

STATE THE OF OHIO

DEPARTMENT OF HEALTH

- - -

In the Matter of: :  
Lebanon Road Surgery Center :

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

Friday, September 6, 2013  
10:00 o'clock a.m.  
Ohio Department of Health  
246 North High Street  
Columbus, Ohio 43215

- - -

SUSAN L. COOTS, RPR  
REGISTERED PROFESSIONAL REPORTER

- - -

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## 1 APPEARANCES:

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11 Melinda.RyansSnyder@OhioAttorneyGeneral.gov

12 On behalf of the State of Ohio.

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20 On behalf of the Respondent.

## 21 Also present:

22 Dr. William Haskell  
23 Mrs. Valerie Haskell  
24 Ms. Tamara Malkoff

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## 1 I N D E X

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## 3 WITNESSES ON BEHALF OF THE STATE OF OHIO

## 4 TAMARA MALKOFF

5 Direct Examination 19  
6 Cross-Examination 31  
7 Redirect Examination 54

## 8 WILLIAM M. M. HASKELL, M.D.

9 Cross-Examination 58

## 10 SHANNON M. RICHEY

11 Direct Examination 110  
12 Examination 123  
13 Cross-Examination 126  
14 Redirect Examination 141

## 15 WITNESSES ON BEHALF OF THE RESPONDENT

## 16 ROY D. CROY

17 Direct Examination 152  
18 Cross-Examination 178  
19 Redirect Examination 184  
20 Examination 189  
21 Recross-Examination 192

## 22 WILLIAM HASKELL, M.D.

23 Redirect Examination 195  
24 Recross-Examination 252

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## STATE'S EXHIBITS

MARKED MOVED ADMITTED

State's Exhibit No. 1 8 150 151  
(Proposal to Revoke)

State's Exhibit No. 2 8 150 151  
(Health Care Facility Renewal Application)

State's Exhibit No. 3 8 150 151  
(Letter dated 10-8-12)

