NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

November 29, 2010

Terry Goddard
Arizona Attorney General
400 West Congress, Suite 315
Tucson, Arizona 85701-1367

Hand Delivered by Dottie Wellman, Spokesperson for Cochise Citizens for Patients' Rights

Dear Attorney General Goddard,

I am Jill Morrison, Senior Counsel at the National Women's Law Center, a Washington D.C. based organization which advocates for women and girls. I am being assisted locally by Laurence Rosenfeld of Greenberg Traurig. We are writing to request that you exercise your jurisdiction over an Arizona-based non-profit organization, the Sierra Vista Regional Health Center ("Sierra Vista" or "the Hospital") in Cochise County. We represent the Complainants, Cochise Citizens for Patients' Rights (CCPR), an unincorporated organization of advocates concerned with access to health care in the community.

On April 17, 2010, Sierra Vista began an affiliation with the Carondelet Health Network. At this time, the Hospital, formerly a non-sectarian institution, agreed to abide by the *Ethical and Religious Directives for Catholic Health Services*.[1] This affiliation changed Sierra Vista's mission from that of a non-sectarian hospital providing comprehensive reproductive health services to that of a sectarian hospital restricting access to such services, including information and referrals for the restricted services. Opposition to this affiliation is not motivated by CCPR's animus towards Catholic-affiliated health care, but solely out of a concern that this affiliation is having a detrimental impact on the delivery of health care services to citizens of this county.

It is our belief that this affiliation as it currently stands is to the detriment of this community, and in violation of the Arizona Trust Code.[2] While the Hospital may eventually[3] need to enter into an affiliation to strengthen its financial standing or enhance its future viability, it may not do so with complete disregard to its historic commitments to its donors and the health care needs of the community. Directors of for-profit businesses have a duty to shareholders, but directors of non-profit institutions have a duty to uphold their commitments to the public they purport to serve.

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[1] United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (2009), available at http://www.usccb.org/bishops/directives.shtml.
[2] Ariz. Rev. Stat. Ann, Title 14, Trusts, Estates and Protective Proceedings, Chapter 11, Arizona Trust Code.
[3] At this time, however, the administration claims that it is financially stable. Bill Hess, Hospital Won't Delay Agreement, Sierra Vista Herald (Mar. 14, 2010) ("[SVHRC spokeswoman Marie] Wurth and others at SVHRC, including CEO Margaret Hepburn and board of trustees Chairman Lanny Kope, say the hospital is in excellent financial shape.").

Furthermore, we are deeply concerned that the Hospital's refusal to take community needs into account will eventually deprive this community of comprehensive obstetric services. As it stands, the community has lost one obstetrician as a direct result of this affiliation.[4] Another obstetrician/gynecologist has stated his intention to stop practicing obstetrics in June 2011. At that time, there will be only two obstetricians remaining in the community. This would make it, in the words of one of the remaining two obstetricians, "impossible" to effectively deliver prenatal care and delivery services. While the current physicians are not employees of the Hospital, and are thus permitted to provide the restricted services outside of the Hospital, we are concerned that any obstetrician/gynecologist subsequently hired by the Hospital would be required to comply with the Hospital's restrictions on reproductive health care, including tubal ligations and contraception. It is a very real possibility that without your intervention, this community will be deprived of basic reproductive health services for the foreseeable future.

As set forth below, we believe that it is well within your authority to review this transaction at this time, examine its necessity, and require the parties to make appropriate modifications in order to bring it into compliance with state law. While we set forth several remedies, including the dissolution of the affiliation, we wish to emphasize that members of CCPR would be amenable to a less drastic solution, as long as your office retained jurisdiction to oversee its implementation.

We urge you to use your authority to bring the concerned parties to the table to negotiate a solution that preserves access to essential health services in this community. The solution we propose, a "carve out," is a separately incorporated facility either in or near the Hospital – that would allow doctors to provide the restricted reproductive health services in accordance with the standard of care to patients for whom it is medically-advisable. This is a solution that has worked in other communities facing a possible diminution in reproductive health services, including in facilities owned by Ascension Health, the parent company of the Carondelet Health Network.[5]

We also request that any agreement establishing a carve-out also address end-of-life care, including the Hospital's compliance with patients' advance directives and right to refuse artificial nutrition and hydration. And because, as set forth below, we have seen communities deprived of services after a change in the Church hierarchy, a more restrictive interpretation of the existing *Directives* or a change to the *Directives* themselves, we ask that you maintain jurisdiction over this matter to ensure that the Hospital continues to uphold its nonsectarian mission.

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[4] See Affidavit of Dr. Cynthia Funckes.

[5] Since 2004, the Austin Women's Hospital in Texas has provided maternity services, sterilizations, emergency contraception for women who had been raped and family planning services on the fifth floor of University Medical Center Brackenridge, a city-owned facility managed by Seton Family of Hospitals, a member of Ascension Health; in Wisconsin, Columbia St. Mary's, also a member of Ascension Health, opened a birthing hospital in 2007 on the first floor of a new hospital. As a separately incorporated facility, Columbia Center offers family planning and elective sterilization procedures in addition to maternity care.

