

August 25, 2021

Via Electronic Mail

Kathy Marks, General Counsel
Division of Legal Affairs
New York State Dept. of Health
Empire State Plaza
Albany, NY

Jennifer Treacy, Deputy Director
Office of Primary Care and Health
Systems Management
New York State Dept. of Health
Empire State Plaza
Albany, NY

Re: Proposed Management Services Agreement Between St. Peter's Health Partners and Ellis Medicine



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

Donna Lieberman
Executive Director

Olivier Sylvain
President

Dear Ms. Marks and Ms. Treacy,

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following comments relating to the proposed Management Services Agreement (“MSA”) between St. Peter’s Health Partners (“SPHP”) and Ellis Medicine filed with your offices for review. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 112,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.

We urge the Department of Health to consider these comments as it reviews the proposed MSA and to ensure that, if it approves of the proposed MSA, that approval is accompanied by robust and enforceable conditions guaranteeing that Schenectady County residents can continue accessing 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

The NYCLU, a member of the Schenectady Coalition for Healthcare Access, is concerned about the potential loss of services and local control of Schenectady’s community hospital under the planned merger of Ellis Medicine, including Bellevue Woman’s Center, the Capital Region’s only inpatient hospital providing dedicated care to women and infants, with SPHP and its Michigan-based parent system, Trinity Health. Ellis leadership has quietly negotiated the MSA with SPHP officials behind closed doors, declining invitations to participate in a community forum and rejecting the Coalition’s requests for a copy of the MSA. Instead of submitting a Certificate of Need (“CON”) application allowing for public review, Ellis and SPHP have chosen a process shrouded in secrecy, foreclosing any meaningful community engagement. If the MSA is approved and implemented, it may be difficult to stop a complete merger between Ellis and SPHP once a full CON application is submitted – even if serious concerns surface at that time, or to ensure that any future



agreement provides for adequate avenues to preserve health care for Schenectady County residents. This is particularly true given that Ellis and SPHP are simultaneously moving forward with a plan for SPHP to directly employ Ellis’ physicians – a transaction that requires no Department of Health review.

Hospitals in Trinity Health’s network, including SPHP facilities, 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 restrict access to the full range of reproductive health care services, including contraception, sterilization, miscarriage management, abortion, the least invasive treatments for ectopic pregnancies, and some fertility treatments; limit a patient’s ability to make end-of-life choices; prohibit gender-affirming care; and jeopardize 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 health care providers will offer the best care possible and counsel them on their full range of options. They should not have to worry about whether they will receive 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, contradicting accepted medical practice as adopted by the major professional medical associations. These restrictions prevent willing health care providers from practicing evidence-based medicine in accordance with their training and legal obligations and 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 meanwhile had allowed some women to access postpartum tubal ligation while refusing the same service to others, including Ms. Chamorro. The ACLU of

¹ See Trinity Health, *St. Peter’s Health Partners – New York*, <https://www.trinity-health.org/hospital-specific-bylaws-policies-and-procedures/st-peters-health-partners-new-york>; *Ethical and Religious Directives for Catholic Health Care Service*, 6th ed., U.S. CONFERENCE OF CATHOLIC BISHOPS, (2018), <https://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf> (last visited Aug. 24, 2021).

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.



Southern California filed a lawsuit in 2015, arguing that withholding pregnancy-related care for reasons other than medical considerations is illegal.³

Hospitals that follow the ERDs also cannot provide certain fertility treatments and assisted reproductive technology services, such as in vitro fertilization and sperm/ovum donation, to assist individuals with becoming pregnant. Restrictions on access to fertility treatments, including long delays in accessing medical interventions, can decrease a person's chances of becoming pregnant.⁴

In direct contradiction to 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 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.⁵

Importantly, 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.⁶

Bellevue Woman's Center, a highly regarded provider of reproductive and maternity services for a wide geographic region that extends beyond Schenectady County, would be particularly affected if Ellis adheres to the

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 Au. 24, 2021).

⁴ R.D. Kramer et al., *Prevalence and experiences of Wisconsin women turned away from catholic settings without receiving reproductive care*, CONTRACEPTION (2021), <https://doi.org/10.1016/j.contraception.2021.05.007>.

⁵ *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 Aug. 24, 2021).

⁶ 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> (last visited Aug. 24, 2021) (noting racial disparities in reproductive health including preterm birth, cesarean delivery, and maternal and fetal death).