## 1 Index, continued.

## 2 STATE'S EXHIBITS

MARKED MOVED ADMITTED

3 State's Exhibit No. 4 8 150 151  
(Health Care Facility Licensure Application)

5 State's Exhibit No. 5 8 150 151  
(Letter dated 9-15-10)

7 State's Exhibit No. 6 8 150 151  
(Variance Request Letter)

8 State's Exhibit No. 7 8 150 151  
(Ambulatory Surgical Facility License)

10 State's Exhibit No. 8 8 150 151  
(Letter dated 8-31-11)

11 State's Exhibit No. 9 8 150 151  
(State Medical Board of Ohio Certification)

13 State's Exhibit No. 10 8 150 151  
(Variance Request Letter)

15 State's Exhibit No. 11 8 150 151  
(Operational Procedure: Variance Request Processing)

17 State's Exhibit No. 12 8 150 151  
(E-mail chain dated 2-28-12)

18 State's Exhibit No. 13 8 150 151  
(Letter dated 2-29-12)

20 State's Exhibit No. 14 8 150 151  
(Letter dated 3-29-12)

21 State's Exhibit No. 15 8 150 151  
(Letter dated 4-10-12)

23 State's Exhibit No. 16 8 150 151  
(Letter dated 4-20-12)

24 State's Exhibit No. 17 8 150 151  
(Letter dated 5-31-12)

25

## 1 Index, continued.

## 2 STATE'S EXHIBITS

MARKED MOVED ADMITTED

3 State's Exhibit No. 18 8 150 151  
(Letter dated 5-4-12)

5 State's Exhibit No. 19 8 150 151  
(Letter dated 5-24-12)

6 State's Exhibit No. 20 8 150 151  
(Letter dated 7-27-12)

8 State's Exhibit No. 21 8 150 151  
(Letter dated 8-9-12)

9 State's Exhibit No. 22 8 150 151  
(Letter dated 10-18-12)

11 State's Exhibit No. 23 8 150 151  
(E-mail dated 10-18-12)

12 State's Exhibit No. 24 8 150 151  
(Opinion dated 2-17-06)

14 State's Exhibit No. 25 8 150 151  
(Adjudication Order)

15 State's Exhibit No. 26 145 -- 267  
(Letter dated 6-7-13)

## 17 RESPONDENT'S EXHIBITS MARKED MOVED ADMITTED

18 Respondent's Exhibit A 8 265 267  
(12-19-11 Correspondence)

20 Respondent's Exhibit B 8 265 267  
(Variance Request Operational Procedure)

22 Respondent's Exhibit C 8 265 267  
(OAC Sections 3701-83-19, 3701-83-13)

23 Respondent's Exhibit D 8 265 267  
(Lebanon Road Surgery Center Emergency Protocol)

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4	Respondent's Exhibit F (Letter dated 3-4-08)	8	265 267
6	Respondent's Exhibit G (Letter dated 3-4-08)	8	265 267
7	Respondent's Exhibit H (Letter dated 9-15-10)	8	265 267
9	Respondent's Exhibit I (Letter dated 8-12-12)	8	265 267
10	Respondent's Exhibit J (Letter dated 1-24-12)	8	265 267
12	Respondent's Exhibit K (Letter dated 2-29-12)	8	265 267
13	Respondent's Exhibit L (E-mail chain dated 3-12)	8	265 267
15	Respondent's Exhibit M (Letter dated 4-20-12)	8	265 267
16	Respondent's Exhibit N (Letter dated 5-2-12)	8	265 267
18	Respondent's Exhibit O (Letter dated 5-4-12)	8	265 267
19	Respondent's Exhibit P (Letter dated 5-21-12)	8	265 267
21	Respondent's Exhibit Q (Letter dated 5-21-12)	8	265 267
22	Respondent's Exhibit R (Letter dated 5-21-12)	8	265 267
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6	Respondent's Exhibit V (Letter dated 10-23-12)	8	265 267
7	Respondent's Exhibit W (Notice of Hearing Request dated 10-31-12)	8	265 267
10	Respondent's Exhibit X (Letter dated 11-29-12)	8	265 267
11	Respondent's Exhibit Y (Notice of Hearing Request dated 11-29-12)	8	265 267
13	Respondent's Exhibit Z (Letter dated 2-6-13)	8	265 267
14	Respondent's Exhibit AA (Request for Written Transfer Agreements and Responses)	8	265 267
16	Respondent's Exhibit CC (Public Records received from Ohio)	8	265 267
17	Respondent's Exhibit HH (Curriculum Vitae)	8	265 267
19	Respondent's Exhibit II (Letter dated 9-5-13)	136	265 267
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1	PROCEEDINGS
2	- - -
3	And, thereupon, State's Exhibit Nos. 1 through 25 and
4	Respondent Exhibits A through Z, AA, CC, and HH were previously
5	marked for identification.
6	- - -
7	BE IT REMEMBERED THAT, on the 6th day of September 2013,
8	this cause came on for hearing. And the parties appearing in
9	person and or by counsel, as herein set forth, the following
10	proceedings were had:
11	- - -
12	HEARING OFFICER KEPKO: Let's go on the record.
13	My name is William Kepko. I'm the Hearing Examiner that was
14	assigned to this case. We are here in the matter of Lebanon
15	Road Surgery Center, License No. 0980AS, Proposed Revocation of
16	Ambulatory Surgical Facility License.
17	Looks like the parties are finally together.
18	MS. BRANCH: Yes. Thank you very much.
19	HEARING OFFICER KEPKO: Why don't we start on my left with
20	appearances first.
21	MS. PACIOREK: Assistant Attorney Tara Paciorek for the
22	department.
23	MS. SNYDER: Good morning. Melinda R. Snyder, Assistant
24	Attorney General representing the Department of Health this
25	morning.

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1	HEARING OFFICER KEPKO: And who is your representative?
2	MS. SNYDER: Our agency representative today is Tamara
3	Malkoff from the Department of Health who also will be a
4	witness.
5	HEARING OFFICER KEPKO: Very good.
6	MS. BRANCH: Good morning. Jennifer Branch. Thank you for
7	your patience in setting the hearing date. I do appreciate it.
8	HEARING OFFICER KEPKO: You're welcome.
9	MS. BRANCH: I am representing the Lebanon Road Surgery
10	Center. With me are Dr. Haskell and Valerie Haskell.
11	HEARING OFFICER KEPKO: Very good.
12	Anything we need to cover in a preliminary manner? I know
13	we've done a lot of talking about scheduling.
14	Any witness separation?
15	MS. SNYDER: Thank you. I think that the State would
16	request separation of witnesses, please.
17	HEARING OFFICER KEPKO: Who's going to be testifying on your
18	behalf? Are both Valerie and the doctor going to be
19	testifying?
20	MS. BRANCH: Well, when I learned that the Department was
21	going to call Dr. Haskell in their case, that will alleviate the
22	need for my calling Valerie Haskell. She's the principal member
23	of the corporation, and I guess she's the corporate
24	representative. Dr. Haskell will be testifying.
25	HEARING OFFICER KEPKO: Okay. Very good.

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1 Any witnesses in the room that you see that we need to ask  
2 to leave?

3 MS. SNYDER: No, thank you. I indicated that Tamara is  
4 going to be our agency representative and a witness.

5 HEARING OFFICER KEPKO: That's fine.

6 MS. BRANCH: No objection to that.

7 HEARING OFFICER KEPKO: Anything else?

8 Everybody's exchanged document lists and exchanged  
9 documents, witness lists? No problems?

10 MS. BRANCH: Yes. No problems.

11 MS. PACIOREK: No problems. Thank you.

12 MS. SNYDER: Thank you.

13 HEARING OFFICER KEPKO: Do you want to make an opening  
14 statement?

15 MS. SNYDER: I do.

16 Good morning again. This case is really simply a case about  
17 a facility that wants to operate as an Ambulatory Surgical  
18 Facility that doesn't meet the requirements for licensure. I  
19 think some background is important here with respect to what an  
20 Ambulatory Surgical Facility is. And ASF is a free-standing  
21 facility where outpatient surgery is routinely performed. A  
22 facility like that that wants to operate in the State of Ohio  
23 has to have a license. In order to have a license, the  
24 Department of Health's rules require the facility has something  
25 call a Written Transfer Agreement or have a variance of that

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1 requirement that is granted by the director of the Department of  
2 Health.

3 To get a variance, the facility has to show that it meets  
4 the requirements for a Written Transfer Agreement in some  
5 alternate way. Now, what's very important is that the director  
6 has the sole discretion of whether to grant or deny a variance  
7 of the Written Transfer Agreement.

8 Lebanon Road Surgery Center has been licensed and operating  
9 as an ASF since 2010. It applied in 2012 for renewal of that  
10 license. It does not now, nor has it ever had a transfer  
11 agreement. Rather, in 2010 and 2011, it received variances from  
12 the director of the Department of Health. It has asked for a  
13 variance to meet the requirements for the 2012 application as  
14 well.

15 It's important, as we go forward with the hearing, to  
16 understand, kind of, the procedural posture of this case. This  
17 is not a typical adjudication under 119. Rather, this case has  
18 two distinct parts:

19 The first part is an adjudication under 119, and the sole  
20 issue for the first part of the case is whether the facility  
21 meets the requirements for licensure because it has either a  
22 Written Transfer Agreement with the hospital or a variance of  
23 that requirement from the director.

24 Now, the State doesn't anticipate that there will be a  
25 dispute that the facility does not have a transfer agreement as

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1 we sit here today, nor has it yet received a variance.

2 That brings us to the second part of the hearing. The  
3 second part of the hearing involves Lebanon Road's current  
4 request for a variance from the director. That part of the  
5 hearing is not held pursuant 119, and that is the result of a  
6 6th Circuit decision that involves a clinic that Dr. Haskell  
7 owns, WMPC, Women's Medical Professional Center, I believe is  
8 what the acronym stands for, versus Baird. The cite for that is  
9 438 F 3d, 595.

10 Under that decision, the 6th Circuit held that we have to  
11 have a hearing so that Dr. Haskell can provide evidence or  
12 information in support of his request for a variance. But that  
13 decision also made it very clear that the Hearing Examiner does  
14 not have jurisdiction to make a recommendation regarding whether  
15 the director should grant or deny the variance request. That is  
16 in the sole discretion of the director. So really, in short,  
17 this is Dr. Haskell's opportunity to give the director further  
18 information about the variance that they've requested.

