative service configurations also noted on pages 23-24 of the application. Such information is necessary for the Department and the public to determine not only whether this hospital is financially viable under Solaris' management (or any entity's management), but also to determine whether Muhlenberg's and Solaris' Boards satisfied their fiduciary duties of care and loyalty when deciding to close the facility.⁵

It is only after the Commissioner has determined whether Muhlenberg Hospital is financially viable, and what changes would have to be made to sustain services at the Hospital, that a political consensus can be reached as to whether financial assistance should be given to Solaris or some other owner to keep this Hospital open.

Will Closure Have An Adverse Impact on the Delivery of Health Services?

In accordance with N.J.S.A. 26:2H-8(3), the Department must determine that closure of Muhlenberg Hospital "will not have an adverse economic or financial impact on the delivery of health services in the region or statewide." Although the applicant has attached letters from several hospitals that also serve patients within Muhlenberg's service area expressing their willingness to accept Muhlenberg patients, it is unclear whether transfer of such patients will have a positive impact on such hospitals and the delivery of health services in the region. We are aware that JFK Medical Center is requesting monies to expand its emergency department to handle the projected increased patient load at that hospital, but it is not clear from the application that other receiving hospitals, such as Somerset Medical Center, St. Peter's University Hospital and Overlook Hospital will be able to similarly respond without infusions of funds for capital improvements and/or staff. As a result, the Commissioner must conduct further investigation before she can determine whether closure will have an adverse impact on the delivery of health services in the region.

⁵ It should be noted that such reports would routinely be produced to the Attorney General (and the public) as part of its review under the Community Health Care Assets Protection Act, (CHAPA) N.J.S.A. 26:2H-7.10 et seq., if this application to close also involved the transfer of hospital assets to another entity. The importance of sharing such information regarding hospital board decision-making with the public cannot be underestimated and is one of several reasons to amend CHAPA to explicitly cover hospital closings regardless of whether such closings involve the transfer of a hospital license and other assets.

Will Muhlenberg's Patients Maintain Access to Adequate Health Services?

A central factor that the Commissioner must consider, and one which we assert must be heavily weighted in her assessment, is whether the closure of Muhlenberg “will contribute to the orderly development of adequate services” to primarily Plainfield residents. N.J.S.A. 26:2H-8(4). There is little doubt that for many years, Muhlenberg Hospital has provided high quality care medical care to the residents of Plainfield and its environs. See NJ Hospital Performance Report ratings for Muhlenberg. Whether they will continue to have access to such quality care upon the closing of the hospital is an open question since Solaris has not conducted a community health needs assessment prior to determining which services they will continue to offer at the Muhlenberg site. It is the position of New Jersey Appleseed that a comprehensive community needs assessment must be completed before the Commissioner decides to permit the Hospital to close and to condition such approval on the provision of certain acute and non acute care services at the site. Statistics, such as occupancy rates, are often insufficient to capture the medical needs of certain special needs populations, or health disparities due to age, ethnicity, culture or economics; and absolute distances between hospitals are often insufficient to capture topological nuances that will necessarily impact on access. Only a community needs assessment undertaken in full dialogue with the community will be able to determine what services, if any, must remain in the community to assure access to adequate health services. As the Reinhardt Commission concluded, **“In the end, mere numbers cannot take the place of sound judgment; they can only guide that judgment.”**

In specific, a review of the CN application and Solaris' responses to the Department's completeness questions raises serious doubts as to whether adequate in patient and out patient psychiatric services are going to be provided once Muhlenberg closes. The Department cannot permit Muhlenberg to shed its responsibilities to such patients, and must compel them to provide such services for at least eight years, or until it is proven that these services are no longer needed.

Accordingly, we request that the factual predicates supporting the Commissioner's conclusions as to each of the above factors, and the relative weight attributed to each, be set forth in her decision as required by In re Virtua's CN (even if such information has not been supplied by either the petitioner or other people participating in the public process). Moreover, since many in the community served by Muhlenberg believe that Muhlenberg Hospital fits into the “more essential, less financially viable” category and other social and economic factors weigh heavily in keeping this Hospital open, we request that Solaris be required to

- (1) maintain its license to operate Muhlenberg Hospital for at least one-year after closing to give the public time to attract alternative sources of funding;
- (2) provide, for at least eight years, in patient and out patient mental health and psychiatric services in addition to the other non acute care services it states it intends to continue to provide at the site;

- (3) undertake, within three months of closure, a comprehensive community health needs study in coordination with a newly established Community Advisory Group to determine what if any acute and non acute health services must remain in the community; and,
- (4) conduct, with the assistance of local officials, a comprehensive Community Impact Study, to determine whether financial assistance must be given to the Hospital to keep it open as an acute care facility to prevent an adverse economic and health impact on the community.

Respectfully submitted,

Renée Steinhagen
Executive Director