

WRITTEN COMMENTS OF  
NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER  
SUBMITTED TO THE DEPARTMENT OF HEALTH AND  
SENIOR SERVICES AND THE OFFICE OF THE ATTORNEY GENERAL  
ON JANUARY 17, 2007, PURSUANT TO THE COMMUNITY HEALTH CARE  
ASSETS PROTECTION ACT

Thank you for the opportunity to submit these comments concerning the transfer of ownership of Passaic Beth Israel Regional Medical Center (PBI) to St. Mary's Hospital (St. Mary's), and the closure of St. Mary's campus, pursuant to the Community Health Care Assets Protection Act (CHAPA). These comments are intended to augment the testimony of Renée Steinhagen, Executive Director of New Jersey Appleseed Public Interest Law Center, before the New Jersey Health Planning Board, the New Jersey Department of Law and Public Safety and the New Jersey Department of Health and Senior Services on January 10, 2007.

New Jersey Appleseed Public Interest Law Center is a state-based, non profit advocacy group that provides a legal voice to those who are not heard in the public arena by providing, directly and through volunteered services legal representation to organizations, communities and person who are affected by government and corporate actions but who do not have the resources to protect their interests. Specifically, over the past eight years, we have conducted a project dedicating to preserving charitable health care assets for community use upon the acquisition or merger of a nonprofit hospital or a change of mission - a change that typically occurs either upon sale to a for-profit entity or upon conversion from a secular hospital to a religious one. Prior to the enactment of CHAPA, we caused, through our advocacy, the creation of charitable trusts totaling millions of dollars to ensure the continuity of certain reproductive services upon the consolidation of Elizabeth General Medical Center with St. Elizabeth Hospital, the acquisition of Wayne General by St. Joseph's Healthcare System and the affiliation of Christ Hospital with Bon Secours New Jersey Health System.

In this case as in the aforementioned transactions, we do not oppose the acquisition of PBI by St. Mary's; but rather, we seek to ensure that a full range of comprehensive, integrated health services continue to be available to the residents of Passaic upon the imposition of the *Ethical and Religious*

*Directives for Catholic Health Care Services on the one remaining acute care facility in the city.*

Situational Context Requires Action to Preserve Access to Full Reproductive Services.

On January 1, 2004, Passaic Beth Israel Hospital (PBI) consolidated with the General Hospital Center at Passaic (GHCP) and soon thereafter moved its Women and Children's Health Clinic, offering full OB/GYN and Pediatric Services, on site to the GHCP campus. This family health clinic had previously been located on Main Street in Passaic. Despite a commitment to maintain such services in its Certificate of Need application at the time of consolidation, PBI proceeded to close this clinic in its entirety in January of 2005, and later eliminated all OB/GYN and Pediatrics services in October 2006. Despite a radical decrease in obstetrics admissions during 2005 (2004: 1,309; 2005: 186), it is our understanding that PBI continued to perform a significant number of tubal ligations (approximately 250 in 2005) compared to St. Mary's, who reported performing fewer than 25 during that same time period.

In July 2006, PBI filed for Chapter 11 bankruptcy, and St. Mary's is now seeking state backing of loans and the advance of \$5.0 million in charity care funds in order to transfer ownership of PBI to itself and wind up the bankruptcy proceeding. Specifically, the New Jersey Health Care Facilities Financing Authority (NJHCFFA) is expected to issue two types of bonds on behalf of St. Mary's: one type of bonds, in the approximate amount of \$17 million, will be sold based solely on St. Mary's credit and will be secured by a mortgage on the former PBI hospital facility and a gross revenue pledge; the other type of bonds, in an amount of about \$30 million will be sold with State support pursuant to the Hospital Asset Transformation Program, N.J.S.A. 26:2I-7(g). Under this program, the State will backstop payments of principal and interest due under the bonds regardless of whether it receives those payments from St. Mary's.

The State is thus directly enabling St. Mary's to acquire PBI's facilities, consolidate and reduce beds, provide certain surgical services it previously did not offer, reduce PBI's staff, and convert PBI into a Catholic institution. As a result, in a matter of three years, three acute care facilities - two of which were secular -- have become one, leaving St. Mary's as the sole acute care facility in Passaic, and thus, depriving Passaic residents of the full range of reproductive

services that PBI/GHCP historically provided. It is this loss of health services as a result of religious doctrine that the State cannot sanction and must compel St. Mary's to address.

Imposition of the Religious Directives Constitutes a Change in Mission.

As stated in the Testimony of Lois Uttley, Director of the MergerWatch Project on January 10, 2007, hospitals operated by certain religious faiths (such as Roman Catholics, Baptists and Seventh-Day Adventists) often restrict services that can be delivered. The most extensive restrictions are found in Catholic hospitals that are governed by the *Ethical and Religious Directives for Catholic Health Care Services* ("Religious Directives") issued by the U.S. Conference of Catholic Bishops. Catholic hospitals, such as St. Mary's, that are subject to these Religious Directives are not permitted to perform certain women's health and family planning services, such as abortion, contraceptive services (including post-partum depo-provera), HIV risk reduction information, sterilization procedures (tubal ligations and vasectomies), infertility treatments including in vitro fertilization, emergency post coital contraception, and prenatal testing if the intent is to abort the fetus if it is found to be severely malformed.<sup>1</sup> Further, a patient's end-of-life choices may be denied if what the patient desires is considered contrary to Catholic moral teaching, and newly-emerging technologies may be prohibited in the event that they are determined by the Bishops to also violate Catholic teachings.