ERDs. Ellis has claimed that the MSA will exclude Bellevue but has failed to provide information as to how this separation will be accomplished or what reproductive health services, if any, will be affected by the MSA.

Ellis has announced it will no longer provide abortions under a merger with SPHP.⁷ Ellis has also publicly stated that other reproductive health services will continue once Ellis is governed by SPHP and Trinity.⁸ If past behavior is indicative, this pledge will not be honored. In 2011, Samaritan Hospital in Troy, NY, whose parent organization is also SPHP, absorbed Burdett Birth Center, and similar promises were made to maintain reproductive health care separate and unimpeded by the ERDs on one floor of the Birth Center. However, that approach was financially unsustainable, and in 2020, the floor was absorbed back into the main hospital system, and Burdett had to stop offering certain reproductive services, specifically tubal ligations and vasectomies, that conflicted with the ERDs.⁹

We urge the Department of Health to determine whether Ellis' promises to preserve reproductive health services are practical and enforceable and to guarantee durable enforceability. Further, the Department should ensure that a MSA or eventual merger agreement includes conditions guaranteeing that these services, including access to contraception, unrestricted miscarriage management, tubal ligations, and fertility treatments, remain available equally and transparently to all patients. If Ellis and SPHP are providing a service to some patients, as a matter of law and policy, they cannot be allowed to claim that policy-based exclusions 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.¹⁰ 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.

⁷ Pete DeMola, Ellis CEO says *St. Peter's merger means end of abortions*, TIMES UNION, Aug. 2, 2021, available at <https://www.timesunion.com/news/article/Ellis-CEO-says-St-Peter-s-merger-means-end-of-16358725.php> (last visited Aug. 24, 2021).

⁸ See Informational Presentation by Paul Milton, Ellis Hospital CEO Regarding a Proposed Hospital Merger, Committee on Health and Human Services, Schenectady County Legislature, Aug. 02, 2021.

⁹ Justin Dawes, *Samaritan Hospital planning to absorb maternity care center*, ALBANY BUSINESS REVIEW, Aug. 6, 2020, available at <https://www.bizjournals.com/albany/news/2020/08/06/samaritan-hospital-absorbs-burdett-birth-center.html> (last visited Aug. 24, 2021).

¹⁰ 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 Aug. 24, 2021) (describing experiences of patients refused care while trying to access gender-affirming surgery).



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. Some Catholic hospitals, like Dignity Health, regularly permit hysterectomies to be performed when the procedure is not part of a person’s gender transition (*e.g.*, providing hysterectomies to cisgender women with cancer).¹¹

SPHP and Ellis both have nondiscrimination provisions stating they do not exclude or treat people differently because of their sex.¹² 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.¹³ Ellis and SPHP must be held to their commitment not to discriminate and should further be encouraged to continue to improve their provision of services for LGBTQ+ individuals.

We urge the Department of Health to ensure that a MSA or eventual merger agreement includes a commitment that all LGBTQ+ patients and their families will be treated with dignity and respect, complies with applicable state anti-discrimination laws, and ensures LGBTQ+ individuals will receive the same medical standard of care that any other patient receives. Specifically, any agreement should include a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and for that reason, policy-based exclusions cannot be cited 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 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.¹⁴

¹¹ *Minton v. Dignity Health*, American Civil Liberties Union, available at <https://www.aclu.org/cases/minton-v-dignity-health> (last visited Aug. 24, 2021).

¹² Ellis Medicine, *Notice Informing Individuals About Nondiscrimination*, <http://www.ellismedicine.org/patients-and-visitors/notice-of-nondiscrimination.aspx>; St. Peter’s Health Partners, *Notice of Non-Discrimination* <https://www.sphp.com/notice-of-non-discrimination/> (last visited Aug. 24, 2021).

¹³ 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).

¹⁴ See Katherine Stewart, *At Catholic Hospitals, A Right to Live but Not to Die*, THE NATION, Oct. 8, 2015, available at <https://www.thenation.com/article/archive/at-catholic-hospitals-a-right-to-life-but-not-a-right-to-death/>; Harris Meyer, *Catholic Directive May Thwart End-Of-Life Wishes*, NPR, Feb 27, 2010, available at

We urge the Department of Health to ensure that the full spectrum of end-of-life care options will remain available under a MSA or eventual merger agreement.