Sierra Vista has a Long History as a Locally-Controlled, Non-Sectarian Institution Providing Comprehensive Health Services to the Residents of Cochise County

Sierra Vista Regional Health Center originated in 1963 as Western Baptist Hospital. In 1981 the hospital became Sierra Vista Community Hospital, and in 1999 it took its current name. At no time prior to April 17, 2010 did the Hospital restrict the services it provided based on its religious affiliation or following the guidelines of any particular religion.

Upon its affiliation with Carondelet on April 17, Sierra Vista adopted the *Ethical and Religious Directives for Catholic Health Services*. This effectuated a change in the Hospital's institutional mission and -- in furtherance of its new mission -- the services it makes available to the members of its service area. The Hospital now forbids the performance of tubal ligations, including post partum tubal ligations, which is contrary to the standard of care.[6] This restriction is especially onerous for women who have cesarean deliveries and wish to avoid an additional surgery and recuperation period by having a post-partum tubal ligation.[7] As indicated in the attached affidavits, as a result of the Hospital's new-found affiliation, patients have been denied medically necessary care and doctors have been unable to deliver the standard of care in contravention of their duties to their patients.

Even more troubling, this affiliation has the potential to present a serious barrier to family planning services in the community. As set forth in the attached affidavit and email correspondence between a former nurse practitioner at the hospital and an administrator,[8] the administration has indicated that prescriptions for contraceptives cannot be written on SVRHC prescription pads. While the Hospital has indicated that such prescriptions can still be written by SVRHC employees on prescription pads that are not from the Hospital, the question of whether providers would be covered by the Hospital's liability insurance for claims related to prescriptions not written on the Hospital's pads was never answer by the Hospital administration.[9] Presuming that the answer is negative, while health care providers employed by the hospital would technically be permitted to prescribe contraception, they would do so at great risk of personal liability. This is not a risk that any professional would reasonably be willing to take.

Unlike the current obstetricians/gynecologists working at the Hospital, if the newly hired physicians are employees of the Hospital, they would presumably be subjected to the same restrictions on providing family planning services as was Ms. Gonzales. This would mean that all women whose doctors are Hospital employees would be unable to access any family planning for which a prescription is required. This includes the most effective methods for many women of reproductive age, and methods that are used to treat other health conditions. Contraception—nearly universal among women in the United States of reproductive age—is a key component of preventive health care for women and critical to helping women achieve healthy pregnancies. A woman whose pregnancy is unplanned is less likely to seek prenatal care in the first trimester and

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[6] National Health Law Program, Health Care Refusals: Undermining Quality Care for Women 38-39 (2010).
[7] Nikki Zite, et al., Failure to Obtain Desired Postpartum Sterilization: Risk and Predictors, 105 Obstetrics & Gynecology 794 (2005).
[8] Affidavit of Kathleen Gonzales and accompanying email from Rebecca McCalmont, Chief Nurse Executive of SVRHC.
[9] Id.

more likely not to obtain prenatal care at all;[10] less likely to breastfeed,[11] and more likely to expose the fetus to harmful substances, such as tobacco or alcohol.[12] Women who wait for some time after delivery before conceiving their next child—which typically requires contraception—lower their risk of adverse perinatal outcomes, including low birth weight, preterm birth, and small-for-size gestational age.[13] In addition, there are a number of noncontraceptive preventive benefits of oral contraceptives, the most commonly used form of contraception in the United States, including lower rates of pelvic inflammatory disease, cancers of the ovary and endometrium, recurrent ovarian cysts, benign breast cysts and fibroadenomas, and discomfort from menstrual cramps.[14] The noncontraceptive benefits of intrauterine devices (IUDs) include relief from excessive menstrual bleeding caused by fibroids, prevention of anemia, and relief from pelvic pain.[15]

Because of the importance of contraception in improving maternal and infant health outcomes, the potential public health harms from restricting contraceptive access over such a large geographic area cannot be overstated. Only two states, New Mexico and Nevada, have higher teen pregnancy rates that Arizona.[16] Arizona also ranks 26th out of 50 states and D.C. in infant mortality.[17] Cochise County would be especially harmed by the loss of access to family planning services. In 2008, Cochise County had a rate of 6.2 perinatal deaths per live births, as compared to a rate of 3.2 in Yavapi, a rural county comparable in population.[18]

Furthermore, the *Directives* are regularly revised, and the Bishops occasionally opine on their interpretation,[19] making this community vulnerable to further restrictions on health care access. We are also concerned because as we have seen in other similar situations, when a hospital is Catholic-affiliated, the local Diocese will often impose its beliefs about how it should be run in accordance with the *Directives*, and may order a hospital administration to further restrict services. In fact, the Bishop in the Phoenix Diocese recently rebuked a nun who, while serving on the ethics committee of a Catholic Hospital, approved an abortion for a woman with a medical condition who would die unless she terminated her pregnancy.[20] At risk for elimination