19 The notice letters, and I'm going to talk about the two  
20 notice letters as well. But the notice letters both set forth  
21 the director's concerns about granting the pending request for a  
22 variance. Those are just that: Those are concerns. Those  
23 aren't facts that the State has to prove, because, again, we're  
24 not operating at this part of the hearing pursuant to 119.

25 What the State intends to do is call Dr. Haskell in its case

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1 on the 119 portion as to whether the facility has a transfer  
2 agreement, whether this meets the requirements for licensure and  
3 then continue its questioning for efficiency about the requested  
4 variance and issues pertinent to the requested variance. But,  
5 again, pursuant that court case, the Hearing Examiner does not  
6 have jurisdiction to make any recommendations to the director or  
7 make a decision regarding whether to grant or deny that  
8 variance.

9 The State will also call Tamara Malkoff to just explain  
10 generally, the licensure process of ASF, and Shannon Richey to  
11 explain, again, generally the process of a variance request.

12 Also here today is Roy Croy. Roy Croy, who for 30 years has  
13 been an invaluable member of the ODH team, has retired, but has  
14 come back in case we have any questions for him.

15 And as I mentioned earlier, and as we discussed in, at  
16 least, one teleconference, there are two Notice for Opportunity  
17 for Hearing letters in this case: One was issued in October of  
18 2012, and another one was issued in November of 2012.

19 The first one was a proposal not to renew the 2012  
20 application. Unfortunately, when processing that application,  
21 human error struck. The button was pushed, a letter was  
22 automatically generated by a computer. It went to Dr. Haskell  
23 saying, "Your license has been granted." The Department of  
24 Health quickly learned about that error, and we'll have some  
25 testimony about that today. It contacted Dr. Haskell and said

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1 that that was an error.  
2 The second Notice of Opportunity was issued in November.  
3 The second one has some language saying we don't want to waive  
4 the fact the facility never did comply and never qualified for  
5 the renewal; however, it called it a revocation.  
6 Procedurally, no matter how we proceed today, it doesn't  
7 really matter. The standard of review is the same for a  
8 proposal not to renew or a proposal to revoke. The evidence is  
9 the same. The arguments will be the same, so it would be the  
10 same way under either.  
11 And, at the conclusion of the hearing, the State would  
12 respectfully request that the Hearing Examiner appropriately  
13 find that the facility does not meet the requirement for  
14 licensure because it does not currently have a Written Transfer  
15 Agreement.  
16 Thank you.  
17 HEARING OFFICER KEPKO: Thank you.  
18 Do you want to make your opening now? I'll give you an  
19 opportunity in your case-in-chief or you can waive.  
20 MS. BRANCH: I'll make an opening now. I think that would  
21 be helpful.  
22 HEARING OFFICER KEPKO: Very good. Go ahead.  
23 MS. BRANCH: Again, I'm Jennifer Branch, and I represent  
24 Lebanon Road Surgery Center, Dr. Haskell and Valerie Haskell  
25 here at this hearing.

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1 I think I should start with a description of what we thought  
2 this hearing was about. I understand now from hearing the  
3 opening from the department that they are here for a different  
4 hearing than I thought I was here for.  
5 I understood that we were here because I filed the Notice of  
6 Appeal for both the October proposed nonrenewal of the license  
7 and a Notice of Appeal on the November proposed revocation of  
8 the license. In both of those letters, the director invited  
9 Dr. Haskell and Lebanon Road Surgery Center to come to the  
10 hearing and provide evidence about the variance.  
11 As far as we understand, and have been told by the  
12 department, the variance that was granted in 2010, and then  
13 modified and granted in 2011 is still in effect. It has never  
14 been revoked, and it has never been rescinded, and Dr. Haskell  
15 and LRSC have been operating under that variance for the last  
16 two years.  
17 The renewal of the license in question was filed with the  
18 department timely last August, August of 2012. And that renewal  
19 application was requesting the license to be renewed for the  
20 same reason it has been renewed for every year prior, and that  
21 the variance requirements were being met because we provided all  
22 the information that the department needed and had never  
23 received notice from the department, until this morning, that  
24 that variance was no longer in effect. And the department has  
25 never asked Dr. Haskell for any additional information since we

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1 filed that renewal application a year ago. So it sounds like  
2 the department has questions for Dr. Haskell, and today will be  
3 the first time we will learn of those.  
4 The Lebanon Road Surgery Center is an ASF, and it performs  
5 abortions. I think that is the real reason that we are here.  
6 Dr. Haskell and LRSC has not been able to get a Written Transfer  
7 Agreement from any hospital in the Cincinnati area. Lebanon  
8 Road is in Sharonville, Ohio. That's Hamilton County, Ohio.  
9 That's in the Cincinnati suburbs.  
10 The hospitals in the Cincinnati area have all declined to  
11 give a Written Transfer Agreement to Dr. Haskell's previous  
12 Cincinnati clinic, to his Dayton clinic, and now to his new  
13 clinic in Sharonville. Dr. Haskell has no control over any of  
14 those hospitals issuing him a Written Transfer Agreement. In  
15 fact, in his prior Cincinnati clinic, Women's Med Center on  
16 Jefferson Avenue, in the Clifton neighborhood of Cincinnati, the  
17 Jewish Hospital did issue a Written Transfer Agreement, but,  
18 eventually, rescinded that Written Transfer Agreement; and,  
19 since then, he's not been able to receive one in the Cincinnati  
20 area.  
21 Dr. Haskell is a licensed medical doctor in Ohio and in  
22 other states. He has been performing abortions and treating  
23 women for over 30 years. He operates, currently, two clinics:  
24 one in Cincinnati and one in Dayton. I'll only briefly say the  
25 Dayton clinic also does not have a Written Transfer Agreement

