July 26, 2021

Via Electronic Mail

Public Health and Health Planning Council
Empire State Plaza, Corning Tower, Room 1805
Albany, New York 12237

Re: Certificate of Need Application No. 211234-C, Mount St. Mary's Hospital and Health Center (Niagara County)

Dear Chairperson Kraut,

NYCLU
ACLU of New York

1 Whitehall Street, 3rd Fl.
New York, NY 10004
nyclu.org

Donna Lieberman
Executive Director

Olivier Sylvain
President

The New York Civil Liberties Union appreciates the opportunity to offer the following comments relating to Mount St. Mary's Hospital and Health Center's ("Mount St. Mary's") Certificate of Need Application, Project #211234-C.

We urge the Public Health and Health Planning Council to ensure that, if it approves of Project #211234-C, the approval is accompanied by robust and enforceable conditions that ensure Niagara County residents can access the health care services they need, including comprehensive reproductive health care, health services for LGBTQ+ patients, gender-affirming care for transgender patients, and end-of-life care options.

Background

As you know, Mount St. Mary's is requesting approval to construct Lockport Memorial Hospital, a new hospital division in Niagara County that will replace the current Eastern Niagara Hospital. Catholic Health System, Inc. (CHS), the active parent of Mount St. Mary's, is an integrated health care delivery system that includes Mount St. Mary's, Mercy Hospital of Buffalo, Kenmore Mercy Hospital, Sisters of Charity Hospital, and Sisters of Charity Hospital – St. Joseph Campus, four long-term care facilities, three home health agencies, primary care and imaging centers, a physician network, and other health care-related services as well as with five charitable foundations.

CHS facilities, including Mount St. Mary's, are bound by the *Ethical and Religious Directives for Catholic Health Care Services* (ERDs).[1] The ERDs are a religious document promulgated by the U.S. Conference of Catholic Bishops that restricts access to the full range of reproductive health care

[1] *See* Catholic Health, Our Beliefs & Accountability, *available at* https://www.chsbuffalo.org/mission/our-beliefs-accountability; Ethical and Religious Directives for Catholic Health Care Services, *available at* https://www.chsbuffalo.org/sites/default/files/files/mission/catholic-health-ethical-and-religious-directives-june-2018.pdf.

services, including contraception, sterilization, miscarriage management, abortion, the least invasive treatments for ectopic pregnancies, and some infertility treatments; limits a patient's ability to make end-of-life choices; prohibits gender-affirming care; and jeopardizes the ability of LGBTQ+ patients to access care free from discrimination. The ERDs provide no exceptions to consider individual patient needs or for risks to a patient's health or even life.

Ensure Access to Comprehensive Reproductive Health Care

When patients seek reproductive health care, they should be confident that their doctors will provide them the best care possible and counsel them on their full range of options. They should not have to worry about not getting appropriate, patient-centered care because of a hospital's policy-based exclusions. Yet policy-based exclusions, like the ERDs, can violate basic evidence-based standards of care, therefore going against accepted medical practice as adopted by the major professional medical associations. These restrictions prevent willing doctors and nurses from practicing evidence-based medicine in accordance with their training and legal obligations. These restrictions directly harm patients by stripping them of their autonomy in medical decision-making, creating unnecessary barriers to care, and risking their health.

Hospitals that follow the ERDs restrict some of the most commonly requested contraceptive methods in the United States.[2] For example, Rebecca Chamorro, a patient at Mercy Medical Center Redding in California, decided with her doctor that she would get a tubal ligation during her scheduled C-section. But the hospital refused her doctor's request to perform the procedure, citing the ERDs classifying sterilization procedures as "intrinsically evil." The hospital had also allowed some women to access postpartum tubal ligation while refusing the same service to others. The ACLU of Southern California filed a lawsuit in 2015, arguing that withholding pregnancy-related care for reasons other than medical considerations is illegal.[3]

In direct contradiction of medical guidelines, some hospitals that follow the ERDs have denied patients life-saving treatment for dangerous pregnancies because there is still a fetal heartbeat, even if the pregnancy is not viable and treatment is necessary to preserve a person's health or save their life. For example, the ACLU of Michigan represented Tamesha Means, who sought care at Mercy Health Partners when her water broke at 18 weeks of

[2] Stulberg, Debra B et al. "Tubal ligation in Catholic hospitals: a qualitative study of ob-gyns' experiences." *Contraception* vol. 90,4 (2014): 422-8. doi:10.1016/j.contraception.2014.04.015.

[3] *Chamorro v. Dignity Health*, ACLU OF SOUTHERN CALIFORNIA, *available at* https://www.aclusocal.org/en/cases/chamorro-v-dignity-health-religious-refusals (last visited July 23, 2021).

pregnancy. The hospital sent her home twice even though she was in excruciating pain, there was almost no chance her pregnancy would survive, and continuing the pregnancy posed significant health risks. The hospital did not tell Ms. Means that ending her pregnancy was an option – or that it was the safest option in her situation. In fact, Ms. Means returned to the hospital a third time with an infection and in extreme distress, and the hospital was poised to send her home again when she began to deliver; only then did the hospital treat her miscarriage.[4]

Further, due to structural inequities and racism deeply embedded in the health care system, restrictions on care disproportionately impact patients of color, particularly Black women who are more likely to die from pregnancy or childbirth complications or experience unintended pregnancy than white patients, and who are also more likely to receive care nationwide in a facility bound by the ERDs.[5]

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CHS states the proposed project "will have a significant primary care and OB/GYN presence to promote health for the entire family including women and children."[6] However, maintaining OB/GYN care as a practice is not the same as maintaining all reproductive health services, including access to contraception, unrestricted miscarriage management, tubal ligations, and abortion care.