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[10] U.S. Department of Health and Human Services, Healthy People 2010: Understanding and Improving Health, 9-32 (Nov. 2000). Available at http://www.healthypeople.gov/Document/pdf/Volume1/09Family.pdf.
[11] Id.
[12] Id.
[13] Id.
[14] Centers for Disease Control and Prevention, Achievements in Public Health, 1900-1999: Family Planning, Morbidity and Mortality Weekly Report 48(47), 1073-1080 (Dec. 3, 1999), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm.
[15] Ian S. Fraser, Non-Contraceptive Health Benefits of Intrauterine Hormonal Systems, 82 Contraception 396 (2010).
[16] National Campaign to Prevent Teen and Unintended Pregnancy, 50-State and National Comparisons, Teen Pregnancy Rate, available at http://www.thenationalcampaign.org/state-data/state-comparisions.asp?ID=3&sID=18&sort=rank#table
[17] National Women's Law Center, Unpublished Data, Making the Grade on Women's Health: A National and State-by-State Report Card 2010 (forthcoming Dec. 2010).
[18] Arizona Health Status and Vital Statistics 2008, 5C-1 Fetal, Perinatal, and Maternal Deaths, Perinatal Deaths and Perinatal Mortality Rates by County of Mother's Residence, Arizona, 2008, available at: http://www.azdhs.gov/plan/report/ahs/ahs2008/pdf/5c1.pdf.
[19] See, e.g., USCCB News Release, Bishops Approve Items on Marriage, Reproductive Technologies, Medically Assisted Nutrition and Hydration (Nov. 18, 2009) (voting to revise *Directive* addressing patients in a persistent vegetative state), available at http://www.usccb.org/comm/archives/2009/09-242.shtml.
[20] Michael Clancy, Nun at St. Joseph's Hospital Rebuked Over Abortion to Save Woman, Arizona Republic, (May 19, 2010).

is life-saving care for women with pregnancy complications, the provision of emergency contraception to rape victims, counseling and services to treat infertility, and advising patients with STIs (including HIV) to use condoms.[21]

Additionally, while it is well established that patients have the right to refuse unwanted medical treatment, including artificial hydration and nutrition, the *Directives* state that there is an "obligation" to provide this type of treatment, particularly for patients in a persistent vegetative state and notwithstanding any prior request by the patient that this type of treatment be withheld or withdrawn.[22] There is also concern that the *Directives* could be applied to change doctors' practices with regard to pain management. The *Directives* state "Patients experiencing suffering that cannot be alleviated should be helped to appreciate the Christian understanding of redemptive suffering."[23]

The Board of Sierra Vista Violated the Arizona Trust Code and its Duty of Obedience by Entering into an Affiliation that Changed the Hospital's Mission

The Trust Code recognizes that trusts may be either express or implied.[24] Express Trusts are established with a specific beneficiary, while non-profit organizations are implied trusts. The Code defines charitable trust broadly, and states that a trust may be created for various charitable purposes including "the promotion of health."[25] "Courts and commentators have taken the position that the assets of a charitable corporation are impressed with a charitable trust limiting the purposes for which they can be used to the purposes of the corporation as those purposes were defined at the time that assets were given."[26]

A nonprofit board's duty of obedience requires it to preserve the "purposes and goals" of the corporation.[27] It is not merely the discontinuation of particular services that is at issue, but the Hospital's failure to carefully examine how its historic mission and service to this community would change once it became a Catholic-affiliated institution. The Arizona Trust Code is intended to protect beneficiaries of nonprofit institutions from actions by the board of directors that weaken or change the institution's charitable mission. "While the courts traditionally offer a nonprofit's directors' broad discretion in managing day-to-day operations, directors receive no such deference when the issue is a fundamental change in corporate purpose."[28]

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[21] See generally, United States Conference of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services (2001), available at http://www.usccb.org/bishops/directives.shtml.

[22] See, e.g., USCCB News Release, Bishops Approve Items on Marriage, Reproductive Technologies, Medically Assisted Nutrition and Hydration (Nov. 18, 2009) (voting to revise *Directive* addressing patients in a persistent vegetative state), available at http://www.usccb.org/comm/archives/2009/09-242.shtml.

[23] *Directive* 61.

[24] Ariz. Rev. Stat. Ann, § 14-10102. Scope,

> This chapter applies to express trusts, charitable or noncharitable trusts and trusts created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.

[25] Section 14-10405.A.

[26] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995).

[27] Manhattan Eye, Ear and Throat Hospital v. Spitzer, 715 N.Y.S.2d 575, 593 (1999).

[28] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995).