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1 and also is operating under the variance. It's been approved  
2 for a variance. There were years of litigation over that. But  
3 eventually, the department granted a variance. And the  
4 application for renewal for Dayton has also been pending for  
5 over a year. And, in fact, the renewal for 2013 has been  
6 applied for last month and that's been pending. The department  
7 has made no decision on the Dayton clinic. He still operates  
8 that clinic every day under the variance that was granted to him  
9 many years ago.  
10 Abortions are legal in Ohio. Performing abortions has been  
11 legal for more than 30 years. I understand it's a controversial  
12 topic and it is a political issue. You will see that -- we will  
13 put into evidence letters, e-mails, complaints from members of  
14 the public, over 200 of them, asking the director of the  
15 Department of Health to revoke Dr. Haskell's license and not  
16 renew his variance. Actually, they're pretty specific requests.  
17 240 -- I think 240 e-mails asking that the variance not be  
18 renewed.  
19 You'll hear a little bit of evidence about that. You'll  
20 also hear from Dr. Haskell to explain what the variance has been  
21 and how it's operated, and why we believe that it meets the  
22 requirements of the Written Transfer Agreement.  
23 Today, as we sit here, a Written Transfer Agreement is a  
24 regulatory requirement, and it is a part of the Administrative  
25 Code. It is not a statutory requirement. A few weeks from now,

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1 it will become a statutory requirement because the Legislature  
2 changed that with the Budget Bill in June.

3 The director, it is my understanding of why we're here, the  
4 director has proposed to not review LRSC's license and to revoke  
5 the license that's already been granted because there's no  
6 Written Transfer Agreement. We are all in agreement that  
7 there's no Written Transfer Agreement, and there's no way that  
8 we will get one.

9 The purpose of the variance is to provide an alternative  
10 method for an AFS to meet the rule if they can't meet it  
11 head-on.

12 We would ask, at the end of the hearing, for a  
13 recommendation from you, this Hearing Officer, to the director  
14 that the variance requirements in place at LRSC satisfy the  
15 Written Transfer Agreement requirement and that the variance  
16 procedures used at LRSC provide care -- sufficient care to the  
17 patients who need to be transferred to a hospital.

18 And I'll say that, for the three years that LRSC has been  
19 operating and the many patients they have treated, only one has  
20 ever needed to be transferred to a hospital. The department  
21 investigated that situation and found that Dr. Haskell and LRSC  
22 in were in compliance and that that patient was cared for  
23 properly.

24 So at the end, I, unlike the department, we would ask for a  
25 recommendation on whether the variance is appropriate.

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1 Thank you.

2 HEARING OFFICER KEPKO: Very good. Thank you.

3 Ms. Snyder, do you want to call your first witness? And  
4 I'll just remind both parties, I can tell you've been very well  
5 prepared, and I know very little about this case. I'll need the  
6 procedural end of it also, as well as the substance of law. So  
7 just keep that in mind as you present your testimony today.

8 Do you want to call your first witness?

9 MS. PACIOREK: With that in mind, we'll call Tamara Malkoff  
10 first.

11 (Witness sworn.)

12 HEARING OFFICER KEPKO: State your full name and spell your  
13 last name, please

14 THE WITNESS: My name is Tamara Malkoff. The last name is  
15 spelled M-A-L-K-O-F-F.

16 HEARING OFFICER KEPKO: Very good. Go ahead.

17 ---

18 TAMARA MALKOFF,  
19 being first duly sworn, as prescribed by law, was examined and  
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MS. PACIOREK:

23 Q. Good morning, Tamara.

24 A. Good morning.

25 Q. Can you tell us where you're employed?

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1 A. I'm employed with the Ohio Department of Health.

2 Q. What is your position with the Department of Health?

3 A. I am currently the chief of the Bureau of Information and  
4 Operational Support and the Division of Quality Assurance. And  
5 just for ease, Bureau of Information and Operational Support is  
6 often referred to as BIOS, B-I-O-S.

7 Q. Thank you for that.

8 How long have you been the chief of BIOS?

9 A. I've been the chief since May of this year.

10 Q. What was your position prior to that?

11 A. Prior to that, from June 2012 until May, I was the assistant  
12 chief of BIOS.

13 Q. How long have you been with the Department of Health  
14 overall?

15 A. I worked for the Department of Health in two different time  
16 frames.

17 Q. Okay.

18 A. Most recently, from October 2000 until the present.

19 Previously, I worked with the Department of Health from 1989 to  
20 1994.

21 Q. What did you do from 1989 to 1994?

22 A. I was an in-house attorney for the Department of Health. I  
23 represented, at that time, the -- it was referred as to the  
24 Bureau of Medical Services. Today it's referred to as the  
25 Division of Quality Assurance.

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1 Q. And from October of 2000, until you became assistant chief  
2 in 2012 of BIOS, what was your position?

3 A. I was an attorney with the Ohio Department of Health  
4 representing the Division of Family and Community Health  
5 Services.

6 Q. What do your job duties include in your current position?

7 A. As chief of BIOS, I oversee and manage the functions of the  
8 Bureau of Information and Operational Support and 39 employees  
9 in that bureau. The function of the bureau include finance  
10 administration, information and data management, and we also  
11 have some licensing and certification administration  
12 responsibilities. So we process applications for facilities  
13 that are required to have a license, and we process applications  
14 for facilities that apply for Medicare.

15 Q. Okay. And your bureau, you said, is within the Division of  
16 Quality Assurance?

17 A. Yes.

18 Q. What is the Division of Quality Assurance responsible for?

19 A. The Division of Quality Assurance is one of three divisions  
20 within the Department of Health. And within the Division of  
21 Quality Assurance, we have four bureaus. BIOS is one bureau.  
22 We have two survey bureaus. One is a survey bureau of long-term  
23 care facilities, nursing homes and residential care facilities.  
24 The other survey bureau is the Bureau of Community Health Care  
25 Facilities and Services, otherwise referred as to the