The PHHPC should secure a commitment from CHS that reproductive health services, counseling, and referrals will be maintained and put protocols in place to ensure those services are available equally and transparently to all patients. If CHS can and is providing a service to some patients, as a matter of law and policy, CHS cannot be allowed to claim the ERDs require them to deny those services to other patients.

Commit to treating LGBTQ+ patients with dignity and respect

Health care facilities bound by the ERDs deny medically necessary care to transgender people and cannot provide certain fertility treatments and assisted reproductive technology services, such as in vitro fertilization, gestational surrogacy, and sperm/ovum donation, to assist individuals

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[4] *Tamesha Means v. U.S. Conference of Catholic Bishops*, AMERICAN CIVIL LIBERTIES UNION, *available at* https://www.aclu.org/cases/tamesha-means-v-united-states-conference-catholic-bishops (last visited July 26, 2021).
[5] American College of Obstetricians and Gynecologists, Committee Opinion No. 649, Racial and Ethnic Disparities in Obstetrics and Gynecology (2015), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Racial-and-Ethnic-Disparities-in-Obstetrics-and-Gynecology (noting racial disparities in reproductive health including preterm birth, cesarean delivery, and maternal and fetal death).
[6] Project #211234-C Exhibit Page 6, available at https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2021-07-15/docs/exhibits.pdf.

conceiving a child, particularly affecting LGBTQ+ people.[7] While the ERDs do not specifically discuss transgender, non-binary, and gender non-conforming patients, LGBTQ+ patients routinely face barriers to accessing basic health care services at facilities bound by the ERDs.

Hospitals that follow the ERDs claim 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, the ACLUs of Northern and Southern California represent Evan Minton, whose hysterectomy at Dignity Health was canceled two days before the scheduled procedure when the hospital learned that he is transgender. Dignity Health regularly permits hysterectomies to be performed when the procedure is not part of a person's gender transition.[8]

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In its application, CHS states that the facility's "admissions policy includes anti-discrimination provisions regarding age, race, creed, color, national origin, marital status, sex, sexual orientation, religion, disability, or source of payment." New York has broad anti-discrimination laws prohibiting all businesses, including hospitals, from discriminating on the basis of sex, including gender identity and gender expression.[9] CHS must be held to their commitment not to discriminate and should further be encouraged to continue to improve their provision of services for LGBTQ+ residents of Niagara County.

The PHHPC should secure a commitment from CHS that all LGBTQ+ patients and their families will be treated with dignity and respect, and that they will receive the same medical standard of care that any other patient receives. Specifically, we request that the PHHPC condition approval on CHS's inclusion of a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and for that reason prohibit CHS from citing the ERDs or any other doctrine or document to prevent provision of such care.

Provide End-of-Life Care Options

The ERDs prohibit the full range of end-of-life options, including the refusal of unwanted or non-beneficial medical treatment, such as medically assisted nutrition and hydration, and removal from life-sustaining

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[7] *See* s.e. smith, "He needed a gender-affirming procedure. The hospital said no." Vox, (Nov. 01, 2019), *available at* https://www.vox.com/the-highlight/2019/10/25/20929539/catholic-hospitals-religious-refusal-rural-health-care-evan-minton (last visited July 25, 2021) (describing experiences of patients refused care while trying to access gender-affirming surgery and in vitro fertilization at hospitals following the ERDs).

[8] *Minton v. Dignity Health,* American Civil Liberties Union, *available at* https://www.aclu.org/cases/minton-v-dignity-health (last visited July 25, 2021).

[9] *See* Exec. Law §296[2][a]; Civ. Rts. Law §40-c[2]; 9 NYCRR §466.13(c) (clarifying discrimination on the basis of gender identity is sex discrimination).

treatments, such as ventilators. Sometimes, doctors and nurses at institutions bound by the ERDs cannot even provide patients with notice of their options and referrals to facilities that do allow the full continuum of end-of-life care. Patients and their families often lack the information necessary to make informed end-of-life decisions until it is too late, denying patients their fundamental autonomy in medical decision-making.

The PHHPC should secure a commitment from CHS that the full spectrum of end-of-life care options will remain available.

Recommendations

Our goal is to ensure that all Niagara County community members have access to a full range of lawful, quality health services, and that no patient is refused access to such care on the basis of CHS's policies. By adopting the recommendations below, the PHHPC can be instrumental in accomplishing this goal and ensuring that accessible, comprehensive health care is available in Niagara County.

Our specific recommendations are as follows:

- Secure a commitment that all reproductive health services, counseling, and referrals will be maintained and put protocols in place to ensure those services are available equally and transparently to all patients. Procedures must be medically defined and align with evidence-based standards of care.
- Secure a commitment that all LGBTQ+ patients will be treated with dignity and respect, and that CHS will allow providers to deliver the standard of care – gender-affirming and otherwise – to transgender, non-binary, and gender non-conforming patients. Include a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and therefore, CHS facilities are prohibited from preventing provision of such care.
- Require a robust anti-discrimination provision ensuring that if a CHS facility provides a specific medical procedure, that procedure will be available to all patients on an equal basis. Procedures must be medically defined and align with evidence-based standards of care.
- Require the availability of the full spectrum of end-of-life care options and maintain such care.
- Require specific reporting on maintenance of reproductive health services, essential health services, community benefits, charity care, and Medicaid and Medicare contracts, at a minimum of every three years post-merger.

Thank you for considering these comments. If you have questions or need further information, please contact Gabriella Larios at glarios@nyclu.org or 212-607-3354.

Sincerely,

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