



National Health Law Program Analysis of California's Conditional Merger of Catholic Hospitals

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Summary

California Attorney General Xavier Becerra issued a Nov. 21 conditional approval of the proposed merger between Dignity Health (DH) and Catholic Health Initiatives (CHI). This merger will create a new health entity called CommonSpirit Health (CSH), which will operate 139 hospitals in 21 states, including 30 hospitals in California.

The National Health Law Program, along with a coalition of more than 20 other California non-profit policy, advocacy, and legal services organizations, submitted a Sept. 27 [letter](#) to the California Department of Justice, requesting that any approval of such a proposed merger be accompanied by robust and enforceable conditions that protect the community interests.

Specifically, we requested that the attorney general:

- Ensure parity of access to reproductive health services;
- Condition approval on a commitment to treat LGBTQ patients with dignity and respect;
- Require that DH and CHI maintain reproductive health and other services, community benefits, and charity care in all California health facilities impacted by the merger;
- Require specific reporting on maintenance of reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts;
- Obtain from DH and CHI additional information on the Ethical and Religious Directives (ERDs) restrictions on collaboration contained and their potential impact on the attorney general's ability to impose restrictions on this merger; and
- Require that DH and CHI remove the section of the Merger Alignment Agreement that served as a loophole to escape conditions imposed by the attorney general.



The attorney general's [conditional approval](#) puts in place many of the restrictions that we requested in our September letter, including:

- preserving access to reproductive health services;
- prohibiting discrimination against LGBTQ patients;
- maintaining Medi-Cal and Medicare contracts, as well as charity care, community benefits, and other critical services; and
- requiring regular compliance reporting.

Below we provide analysis on the conditional approval as it pertains to each of the requests raised in our coalition letter.

Analysis

Ensuring parity of access to reproductive health services

To ensure parity of access to reproductive health services at all DH hospitals, our letter requested that where reproductive health services are currently being provided as exceptions to the ERDs, those services must be maintained. Where those services are being provided but only on a case-by-case basis, we asked that Attorney General Becerra require that DH and CHI put protocols in place to make those services available equally and transparently to all patients at those facilities.

In the conditional approval, Becerra did not follow this recommendation with respect to putting in place protocols to ensure that where reproductive health services are being provided at any level at any DH and CHI facilities, they be provided equally and transparently to all at that facility. However, the Attorney General does put in place a ten-year requirement that women's health services, including women's reproductive services, be maintained "at current licensure and designation with the current types and/or levels of services" at each hospital. Also, for those hospitals that follow the Statement of Common Values rather than the ERDs, the maintenance of women's health services, including women's reproductive services, is required "regardless of any amendments that increases or expands prohibited services to the Statement of Common Values."

The National Health Law Program believes that variation in services within and across DH facilities creates an inequitable situation for DH patients, such that an individual going to one DH facility could potentially receive very different treatment from another



individual going to that same DH facility. If DH can and is providing a service to some patients, we do not believe DH should be allowed to deny those services to other patients at the same facility. However, we are glad that the Attorney General has chosen to go beyond the health impact statement's five-year recommendation for maintenance of women's health services, to require DH to continue providing these important services to the community for ten years post-merger. (Note there is one caveat to this 10-year requirement, which we will discuss in detail below.)

Conditioning approval on a commitment to treat LGBTQ patients with dignity and respect

Our letter also requested that the California DOJ secure from DH a commitment that all LGBTQ patients will be treated with dignity and respect, and that they will allow providers to deliver the standard of care—gender-affirming and otherwise—to transgender, non-binary, and gender non-conforming patients. We further asked that the attorney general include a provision noting that gender dysphoria is a serious medical condition that may require medical interventions, and for that reason, the merging entities are prohibited from citing the ERDs or any other doctrine or document to prevent the provision of such care.

The conditional approval states that: "There shall be no discrimination against any lesbian, gay, bisexual, transgender, or queer individuals" at the DH hospitals, and requires that "This prohibition must be explicitly set forth in Dignity Community Care's policies applicable at [the DH hospitals], adhered to, and strictly enforced."