1 Non Long-term Care Survey Bureau.  
2 We also have a Bureau of Regulatory Compliance that makes  
3 recommendations on the types of enforcement action. The  
4 Division of Quality Assurance has several functions, and as you  
5 can guess, probably, from my testimony, primarily, the  
6 division's responsible for overseeing the licensing and Medicare  
7 Medicaid certification compliance of health care facilities and  
8 suppliers. That includes nursing homes, residential care  
9 facilities, and it includes health care facilities, which  
10 Lebanon Road Surgery Center is a health care facility as a  
11 licensed surgical facility, and several other types of  
12 facilities.  
13 Q. Okay. Are Ambulatory Surgical Facilities then considered  
14 health care facilities?  
15 A. Yes.  
16 Q. What role does BIOS play in the licensure process?  
17 A. When an application comes in for licensure, BIOS will review  
18 that application to determine is the application complete. We  
19 often will check the application to make sure, if it's an  
20 entity, that they are registered with the Secretary of State.  
21 We check to make sure it's complete. If it is not complete,  
22 then we generally send out a Request for Information, or a  
23 letter that we refer to as an RFI, to the facility in an effort  
24 to obtain a complete application. And, then, once we determine  
25 we have a complete applications, then that is, for most

1 Written Transfer Agreement?  
2 A. Yes. Most facilities are required. There is one provision  
3 in our rule that says if the facility is a provider-based entity  
4 of a hospital, then they do not need to have a formal agreement,  
5 they have to have a policy.  
6 Q. Can you tell us what a Written Transfer Agreement is?  
7 A. The Written Transfer Agreement is a written agreement that's  
8 between the Ambulatory Surgical Facility and a hospital for the  
9 transfer of patients from the facility to the hospital in the  
10 event of medical complications, emergency situations, or as  
11 other needs arise.  
12 Q. How often do facilities need to apply for renewal?  
13 A. Annually.  
14 HEARING OFFICER KEPKO: I'm sorry. I didn't hear you  
15 THE WITNESS: Annually. I'm sorry.  
16 BY MS. PACIOREK:  
17 Q. And do they need to submit the transfer agreement annually  
18 with each renewal?  
19 A. Yes.  
20 Q. Are transfer agreements processed by BIOS?  
21 A. Okay. The bureau -- we play a roll in reviewing the  
22 transfer agreement. The way our process is set up, when the  
23 transfer agreement comes in, I have been reviewing them for  
24 BIOS. We also have a staff member in our legal office review  
25 them, and we have a staff member in the Non Long-term Care

1 application, referred then to the survey bureau, whether it's a  
2 nursing home, bureau of long-term care, quality, or if it's a  
3 non long-term care facility, it would go to the Bureau of  
4 Non Long-term Care.  
5 Q. Okay. What is necessary for a complete application?  
6 A. If we're talking about Ambulatory Surgical Facilities, there  
7 is either a paper application form or it can be submitted  
8 electronically. It includes various information that's set  
9 forth in our rule that's required for an application. The  
10 facility also needs to submit an application fee. They are also  
11 required to submit a current State Fire Marshal's report showing  
12 that the facility is in compliance with the fire code.  
13 If the facility is accredited by an accreditation  
14 organization, they have to submit an award letter showing that  
15 they are accredited. And if the facility is required to have a  
16 transfer agreement, we ask for the transfer agreement at the  
17 time of the renewal application.  
18 Q. And what happens if an application does not have all of the  
19 required paperwork?  
20 A. For example, for an Ambulatory Surgical Facility, if it's  
21 prior to the end of the renewal month, and there's still time,  
22 we attempt to collect that information by notifying the facility  
23 and asking them for additional information.  
24 Q. When you're processing an application for an Ambulatory  
25 Surgical Facility, are those facilities required to have a

1 Survey Bureau review them. We review them at once so if there's  
2 is a question, we can coordinate a response and send one request  
3 out for information rather than have that broken up.  
4 Q. If a facility, for some reason, can't obtain a Written  
5 Transfer Agreement, is there an alternate way that they can  
6 achieve licensure?  
7 A. Yes. Our rules provide a process for requesting a variance  
8 to a requirement.  
9 Q. And what exactly is a variance?  
10 A. A variance is an alternative manner of meeting the intent of  
11 the requirement.  
12 Q. Does a facility that has been granted a variance to the  
13 Written Transfer Agreement have to renew its variance request  
14 with its license every year?  
15 A. Yes.  
16 Q. Is that a new requirement?  
17 A. It's my understanding that that was implemented in November  
18 of 2011.  
19 Q. And does BIOS process the variance requests?  
20 A. No. We if we obtain the variance request in lieu of a  
21 transfer agreement, then we will forward that to the survey  
22 bureau with the application.  
23 Q. Who makes the decision about whether to grant a variance?  
24 A. Our rules provide that the director has the authority to  
25 grant a variance.



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1 Q. Does anyone else have that authority?  
 2 A. No.  
 3 Q. How many Ambulatory Surgical Facilities does ODH license?  
 4 A. Earlier this week when I checked, we have 267 licensed  
 5 Ambulatory Surgical Facilities.  
 6 Q. Does that number fluctuate?  
 7 A. It can fluctuate. Yes.  
 8 Q. About how much per year would you say it fluctuates?  
 9 A. I have not really looked at that, but I would say five to  
 10 maybe ten a year.  
 11 Q. How many of those facilities have been unable to obtain  
 12 Written Transfer Agreements?  
 13 A. I'm aware of two.  
 14 Q. Do you know the names of those facilities?  
 15 A. Lebanon Road Surgery Center, the facility we're here talking  
 16 about, and Women's Med Center of Dayton.  
 17 Q. Are you familiar with Lebanon Road Surgery Center?  
 18 A. I am.  
 19 Q. And how are you familiar with them?  
 20 A. The renewal application for Lebanon Road Surgery Center came  
 21 in. Their renewal month was October 2012. I participated in  
 22 the review of that application.  
 23 Q. Is Lebanon Road an Ambulatory Surgical Facility?  
 24 A. Yes, it is.  
 25 Q. So as an Ambulatory Surgical Facility, is it required to

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1 have a Written Transfer Agreement?  
 2 A. Yes, it is.  
 3 Q. When was Lebanon Road first licensed?  
 4 A. It was first licensed in October 2010.  
 5 Q. Do you know whether it had a transfer agreement at that  
 6 time?  
 7 A. It did not.  
 8 Q. Did they obtain a variance, then, in 2010?  
 9 A. Yes.  
 10 Q. Can you turn to Exhibit 2. Do you recognize this document?  
 11 A. Yes. This is the renewal application that was submitted in  
 12 October 2012.  
 13 Q. So this is its most recent renewal application?  
 14 A. Yes.  
 15 Q. Did Lebanon Road submit a transfer agreement with this  
 16 application?  
 17 A. They did not.  
 18 Q. Did it submit a transfer agreement at any time after the  
 19 filing of the initial renewal application?  
 20 A. No.  
 21 Q. Did they submit a variance request?  
 22 A. Yes.  
 23 Q. Can you turn to what's been marked as State's Exhibit 3.  
 24 A. Okay.  
 25 Q. Do you recognize this document?