The Board of Directors of the Hospital Violated its Duties of Care and Obedience in Entering into this Affiliation

In addition to changing the charitable purpose of the Hospital, this transaction also removed control of the Hospital's assets from Arizona to Missouri, where Ascension Health, the parent company of Carondelet, is based. As a hospital with a historic mission of local control, this decision cannot be said to be in the Hospital's best interest or consistent with its historic goal of serving the needs of the immediate surrounding community. Furthermore, in addition to being subject to control by its parent company, as a Catholic institution, the Hospital is also subject to control by the Vatican. There have been several instances where the Vatican has exercised its authority over Catholic hospitals in the United States, disallowing particular procedures that a hospital board had determined were in the community's best interest for the hospital to provide.[29]

The Board violated it fiduciary duty to exercise reasonable care in approving the affiliation with Carondelet. To fulfill its duty of reasonable care, a nonprofit board must ensure that a transaction is in the nonprofit's best interest. The Board was under an obligation to solicit bids from many interested parties and to obtain the best deal for its assets and "entertain all competing offers."[30] To the best of our knowledge and belief, the Board did not place the Hospital's assets up for bidding, nor did it seek potential partners by sending out requests for proposals.

Additionally, because non-profit boards have the duty of obedience and are required to protect the mission of the non-profit, the Board had a duty not only to enter into the most financially advantageous affiliation, but to find the best partner that could maintain and protect the Hospital's mission.[31] This might actually mean joining with a partner that does not provide the best financial benefit, but better allows the nonprofit to maintain its mission. For example, "[i]t appears likely that a board could, consistent with its duty of care, accept a lower bid, provided it could show that its choice was based on the belief that the chosen bidder would provide a higher level of services to the community."[32]

The Board had a duty to find a partner that would not require the Hospital to follow the *Directives* and eliminate vitally needed services that have traditionally been provided to the community it serves or remove local control of the Hospital. To the best of our information and belief, there were, in fact, other non-sectarian, locally-controlled institutions willing to partner with Sierra Vista Regional Health Center, yet it chose a partner that changes the Hospital's historic mission of providing comprehensive reproductive health services. For the aforementioned reasons, the Attorney General should investigate the Hospital Board's violation of its duty of care.

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[29] Fighting Religious Health Restrictions: Catholic Bishops' Crackdown on Hospital Merger Compromises That Would Save Reproductive Services (MergerWatch Project Factsheet, Feb. 2004), available at http://www.mergerwatch.org/pdfs/fs_crack_down.pdf.

[30] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995), citing

[31] Manhattan Eye, Ear and Throat Hospital v. Spitzer, 715 N.Y.S.2d 575, 593 (1999).

[32] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995), n. 20.

Precedent Regarding Change in Charitable Mission in the Course of Transactions Between Religious and Non-Sectarian Hospitals

Relevant Arizona case law directs courts to look to the Restatement Second of Trusts, leading commentators, and other state courts for guidance in determining the proper administration of a charitable trust.[33] We would urge you to consider as instructive the Optima case, involving a hospital affiliation in New Hampshire between non-sectarian and religiously affiliated partners. The Attorney General dissolved a five-year old merger because the transacting parties failed to adequately consider how the merger would drastically alter the respective missions of the two hospitals. The New Hampshire Attorney General explicitly cited the change in reproductive health care services as evidence that the transacting parties had different institutional missions.[34]

In 1998 the nonsectarian Elizabeth General Medical Center and the Catholic St. Elizabeth's Hospital planned to merge, making both institutions Catholic-affiliated. The New Jersey Attorney General reviewed the application for a merger, and found that the transaction did not result in a change in the institution's respective missions. Nonetheless the Attorney General required that the transaction receive court approval to ensure that the public's concerns about health care access were adequately addressed.[35] Advocates concerned with access to reproductive health services requested intervener status in the court hearing, arguing that the elimination of reproductive health services was evidence of the hospital abandoning its mission as a nonsectarian institution.[36] The court found that the merger did effectuate a change in the mission and applied the principle of *cy pres* to require the nonsectarian hospital to set aside funds to assist in the provision of the lost services in the community.[37] The parties eventually settled out of court, and Elizabeth General established a $2 million trust to fund eliminated services, including tubal ligations, vasectomies and contraceptive counseling.[38]

Donors, Doctors and Patients Have Standing to Request that the Attorney General Intervene on Their Behalf Under the Trust Code and Common Law

Complainants are beneficiaries of Sierra Vista Hospital as defined by the Trust Code,[39] including: residents of Cochise County who have been in the past and expect to be in the future patients at Sierra Vista Regional Health Center;[40] doctors who believe that their ability to deliver