We are encouraged that Attorney General Becerra including this strong, and not time-limited, prohibition against discrimination, which includes strict requirements for adherence and enforcement. We are very much hopeful that in the future, LGBTQ individuals and families will be able to seek and receive the health care they need at all DH facilities. In particular, we are hopeful that transgender patients will be able access all necessary health care services, including gender-affirming care and any and all transition related services, and that they will be treated with dignity and respect when patients at DH hospitals.



Requiring that DH and CHI maintain reproductive health and other services, community benefits, and charity care in all California health facilities impacted by the merger

To protect broader community interests, we asked that Becerra require DH and CHI to maintain reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts at least at their current levels for a minimum of 15 years post-merger, based on a five-year lookback period.

In the conditional approval, the attorney general does require DH hospitals to maintain “women’s healthcare services including women’s reproductive services” at least at their current levels for five years. After five years, between year 6 and year 10, if any DH facility wants to reduce or discontinue any of these services, they must give at least 45-day notice to the attorney general of the proposed reduction or discontinuation and the reasons for such. At that point, the AG will assess whether the reduction or discontinuation of services “creates a significant effect on the availability and accessibility of such services” to the relevant hospital communities.

We appreciate that Becerra went above-and-beyond the health impact statement’s recommendation of a five-year period for maintenance of women’s health services. We will seek more details from the attorney general about the specific process by which DH hospitals can request a reduction or discontinuation of women’s health services during years 6 through 10.

The conditional approval imposes the same initial five-year maintenance requirement for emergency and trauma services in the majority of the DH hospitals, followed by the notice requirement in the event that a DH facility seeks to reduce or discontinue services during the second five-year period. We do have concerns about even a potential reduction or discontinuation in emergency and trauma services, especially given the ongoing issues that individuals and families across the state, especially low-income communities, are having accessing emergency room services. We would certainly seek to work with Attorney General Becerra to monitor closely any such proposals to reduce or discontinue services.

The conditional approval requires that a number of specific health services be maintained in the hospitals where such services are currently being provided, at their current levels for five years following the closing date of the merger, including:

- critical care services,
- obstetrics services,



- intensive care newborn nursery services,
- rehabilitation services,
- acute psychiatric services,
- skilled nursing services,
- pediatric services,
- cardiovascular services,
- neuroscience services,
- oncology services,
- orthopedic surgery services,
- general surgery services,
- outpatient services,
- nuclear medicine services,
- imaging and radiology services,
- occupational therapy services,
- physical therapy services,
- respiratory care services,
- social services, and
- speech pathology services, and
- speech therapy services.

The conditional approval contains a number of provisions aiming to maintain and strengthen DH hospitals commitment to low-income and underserved communities. With respect to charity care, the conditional approval requires that DH hospitals each provide a specific amount of charity care for six years post-merger, the calculation for which is the same as that used by the Office of Statewide Health Planning Development for its annual hospital reporting. The conditional approval further requires a 100 percent discount to patients up to 250 percent FPL, starting in 2019. Lastly, the conditional approval goes beyond the existing state charity care requirements by requiring DH hospitals to conduct affirmative advertising and outreach about the financial assistance policies available at their facilities, and requiring training all staff interacting with patients and their families as to DH's financial assistance policy.

With respect to its Medi-Cal and Medicare contracts, the attorney general is requiring that the hospitals maintain its Medi-Cal contracts and remain a Medicare provider for five years post-merger.



The conditional approval also requires a specific amount of Community Benefit Services at each hospital for six years post-merger, and requires that specific community benefit programs and services continue to be offered for those six years.

Of note, the conditional approval requires CSH to create a Homeless Health Initiative by allocating \$20 million over six years to provide coordinated care in the communities surrounding the 30 DH hospitals in the state. The approval requires that CSH “work with and contribute funds to local counties and cities and nonprofit organizations . . . to co-locate, coordinate, and integrate health, behavioral health, safety, and wellness services with housing and other social services, and create better resources for providers to connect patients with these resources.” At least half of the \$20 million must be spent in the first three fiscal years post-merger.

In a [press release](#), the California Department of Justice stated that the conditions put in place to “reflect the largest commitment by a system to serving Medi-Cal beneficiaries and charity care in State history.” We would have liked to see these maintenance requirements and expansions of services to low-income and underserved communities put in place for a longer period (our letter requested 15 years). Nonetheless, we recognize the attorney general’s commitment to these issues, and are particularly glad to see the expansion of charity care beyond that which is currently mandatory under California charity care requirements. We also look forward to implementation of the Homeless Health Initiative.