1 A. I do. This is a letter dated October 8th, 2012, that was  
 2 submitted on behalf Lebanon Road Surgery Center requesting a  
 3 variance.  
 4 Q. Has the director made a decision about this variance  
 5 request?  
 6 A. Not that I'm aware of.  
 7 Q. Can you turn to what's been marked as State's Exhibit 22.  
 8 Do you recognize this document?  
 9 A. I do. This is a letter dated October 18th, 2012, and it is  
 10 signed by Bridgette Smith, licensure administrator. This was a  
 11 letter that was sent out in error informing Dr. Haskell that the  
 12 renewal application had been approved.  
 13 Q. Did Lebanon Road meet the requirements of licensure when  
 14 this was sent out?  
 15 A. They did not.  
 16 HEARING OFFICER KEPKO: If I may ask a question.  
 17 MS. PACIOREK: Sure.  
 18 HEARING OFFICER KEPKO: When a letter like this goes out  
 19 indicating that the licensure has been approved, does that  
 20 include the variance?  
 21 THE WITNESS: This letter does not make any decision of the  
 22 variance. This letter is saying we're renewing your renewal --  
 23 approving your renewal application, but does not indicate one  
 24 way or the other whether the variance has been --  
 25 HEARING OFFICER KEPKO: But if the director renews the

1 application, doesn't that, by implication, indicate that the  
 2 variance has been approved?  
 3 THE WITNESS: In this case, the director had not made that  
 4 decision. It was a lower-level staff person, who, through our  
 5 electronic database, keyed in strokes that automatically sends  
 6 the letter out.  
 7 HEARING OFFICER KEPKO: But let's assume the letter was  
 8 correct. Just in general, when a letter like this is sent out,  
 9 does it indicate also that the variance, if a variance request  
 10 has been made, is approved also?  
 11 THE WITNESS: For a letter to be sent saying we're approving  
 12 the application, that would imply that there's either a transfer  
 13 agreement or a variance.  
 14 HEARING OFFICER KEPKO: Okay. Go ahead, Counsel. I'm  
 15 sorry.  
 16 BY MS. PACIOREK:  
 17 Q. I think, maybe to clarify some things, we need to address  
 18 how things used to work versus how things work now.  
 19 A. Okay.  
 20 Q. Prior to 2012, did the department process the transfer  
 21 agreement or the variance at the time of the initial application  
 22 renewal?  
 23 A. Prior to August 2012, the transfer agreement was not  
 24 considered at the time of renewal.  
 25 Q. And so if a facility did not submit a Written Transfer

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1 Agreement with its application, but had all of the other  
2 information at that time, would the facility be licensed?  
3 A. Yes. It was more of an automatic paper review process prior  
4 to August 2012. At that time, transfer agreements were not  
5 submitted with the renewal application with all of the other  
6 paperwork, and if we had a complete application, then the  
7 license renewal was approved.  
8 Q. And then, once it was approved, when was the transfer  
9 agreement reviewed?  
10 A. For Ambulatory Surgical Facilities that are licensed only,  
11 we do on-site visits prior to the renewal application. The  
12 transfer agreement would be reviewed by surveyors at the on-site  
13 visit prior to August.  
14 Q. Okay. Now, you said in August of -- October of 2012, things  
15 changed at the department?  
16 A. In August 2012, mid August to late August, we began  
17 requesting the renewal -- with the renewal application, a copy  
18 of the transfer agreement.  
19 Q. Why was that change made?  
20 A. That change was made because when we reviewed our rules  
21 under the Administrative Code, we came to the conclusion that,  
22 if you look at rule -- I believe it's under Rule 3701-83-04, the  
23 renewal application should include any other agreements that are  
24 required by the chapter. So to be in compliance with that rule,  
25 we began asking for the transfer agreement at the time of

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1 renewal.  
2 Q. Going back to Exhibit 22, you said this was an error that  
3 was made by a licensure specialist just keying in the wrong --  
4 A. Keystroke.  
5 Q. Okay. Did you inform Dr. Haskell of the error?  
6 A. Yes. The same day when we -- actually, I'm the person who  
7 noticed that the letter had been sent out. I talked with  
8 Bridgette Smith and asked her if she was aware it had been sent  
9 out, and she was not. At that time, we sent an e-mail to  
10 Dr. Haskell informing him that this was sent in error and that  
11 the renewal application was still under review.  
12 Q. Can you turn to what's been marked as State's Exhibit 23.  
13 A. Yes.  
14 Q. Is this the e-mail that the department sent to Dr. Haskell  
15 informing him of the error?  
16 A. Yes. Underneath the line that's across the page, that's the  
17 e-mail that went out from Bridgette Smith to Dr. Haskell.  
18 MS. PACIOREK: We have nothing further right now.  
19 HEARING OFFICER KEPKO: Cross-examination.  
20 MS. BRANCH: Yes, thank you.  
21 ---  
22 CROSS-EXAMINATION  
23 BY MS. BRANCH:  
24 Q. Are you aware that I appealed this e-mail? I filed a Notice  
25 of Appeal on the e-mail.