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[33] Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 208 Ariz. 176, 182 (2004).
[34] See, New Hampshire Attorney General's Report on Optima Health, Mar. 10, 1998, available at http://doj.nh.gov/publications/optima1.html.
[35] Alison Manolovici Cody, Success in New Jersey: Using the Charitable Trust Doctrine to Preserve Women's Reproductive Services When Hospitals Become Catholic, 57 N.Y.U. Ann. Surv. Am. L. 323 (2000).
[36] Id. at 336.
[37] Id. at 337-38.
[38] Jonathan Jaffe, Added Funds Satisfy Pro-Choice Groups, Star-Ledger (Newark, N.J.), Nov. 3, 1999, at 24. The trust also paid for abortion services, which have never been provided at Sierra Vista Regional Health Center.
[39] The Trust Code defines beneficiary as a person who "has a present of future beneficial interest in a trust, vested or contingent." Ariz. Rev. Stat. Ann., §14-10103.2(a)
[40] Martha Gonzales and Cassandra Capas are patients that are unable to have post-partum tubal ligations as a result of the affiliation.

services according to the standard of care has been compromised by the Board's decision;[41] and donors to the Hospital who are opposed to the Hospital's change in mission and see this affiliation as being a misuse of their donations.[42] Courts have granted standing to current and potential patients seeking to enforce a hospital board's duties to the community served by the hospital.[43]

In Schalkenbach, the court found that the parties were merely "potential beneficiaries" of the trust, and therefore lacked standing.[44] In comparison, Complainants comprise a "sharply defined, small class of beneficiaries" as required for "special interest" common law standing under Schalkenbach.[45] Nonetheless, special interest standing is not necessary, given that Complainants meet the statutory standing requirement. As we set forth above, we are representing parties with both current and future interest in Sierra Vista Regional Health Center.

While courts sometimes allow individuals to bring actions to enforce trusts,[46] it is generally within the purview of the Attorney General to protect the public's interest in the state's charitable assets, including its nonprofit corporations. We strongly believe this to be true in the present case, given the Hospital's stated intention to enter into a full merger with the Carondelet System and the Attorney General's eventual jurisdiction over this under the Arizona Hospital Merger Act.[47]

The Trust Act specifically states that the Act does not void any of the Attorney General's common law authority to enforce charitable trusts.[48] The Attorney General has a common law duty to preserve the state's chartable assets for use by the citizens of this state, and as described above, control of the Hospital's assets are now with the parent corporation headquartered in

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[41] Dr. Kenneth Kacenga is an obstetrician/gynecologist with twelve patients who are unable to find alternative arrangements to have tubal ligation surgery as a result of the affiliation and who believes that the affiliation has interfered with his ability to provide the standard of care, and is posing unacceptable medical risks to his patients.

[42] Ms. Helen Patterson donated to the Hospital with the expectation that it would continue its historic mission of meeting the medical needs of the entire community.

[43] Stern v. Lucy Webb Hayes Nat'l Training Sch. For Deaconesses and Missionaries, 367 F. Supp. 536, 540-41 (D.D.C. 1973) (patients could sue to prevent further loss to hospital due to mismanagement by hospital trustees; patients could sue for repayment of losses to the hospital, but could not be personally compensated for acts), supplemented by 381 F. Supp. 1003, 1015-16 (D.D.C. 1974) (holding that board of charitable corporation engaged in self-dealing and mismanagement); Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. St. Ch. Div. 1967)(city residents and taxpayers had standing to compel performance of charitable corporation), aff'd, 250 A.2d 427 (N.J. Super. Ct. App. Div. 1969).

[44] Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 208 Ariz. 176, 181 (2004).

[45] Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 208 Ariz. 176, 183 (2004).

[46] Section 14-10201 states that the court may intervene in the administration of a trust to the extent that its jurisdiction is invoked by an interested person or as provided by law.

> Historically once courts began to look with favor on charitable trusts, they relied upon state attorneys general to enforce the terms of the trust. Later, recognizing the limitations on state attorney general enforcement of such trusts, courts began to expand the standing concept, allowing private persons to bring relator actions, analogizing to corporate law and derivative suits and ultimately developing a "special interest" test.

Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 208 Ariz. 176, 182, n.6 (2004).

[47] Ariz. Rev. Stat. Ann., Title 10. Corporations and Associations. Chapter 35.1, Hospital and Community Health Center Mergers and Other Transactions

[48] Section 14-10106 states that the common law of trust supplements the chapter "except to the extent modified by this chapter or another statute of this state," thereby giving the Attorney General the authority to enforce the common law with regard to trusts.