Requiring specific reporting on maintenance of reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts

To ensure enforcement of our recommendations, we requested that Attorney General Becerra require specific reporting from DH and CHI on maintenance of reproductive health services, essential health services, community benefits, charity care, and Medi-Cal and Medicare contracts, at intervals of at least every three years post-merger.

In the conditional approval, Becerra imposes just such a requirement, but on an annual basis for six years post-merger. The provision requires each DH hospital to submit an annual report to the attorney general “describing in detail compliance with each Condition” set forth in the conditional approval. These reports must be certified to be true, accurate, and complete by the Chairman of the Board of Directors of Dignity Community Care, the Hospital Community Boards, and the CEO of Dignity Community



Care and each hospital. Each hospital must also provide documentation that the Board of Directors has reviewed and approved the annual report.

We are pleased that the attorney general is requiring this annual reporting from the DH hospitals. We believe this will go a far way to help monitor and enforce compliance with the provisions in the conditional approval. We hope that the attorney general's office will welcome participation from the health advocacy community with respect to ongoing compliance monitoring, and look forward to working with Becerra's office in this regard.

Obtaining from DH and CHI additional information on the Ethical and Religious Directives (ERDs) restrictions on collaboration contained and their potential impact on the Attorney General's ability to impose restrictions on this merger, and requiring that DH and CHI remove the section of the Merger Alignment Agreement that served as a loophole to escape conditions imposed by the Attorney General

Our letter raised concerns about language in the most recently updated version of the ERDs pertaining to restrictions on collaborations, and the impact such restrictions might have on the attorney general's ability to impose conditions on the merger. As such, we asked him to request additional information from DH and CHI about these restrictions and their potential impact on the merger and any conditions that may be imposed on the merger. We also requested that the attorney general have DH and CHI remove a section of the Merger Alignment Agreement that served as a loophole to escape any conditions that the attorney general may impose on the merger. We further advised Becerra to seek additional legally binding and enforceable commitments from DH and CHI with respect to any conditions that the attorney general may impose on the merger.

In his conditional approval, Becerra does not directly address these issues. However, the conditional approval does include strong language, stating that once the merger is complete, all of the relevant entities to the merger:

. . . are deemed to have explicitly and implicitly consented to the applicability and compliance with each and every Condition and to have waived any right to seek judicial relief with respect to each and every Condition.

The Attorney General reserves the right to enforce each and every Condition set forth herein to the fullest extent provided by law. In addition to any legal remedies the Attorney General may have, the Attorney General shall be entitled to specific performance, injunctive relief, and such other equitable remedies as a



court may deem appropriate for breach of any of these Conditions. Pursuant to Government Code section 12598, the Attorney General's office shall also be entitled to recover its attorney fees and costs incurred in remedying each and every violation.

Also in the conditional approval, Becerra states that for those hospitals that follow the Statement of Common Values rather than the ERDs, the maintenance of women's health services, including women's reproductive services, for the initial five-year period, is such "regardless of any amendments that increases or expands prohibited services to the Statement of Common Values."

With respect to the requirements imposed in the conditional approval, we believe it is paramount that the attorney general have both the authority and the ability to actively monitor and enforce all provisions. Without proper enforcement, there will be essentially no protections for access to care at the affected health facilities. As such, we plan to closely monitor compliance with all of the conditional approval requirements, at the same time that we continue to monitor the impact of the ERDs on this and future similar mergers.

Conclusion

Today's health care landscape is changing. We believe we will only see more of these mergers over time, in which religiously affiliated health systems combine with either secular or other religiously affiliated health systems. Each such merger will raise concerns about whether or not the combined health systems will provide and preserve access to the full range of health services, including reproductive health services equally to all and with dignity and respect, which we raised in our September letter to Attorney General Becerra. We are pleased that he accepted so many of our recommendations. We very much appreciate Becerra's commitment to these issues, and look forward to continued partnership to help ensure access to reproductive health services, services for LGBTQ communities provided with dignity and respect, and maintenance of critical services for low-income and underserved individuals and families.