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1 A. I may have seen something. I don't recall.  
2 Q. Okay. And I'm just curious. Was my filing the Notice of  
3 Appeal on the e-mail, which basically undid the renewal, was  
4 that ever processed and brought to hearing, like we are here  
5 today?  
6 A. Not that I'm aware of.  
7 Q. After I filed that Notice of Appeal, the director drafted a  
8 Notice of Proposed Revocation of this renewal; is that right?  
9 A. I know that a letter went out in November.  
10 Q. Okay. And the November letter, if you need to look at it,  
11 that's Exhibit 1 in the book that's in front of you.  
12 A. Yes.  
13 Q. That's the one that's proposing to revoke the license. I  
14 think that's the one where -- maybe we're proceeding under both  
15 because I've filed so many Notices of Appeal.  
16 But this letter proposed to revoke the license; right?  
17 A. Yes.  
18 Q. And, then, the October letter, which is also in Exhibit 1,  
19 that's going to be at page 7, that's the letter from the  
20 department proposing to refuse to renew the license; right?  
21 A. Yes.  
22 Q. And that letter was sent immediately after that e-mail to  
23 Dr. Haskell saying he had been renewed?  
24 A. Right.  
25 Q. So the sequence of events were, October 18th, 2012, he gets

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1 the e-mail saying here's your license, you've been renewed, and  
2 he also gets a letter from the department; right? He didn't  
3 just get the e-mail.  
4 A. The letter was attached to the e-mail.  
5 Q. Okay. And the letter was signed by Bridgette Smith?  
6 A. Yes.  
7 Q. That's the standard letter he would have gotten in prior  
8 years?  
9 A. Right.  
10 Q. He got that on the 18th. Also on the 18th, he got the  
11 e-mail rescinding all that from Bridgette Smith?  
12 A. Yes.  
13 Q. And then, the next day, the 19th, the director issued this  
14 proposed refusal to renew the license; right?  
15 A. Yes.  
16 Q. But the license had been renewed the day before; right?  
17 A. I think that's the question -- one of the questions is the  
18 letter went out saying the renewal application had been  
19 approved, and we sent an e-mail saying it had not been approved,  
20 it was in error. It's still pending.  
21 Q. So we appealed this letter; right?  
22 A. Yes.  
23 Q. And, then, when the November letter came out, page of 1 of  
24 Exhibit 1, we appealed that one as well?  
25 A. Yes.

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1 Q. Just to set the record that we're here at this hearing, I  
2 believe, under both of those letters. Although, they both do  
3 two different technical things: Refuse to renew and revoke, the  
4 reasons for it are both the same; right?  
5 A. Correct.  
6 Q. And it's in these letters that the director has pretty much  
7 said that, because LRSC does not have a Written Transfer  
8 Agreement, they don't get a license; right?  
9 A. Yes.  
10 Q. That's been true since -- I mean, LRSC hasn't ever had a  
11 Written Transfer Agreement?  
12 A. That's my understanding.  
13 Q. And also, I just wanted to ask about the offer in this  
14 proposed revocation letter, Exhibit 1, page 3. I'll ask you to  
15 look at the first full paragraph on page 3, that starts, "You  
16 may request a hearing before me." Do you see that?  
17 A. Yes.  
18 Q. In the second sentence, it says, "At any such hearing,  
19 evidence regarding the variance may also be presented for  
20 consideration." Did I read that correctly?  
21 A. Yes, you did.  
22 Q. And did the director invite Lebanon Road Surgery Center to  
23 do the same thing in the October Proposed Refusal to Renew,  
24 which would be same exhibit, and it would be at the bottom of  
25 page 8?

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1 A. Yes.  
2 Q. Final paragraph, again, starting with, "You may request a  
3 hearing." Second sentence, "At any such hearing, evidence  
4 regarding the evidence may also be presented for consideration."  
5 Did I read that correctly?  
6 A. Yes, you did.  
7 Q. Was that the director's intent to give Lebanon Road Surgery  
8 Center the opportunity to bring the evidence --  
9 MS. PACIOREK: Objection.  
10 HEARING OFFICER KEPKO: Pardon. Hold on a minute. I  
11 thought I heard an objection.  
12 MS. BRANCH: I didn't get question out.  
13 HEARING OFFICER KEPKO: Let me hear what's --  
14 MS. PACIOREK: Go ahead. I'm sorry.  
15 HEARING OFFICER KEPKO: There's no objection?  
16 MS. SNYDER: We need to hear the full question.  
17 HEARING OFFICER KEPKO: Go ahead and ask your question.  
18 BY MS. BRANCH:  
19 Q. And it was the director's intent to give Lebanon Road  
20 Surgery Center the opportunity to present evidence of the  
21 request for a various at the hearing?  
22 MS. PACIOREK: Objection. She can't testify to the  
23 director's intent.  
24 HEARING OFFICER KEPKO: She just asked if the director's  
25 intent was -- I would agree. I think that this witness can't

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1 get into the mind of the director. I think you can question her  
2 about the letter, which you're doing, but I'm not sure the  
3 intent of the director is within her knowledge.  
4 BY MS. BRANCH:  
5 Q. After reading these two sentences in these two letters, if  
6 you were the recipient of these letters, would you believe you  
7 could bring evidence of the variance for consideration by the  
8 department at the hearing?  
9 A. Yes.  
10 Q. And that the purpose of the hearing is for the Hearing  
11 Officer to make recommendations to the director; is that right?  
12 A. It's my understanding that the Hearing Officer is to make a  
13 recommendation on the proposal to revoke or the proposal to not  
14 review.  
15 Q. Okay. Does the Hearing Officer also have the ability to  
16 consider and make a recommendation on the variance?  
17 A. I don't feel I'm qualified to answer that question.  
18 Q. Who would be?  
19 A. To me, it appears to be more of a legal question.  
20 Q. And would the director know what his intent was?  
21 A. I would think the director would know what his intent is.  
22 Q. Okay. So maybe I need to ask the director that?  
23 A. Is that a question?  
24 Q. Yes. If you asked the director that question.  
25 A. I don't think I can answer that.