As a general matter, it is clear that a hospital that provides health care in a manner guided by and consistent with the tenets of the Roman Catholic Church as expressed in the Religious Directives has a spiritual mission that is distinct from and qualitatively different from the mission of a secular hospital. As the Catholic Health Association has stated, it is the "'mission imperative': that 'fidelity to Jesus today mandates identifiable Catholic presence in the broader healthcare system'." New Covenant Unleashes the Potential, HEALTH PROGRESS, July-August 1996, at 28-29. This distinct faith-based mission has been acknowledged in New Jersey both by the Attorney General (in its first decision under CHAPA) as well as the courts (pre-CHAPA).

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<sup>1</sup>Lisa C. Ikemoto, "Doctrine at the Gate: Religious Restrictions in Health Care," JGSM, Vol. 4, Nov. 4 (2001).

In a letter opinion issued by Atty. Gen. Farmer, Jr., dated December 5, 2001, regarding the proposed transfer of assets of St. Francis Medical Center (SFMC) to Catholic Health East (CHE), the Attorney General noted that the "corporate service of [Catholic Health Initiatives] CHI, SFMC, and CHE, as far as the religious order, church, or denomination under whose auspices they were founded and continue to operate, is not a business, but a fundamental and essential religious ministry." Letter to Charles Condon, Esq., from Assistant Attorney General Mark Fleming, dated December 5, 2001, at 11. As a result, the Attorney General held that "neither opposition to the acquisition nor modifications to the transaction is warranted. . . [primarily because] the acquisition is between two faith-based and mission-based entities that share identical values and missions." *Id.* This opinion was issued pursuant to the Attorney General's obligations under CHAPA.

Conversely, the Superior Court in In the Matter of Elizabeth Gen. Med. Ctr. And St. Elizabeth Hosp., Docket No. UNN-C-97-99 found that the consolidation of a secular hospital, Elizabeth General Medical Center, with a Catholic hospital constituted a change in mission and required the creation of three charitable trusts to ensure that all services banned by the Directives and historically provided by Elizabeth General were made available to the residents of the City of Elizabeth prior to issuing the court's approval of the transaction.

Similar action is required here. This transaction cannot be approved until modifications are made that ensure the continuity of those services historically provided by PBI/GHCP that will be prohibited, upon the acquisition of PBI by St. Mary's, due to the imposition of religious doctrine.

The State's Involvement in this Transaction Requires Modification of Its Terms.

In addition to common law principles of *cy pres* requiring a charitable asset settlement upon a change of mission, there are many levels of State action implicated by this acquisition compelling the State to ensure the continuity of integrated, community health services at the PBI/GHCP campus.

First, when the judiciary gets involved in the supervision and disposition of charitable assets such as the case herein, state action occurs. In re Crichfield Trust, 177 N.J. Super. 258, 262 (Ch.Div.1980) (the "involvement of the court itself in

supervising and directing the administration of a charitable trust is state action."); N.J.S.A. 26:2H-7.11(1).

The State's involvement in this transaction is also evidenced by the extensive role played by the Department of Health and Senior Services, the Department of Law and Public Safety, and the NJHCFFA. CHAPA requires all nonprofit hospitals to provide notice to both the Attorney General and the Commissioner of Health and Senior Services before they enter into an acquisition. N.J.S.A. 26:2H-7.11. The transaction is then subject to the prior review of these two cabinet officials. In general, the Attorney General, in consultation with the Commissioner of Health and Senior Services, must support the proposed acquisition if he finds it is in the public interest. N.J.S.A. 26:2H-7.11(b) In his review, the Commissioner of Health and Senior Services must determine that the proposed transaction is not likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities. N.J.S.A. 26:2H-7.11(b).

Finally, as noted above NJHCFFA is expected to issue two types of bonds on behalf of St. Mary's. One type of bond, in an amount of approximately \$30 million is expected to receive direct backing from the State, resulting in the possibility that New Jersey taxpayers will be making payments of interest and principal even if St. Mary's does not.

It is a combination of the above factors that we believe support the State's imposition on St. Mary's of an obligation to ensure the continuity of health care services that it will cease providing upon the acquisition of PBI due to religious doctrine.

#### Possible Solutions and Appointment of a Health Care Monitor

We again refer you to the Testimony of Lois Uttley for possible models that can be used to ensure continued access to a comprehensive range of hospital-based services in Passaic. At a minimum, however, we urge the State to require the reopening of the Women and Children's Health Clinic that was closed in January 2004, and which provided a full range of reproductive and family planning services to Passaic residents, including low-income women, mothers-to-be and their children. This clinic could be located on the hospital campus, in a building immediately adjacent to the main hospital building, or downtown where it was originally located, and should be operated by

Barnert Hospital that operates a similar clinic in downtown Patterson. It should be noted that Barnert Hospital is going to be the only secular hospital in Passaic County, and it is thus the only hospital that will be providing a full-range of reproductive services including voluntary terminations of pregnancy and tubal ligations in Passaic County.

Furthermore, we urge the Department of Health and Senior Services appoint a health care monitor pursuant to N.J.S.A. 26: 2H-7.11(i). Not only should this monitor be focused on ensuring that Passaic residents are receiving services impacted by the Religious Directives, but given the confusion that accompanied the merger of PBI and GHCP, the failure to maintain services as stated in the Certificate of Need application, and the deterioration of services, we urge that a monitor be appointed to oversee the management of the consolidation to ensure that the "quality, availability or accessibility of health services" in Passaic do not further deteriorate. N.J.S.A. 26: 2H-7.11(b).