Considerations

Our goal is to ensure that all Schenectady County residents 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 SPHP's policy-based exclusions. By addressing the questions below in considering approving the proposed MSA, the Department of Health can be instrumental in accomplishing this goal and ensuring that accessible, comprehensive health care remains available in Schenectady County.

We urge the Department of Health to address and answer the following questions explicitly and publicly:

- **Governance Structure:** What levels of governance and authority over Ellis Medicine would SPHP/Trinity Health gain through this agreement? Will SPHP/Trinity Health send executives to manage Ellis? If so, what powers would they have over budget, operations, employment and clinical services at Ellis? How would this be different from an “active parent” or other affiliation arrangement that would require a CON application and public review?
- **Governance Structure of Bellevue:** What would the organizational chart and governance structure of Bellevue Woman’s Center look like with the MSA in place?
- **Policy-Based Exclusions:** Will the MSA require Ellis Medicine and physicians and nurses working at Ellis to follow the ethical policies and restrictions of SPHP and Trinity Health? If so, which services would be discontinued? How would patients be assisted in finding those services elsewhere? In cases of emergencies, such as ectopic pregnancies or premature rupture of membranes, would patients presenting at the Ellis emergency department be guaranteed medically-appropriate care, including termination of pregnancy when clinically indicated?
- **Employment Contracts:** Is the MSA in conjunction with SPHP’s employment of Ellis’ staff physicians? Would those employment contracts include non-compete clauses and requirements to adhere to SPHP ethical policies that will limit physician choices and patient care options?
- **Evaluation of Partnership:** How would the outcomes of the MSA be evaluated to determine whether a closer corporate partnership should be pursued? Would that evaluation include public comment? What is the exit strategy for Ellis, should the MSA not prove to be of value to Ellis or the community?



<https://www.npr.org/templates/story/story.php?storyId=126049276> (last visited Aug. 25, 2021).

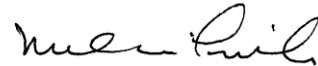
The NYCLU is submitting these comments in conjunction with a FOIL request to the Records Access Office at the NYS Department of Health seeking a copy of the MSA (attached as **Exhibit A**). We would welcome the opportunity to provide comment and recommendations on specific provisions of the agreement if we receive a copy in a timely fashion.

Thank you for your attention to this matter. If you have questions or would like to schedule a meeting to discuss further, please contact Gabriella Larios at glarios@nyclu.org or 212-607-3354.

Sincerely,



Gabriella Larios
Legal Fellow
New York Civil Liberties Union



Melanie Trimble
Regional Director
NYCLU Capital Region Office



Allison S Bohm
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New York Civil Liberties Union



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EXHIBIT A



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VIA RECORDS REQUEST PORTAL

August 24, 2021

Records Access Office
New York State Department of Health
Corning Tower, Room 2364
Albany, New York 12237-0044
<https://openfoil.ny.gov/#/newfoilrequest?agencyCode=DOH>

Re: FOIL Request—Management Services Agreement Between St. Peter’s Health Partners and Ellis Medicine

Records Access Officer:

The New York Civil Liberties Union submits this request for records to the New York State Department of Health under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84, *et seq.*, for access to, and copies of, the Management Services Agreement between St. Peter’s Health Partners and Ellis Medicine filed with the Department of Health on or around August 11, 2021.

As you may be aware, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, we would appreciate a response as soon as possible and look forward to hearing from you shortly. Please furnish records to:

New York Civil Liberties Union
Attn: Gabriella Larios
1 Whitehall Street, 3rd Floor
New York, NY 10004
Email: glarios@nyclu.org

If there are any fees for copying the records requested, please inform us before filling the request.

If for any reason any portion of this request is denied, please inform us of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed. If you determine that any portion of the requested records are exempt from disclosure, please withhold only the specific piece of information (by redaction) claimed as exempt, inform us of the basis for the exemption claim, and furnish copies of those portions of the records that you determine not to be exempt.

Whether you produce or withhold records, please provide me with a written certification pursuant to N.Y. Pub. Off. Law § 89, either certifying the correctness of the records provided

or confirming that the records do not exist, that you could not locate the records after a diligent search, or that you are withholding certain records.

To the extent that records are available in an electronic format, we request that they be provided in that format.

Please do not hesitate to contact me at (212) 607-3354 or glarios@nyclu.org if you have any questions about this request. Thank you for your attention to this matter.

Sincerely,

Gabriella Larios

Gabriella Larios
Legal Fellow