Missouri. The Attorney General also has the obligation to determine whether the Board has violated its common law fiduciary duties of care, loyalty and obedience in taking action that affects a nonprofit corporation.[49]

The public's interest in its non-profit hospitals is best defended by the state attorney general, who have "both the authority and the duty to initiate such actions for breach of duty."[50] As succinctly described in an article describing the duties of boards of non-profit hospital:

> As the representative of the public interest, the attorney general is automatically a party to any such court proceeding, and thus, has clear legal authority to undertake an independent review of the reasonableness and appropriateness of nonprofit hospital and HMO conversion transactions.[51]

This oversight is required whether a nonprofit is transacting with a for-profit corporation or another nonprofit, because either can result in a breach of fiduciary duty.[52] Experts have also noted that attorney general oversight is not limited merely to those transactions that invoke the technical requirements for *cy pres* approval or breach of fiduciary duty. Rather, given the attorney general's "broad *parens patriae* power," the attorney general can intervene simply to determine whether or not a hospital transaction is in the public interest.[53]

Request for Intervention and Relief

We are asking that you use your authority over Arizona nonprofit institutions to apply the remedy of *cy pres* as set forth in the Trust Code. A charitable institution is required to maintain its charitable purpose, and cannot use its assets to advance a different purpose unless its original purpose has become "unlawful, impracticable, impossible to achieve or wasteful."[54] Under traditional *cy pres* analysis, the Board would be required to show that an affiliation was both necessary and in the best interest of the Hospital and the community it serves. If the Board could make such a showing, then the Board would further be required to show that it could not find a partner that would allow it to maintain its nonsectarian charitable mission and continue providing health care uninfluenced by the *Ethical and Religious Directives for Catholic Health Services.* Assuming that the Hospital could show that there was no partner available to preserve its mission as a nonsectarian institution, pursuant to the Trust Act, the hospital would still be required to account for its change in mission and the resulting loss in services in this community.[55]

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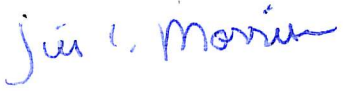
[49] See generally, Phill Kline, Robert T. Stephan, & Reid F. Holbrook, Protecting Charitable Assets in Hospital Conversions: An Important Role for the Attorney General, 13 Kan. J.L. & Pub. Pol'y 351, 360 (2004).
[50] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995).
[51] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995).
[52] See, e.g., New Hampshire Attorney General's Report on Optima Health, Mar. 10, 1998, available at http://doj.nh.gov/publications/optima1.html. The Attorney General intervened to require two non-profit Boards to consider whether their affiliation was in the interest of their respective institutional missions, one historically Catholic and the other nonsectarian.
[53] Robert A. Boisture & Douglas N. Varley, State Attorney's General Legal Authority to Police the Sales of Nonprofit Hospitals and HMOs (Volunteer Trustees Foundation for Research and Education, 1995).
[54] Section 14-10413.A.
[55] See *infra* n.26.

Despite the existence of remedies that would allow for the dissolution of this affiliation,[56] on behalf of members of Cochise Citizens for Patients' Rights and the other Complainants, we request that you require the Hospital to immediately begin developing a carve-out in which comprehensive reproductive health care services can be provided, in accordance with the Hospitals' prior non-sectarian mission. We also request that any agreement establishing a carve-out also address the Hospital's compliance with patients' end-of-life wishes. And finally, we ask that your office exercise continuing jurisdiction to ensure that the carve-out is initiated in a timely manner and that access to services in accordance with the Hospital's nonsectarian mission is not compromised by a change in the *Directives*, future interpretations of the *Directives*, or a change in Church leadership.

Because this community is being deprived of medically necessary services until this matter is resolved, and is currently at risk of losing its remaining obstetricians as a result of the merger, we respectfully request that you reply by December 15th. If you have any questions or need further information, please contact Jill Morrison at 202-588-7616. Thank you for your consideration.

Sincerely,



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on behalf of Cochise Citizens for Patients' Rights

[56] This request is not intended to withdraw dissolution as a possible remedy. We maintain that this affiliation was not necessary because of the strong financial position of the Hospital, and was not in the best interest of this community. We further maintain that the hospital did not do its due diligence in identifying an alternative partner that would allow it to preserve its nonsectarian mission and continue all of the services provided prior to the April 17, 2010 affiliation.

cc:

Sierra Vista Regional Health Center
Attn: Board of Trustees/Administration
300 El Camino Real
Sierra Vista, AZ 85635

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF ~~COCHISE~~ PIMA)

Dr. Cynthia Funckes, being first duly sworn, upon oath deposes and states as follows:

1. I am a physician specializing in obstetrics and gynecology.

2. I previously practiced in the town of Sierra Vista, Arizona, with admitting privileges at the Sierra Vista Regional Health Center (SVRHC).

3. In September 2010, I relocated my practice to Tucson.

4. I made the decision to relocate due to the April 17th affiliation between SVRHC and the Carondelet Health Network.

5. It is my belief that the affiliation would have interfered with my ability to deliver health care according to my medical training and the standard of care to which my patients are entitled.

6. By continuing to practice under the restrictions imposed by Carondelet, it is my belief that I would have been posing medically unacceptable risks to my patients in need of surgical sterilizations, which are forbidden by Carondelet.

DATED this 3 day of November, 2010.

Cynthia Funckes MD.
[Name]

SUBSCRIBED AND SWORN TO before me this 3 day of November 2010, by Cynthia G. Funckes.

Gina ARohde
Notary Public

My Commission Expires:
3/30/2013

Gina A. Rohde
Notary Public - Arizona
Pima County
My Commission Expires
March 30, 2013

AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF COCHISE)

Kathleen Gonzales, being first duly sworn, upon oath deposes and states as follows:

1. I am a registered nurse, and a family nurse practitioner specializing in family practice.

2. I was formerly employed by the Sierra Vista Regional Health Center (SVRHC or the Hospital), and served as the clinic coordinator for two family practice clinics affiliated with the Hospital.

3. Prior to the April 17th affiliation between SVRHC and the Carondelet Health System, I asked whether I could continue to write prescriptions for oral contraceptives due to its new religious affiliation.

4. I was told by the Hospital's Vice-President, Rebecca McCalmount, that I could not write prescriptions for oral contraceptives on the prescription pads dispensed by the Hospital; I was also told that I could not discuss any family planning methods with my patients other than natural family planning, also known as the "rhythm method."

5. When I asked whether the Hospital's liability insurance would cover any claims against me that might result from prescriptions that were not written on Hospital pads, I did not receive an answer.

6. This effectively prohibited me from being able to dispense prescriptions for oral contraceptives, since I could not risk incurring personal liability.

7. I discontinued my employment with the Hospital on Jun 30, and currently serve as a family nurse practitioner in the office of Dr. Ralph Mayberry.

DATED this 09 day of Nov, 2010.

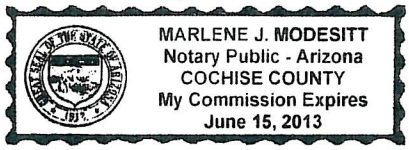
Kathleen Gonzales
[Name]

SUBSCRIBED AND SWORN TO before me this 9 day of November 2010, by

Notary Public

My Commission Expires:

June 15, 2013



Kathleen Gonzales

From: Rebecca McCalmont
Sent: Friday, April 16, 2010 11:56 AM
To: Kathleen Gonzales; Craig Harris
Subject: birth control
Importance: High

Katie, effective Monday, writing prescriptions for birth control can be done in this manner:
The prescription pad is not a SVRHC prescription pad. It will need to be your own independent prescription pad or a generic prescription pad. Do you have any?
We cannot include the birth control counseling/prescription writing as a billable service by SVRHC.
Essentially, at this point, you can continue to prescribe but only as an independent practitioner. I know we don't have you set up to do any billing as an independent practitioner but we may need to look at this in the future as things progress.
Let me know if you have any questions.

Rebecca McCalmont, RN, BSN.
Chief Nurse Executive, Nursing VP
Sierra Vista Regional Health Center
520-417-3099
What you believe, you can achieve.

Integrity, Quality, Compassion
Collaboration, Stewardship, Innovation

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AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF COCHISE)

Martha Gonzalez, being first duly sworn, upon oath deposes and states as follows:

1. I am patient of Dr. Silva, a physician specializing in obstetrics and gynecology with privileges at the Sierra Vista Regional Health Center.

2. Because of a previous cesarean section, I was medically required to deliver my next child by cesarean section.

3. I am currently postpartum and wished to have a tubal ligation following the cesarean birth of my child.

4. I have been told by Dr. Silva that because of the April 17, 2010 affiliation with the Carondelet Health System, I was unable to obtain a tubal ligation at the same time of my cesarean delivery at the Sierra Vista Regional Health Center.

5. I have been told by Dr. Silva that if I had wanted to have a tubal ligation at the time of my delivery, I would have had to schedule delivery at the Tucson Medical Center, or have a tubal ligation at a later time.

6. I could not schedule surgery for Tucson Medical Center because I went into labor, went to Sierra Vista Regional Health Center and was not stable enough to transfer.

7. I believe the affiliation between the Sierra Vista Regional Health Center and the Carondelet Health System is preventing me from obtaining the quality of care I have come to expect from my community hospital and subjecting me to the risks of a second surgery if I wish to obtain the method of contraception that is most medically appropriate for me.

DATED this 4 day of August, 2010.

Martha L Glz.
[Name]

SUBSCRIBED AND SWORN TO before me this 4 day of August, 2010, by Martha Gonzalez.

Sandra K. Kaplan
Notary Public

My Commission Expires:

SANDRA K. KAPLAN
NOTARY PUBLIC - ARIZONA
COCHISE COUNTY
My Commission Expires
June 29, 2013

AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF COCHISE)

Cassandra Capas, being first duly sworn, upon oath deposes and states as follows:

1. I am patient of Dr. Bruce Silva, a physician specializing in obstetrics and gynecology with privileges at the Sierra Vista Regional Health Center.

2. I had an emergent cesarean section at Sierra Vista Regional Health Center on June 30, 2010

3. I have been told by Dr. Silva that because of the April 17, 2010 affiliation with the Carondelet Health System, I was unable to obtain a tubal ligation at the same time of my cesarean delivery at the Sierra Vista Regional Health Center.

4. I have been told by Dr. Silva that if I want to have a tubal ligation I will have to have it at a later time in a different facility. This will cost me and my family money, inconvenience, and entail extra risk to me.

5. I believe the affiliation between the Sierra Vista Regional Health Center and the Carondelet Health System has prevented me from obtaining the quality of care I have come to expect from my community hospital and subjecting me to the risks of a second surgery if I wish to obtain the method of contraception that is most medically appropriate for me.

DATED this 22 day of July, 2010.

C Capas
[Name]

SUBSCRIBED AND SWORN TO before me this 22 day of July, 2010, by Cassandra Capas.

SANDRA K. KAPLAN
NOTARY PUBLIC - ARIZONA
COCHISE COUNTY
My Commission Expires
June 29, 2013

Sandra K. Kaplan
Notary Public

My Commission Expires:

6/29/2013

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AFFIDAVIT

STATE OF ARIZONA)
)
COUNTY OF COCHISE)

Dr. Kenneth Kacenga, being first duly sworn, upon oath deposes and states as follows:

1. I am a physician specializing in obstetrics and gynecology with privileges at the Sierra Vista Regional Health Center.

2. Because of the April 17, 2010 affiliation between the Carondelet Health System and the Sierra Vista Regional Health Center, I will be unable to provide post-partum cesarean ligations to 15 patients who are currently pregnant, have previously had cesarean sections, and have requested that I provide them with tubal ligations following their next deliveries by cesarean section.

3. As a result of the affiliation, if these patients wish to have a tubal ligation, they will have to schedule delivery for Tucson Medical Center, which is approximately a one and one half hour drive from SVRHC.

4. I have been informed by 12 of these patients that they are unable to schedule delivery for Tucson Medical Center for a variety of reasons, including transportation barriers, discomfort in delivering with a doctor they do not know, and a desire to be close to supportive friends and family members in the Sierra Vista community during the time of delivery.

5. Based on my experience as an obstetrician, it is also highly likely that another subset of these patients who intend to deliver at Tucson Medical Center will go into labor before their scheduled date of the scheduled delivery, and will not be stable enough to transfer to Tucson for their cesarean section and tubal ligation.

6. A patient who is caring for a newborn may not be able to take time away for second surgery, and may therefore resort to less effective methods of contraception.

7. The affiliation with Carondelet is posing medically unacceptable risks to patients who are unable to schedule their deliveries and tubal ligations at Tucson Medical Center.

8. In order to receive tubal ligations, these patients will have to undergo a second separate surgery, administration of anesthesia and recover, and endure the risks of a second surgery.

9. It is the medical standard of care to provide a tubal ligation at the same time as cesarean delivery for women who wish to have a tubal ligation.

10. The medical benefits of avoiding a second surgery include reduction of anesthesia-related risks and infection at the surgical site and a shorter period of recuperation.

11. The affiliation is causing a disruption in continuity of care for my patients, interfering with my ability to provide the standard of care in accordance with my medical training, and interfering with the patient-physician relationship in violation of basic quality-of-care principles.

DATED this 3 day of November, 2010.

/Kenneth Kacenga DO
[Name]

SUBSCRIBED AND SWORN TO before me this 3 day of November, 2010, by Kenneth Kacenga DO.

SANDRA K. KAPLAN
NOTARY PUBLIC - ARIZONA
COCHISE COUNTY
My Commission Expires
June 29, 2013

Sandra K. Kaplan
Notary Public

My Commission Expires:

_____

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF COCHISE)

Helen D Patterson being first duly sworn, upon oath deposes and states as follows:

1. I donated $10,000.00 to the Sierra Vista Regional Health Center ("the Hospital") on or about April 1, 2008 $5,000.00 Oct. 14, 2008 5,000.00.

2. I made my donations based on my belief that the Hospital would continue its historic mission of meeting the needs of the people of Cochise County.

3. Because of the Hospital's affiliation with the Carondelet Health System on April 17, 2010, and the reduction in services that accompanied the affiliation, I no longer believe that the Hospital is meeting its historic mission to provide for the health care needs of the entire community.

4. I do not believe that the Board of Directors of the Hospital adequately considered the impact that the affiliation with Carondelet would have on the citizens of Cochise County.

DATED this 14th day of Sept., 2010.

Helen D Patterson
[Name]

SUBSCRIBED AND SWORN TO before me this 14th day of September, 2010, by Helen D Patterson.

Carrie L Stubbs
Notary Public

My Commission Expires:
4/23/2012

OFFICIAL SEAL
CARRIE L. STUBBS
NOTARY PUBLIC - STATE OF ARIZONA
COCHISE COUNTY
My Comm. Expires April 23, 2012