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1 Q. Have you had any conversations with the director about this  
2 hearing?  
3 A. I have not.  
4 Q. If you could turn to Exhibit 18 in this same book. I'm  
5 sorry. Wrong one. Exhibit 20 in the same book.  
6 This is a July 27, 2012, letter from Rebecca, is it Maust?  
7 I've never heard it, so I guess I've never pronounced it  
8 correctly myself.  
9 This is a July 27th, 2012, letter from Rebecca Maust to  
10 Dr. Haskell and Lebanon Road Surgery Center; is that right?  
11 A. Yes. I'm not familiar with this letter personally. I've  
12 seen it. It's a letter dated July 27th, 2012, to Dr. Haskell,  
13 and it's signed by Rebecca Maust.  
14 Q. And this would be the month before the renewal of the  
15 license; is that right?  
16 A. I believe the license renewal month is October.  
17 Q. Oh, that's right, for Lebanon Road Surgery Center it's  
18 October. You're correct.  
19 So this is the month before that change was made that you  
20 talked about during your direct in August of 2012?  
21 A. Yes. This was the month before we started requesting  
22 transfer agreements with the renewal application.  
23 Q. All right. I just want to ask you about a sentence in her  
24 letter at the top of page 2. The beginning of the sentence is,  
25 "Therefore, we remind you that your variance continues at the

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1 director's discretion." Do you see that?  
2 A. I do.  
3 Q. Do you know, sitting here today, if the director has ever  
4 rescinded the variance that was granted for LRSC in 2011?  
5 A. I am not aware.  
6 Q. Do you know if the director has revoked the variance that  
7 was granted in 2011?  
8 A. I'm not aware.  
9 Q. The change that was made in August that you testified to  
10 that, now, a Written Transfer Agreement would need to be  
11 presented with the renewal.  
12 A. Yes.  
13 Q. Was that change in writing? Is that a rule change or a  
14 regulation change?  
15 A. It was not a rule change. We interpreted the rules to  
16 require it.  
17 Q. And when you made that interpretation, how did you inform  
18 the ASFs of that rule change?  
19 A. We began requesting the transfer agreement, if it wasn't  
20 sent in with Request for Information letters. We also sent a  
21 letter in October 2012 to all licensed Ambulatory Surgical  
22 Facilities telling them. It also went to -- there was a letter  
23 that went to health care facilities that are required to have an  
24 agreement. So it went to licensed Ambulatory Surgical  
25 Facilities, licensed dialysis centers, and licensed birthing

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1 centers, that, at the time of renewal, if they are required to  
2 have a transfer agreement of some kind depending on the rule,  
3 that they would have to submit that with the renewal  
4 application.  
5 Q. And that was October 2012?  
6 A. Yes.  
7 Q. The same month that this facility needed to renew its  
8 license?  
9 A. Same month.  
10 Q. Do you have a copy of that letter?  
11 A. I don't have a copy with me. We generated a letter and did  
12 a mail merge, so they were sent out, and it automatically  
13 inserted the address to all licensed facilities.  
14 Q. Do you have a copy that was sent to Dr. Haskell or LRSC?  
15 A. I don't have it with me.  
16 Q. So the change was made mid August of 2012?  
17 A. Yes.  
18 Q. At that time, Dr. Haskell and LRSC were not notified of that  
19 change at all; right?  
20 A. I don't know for sure whether or not they received a Request  
21 for Information. I don't know.  
22 Q. If they did not receive a Request for Information, then they  
23 would not have been notified that the variance needed to be  
24 resubmitted for 2012; is that right?  
25 A. I'm confused by your question. Are we talking about the

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1 transfer agreement or the Request for Variance?  
2 Q. Either one.  
3 A. The letter that we sent out talked about the requirement to  
4 have the transfer agreement submitted with the renewal  
5 application. I don't believe there was any mention of a  
6 variance in that letter.  
7 Q. Was there anything in writing to -- let me back up. Maybe I  
8 don't understand your change in August of 2012.  
9 Was the change just to ASFs Written Transfer Agreements,  
10 submit your Written Transfer Agreements?  
11 A. No.  
12 Q. Did it also require Dr. Haskell, since he's the only one  
13 with the variance, to also submit a new Request for Variance?  
14 A. It did not address the variance.  
15 Q. So there was no change, then, in the process that, let's  
16 say, was in effect the year before, in 2011, for Dr. Haskell?  
17 A. If you're referring to the variance, it's my understanding  
18 that there was, in November 2011, a written protocol that was  
19 sent to all licensed Ambulatory Surgical Facilities that  
20 addressed the protocol for variances and when they expired.  
21 Q. Okay. And we'll get to that in a second. Other than that  
22 October -- I think the letter was sent in November. No. The  
23 protocol was changed in November 2011, and the letter was sent  
24 in December of 2011?  
25 A. Yes.

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1 Q. Other than that November 2011 protocol change, was there  
2 anything else in writing given to LRSC, or Dr. Haskell, that  
3 would alert him to the fact that when he renews from now on his  
4 ASF license, he also needs to renew his variance request?  
5 A. I can only speak to -- I'm not aware of anything that came  
6 out of BIOS.  
7 Q. Are you aware -- so out of BIOS, nothing came out?  
8 A. Not that I can recall.  
9 Q. How about the whole department? Are you aware of that?  
10 A. I can't say. The survey bureau, oftentimes, will have  
11 communication with our licensed facilities, so I don't know if  
12 there was communication between the survey bureau and  
13 Dr. Haskell, but I'm not aware of anything coming out of BIOS.  
14 Q. And is Rebecca Maust from the survey bureau?  
15 A. No. She's the division chief. She's over all of the  
16 bureaus.  
17 Q. She would be able to answer questions about that survey  
18 bureau?  
19 A. She should. I don't know what she can answer, but she is  
20 responsible for the Division of Quality Assurance.  
21 Q. It's under her?  
22 A. It is under her.  
23 Q. That is helpful.  
24 If you could turn to the other book, this is the LRSC  
25 Exhibit Book, Exhibit A, and along with Exhibit A is going to be

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1 Exhibit B. Exhibit B is the Operation Procedure Variance  
2 Request Processing Ambulatory Surgical Facility Transfer  
3 Agreement Requirement. Is that the appropriate title of that  
4 procedure?  
5 A. Yes.  
6 Q. My shorthand for that has been the variance protocol; is  
7 that fair?  
8 A. That will work for me.  
9 Q. Okay. So this variance protocol was drafted by ODH in  
10 November of 2011; is that right?  
11 A. Correct.  
12 HEARING OFFICER KEPKO: You're referring to Exhibit B now?  
13 MS. BRANCH: Yes. I'm focusing on Exhibit B.  
14 BY MS. BRANCH:  
15 Q. This exhibit was not done through regular administrative  
16 rule making; is that right?  
17 A. It was not adopted as a rule.  
18 Q. Okay. It's an internal procedure at the department?  
19 A. Correct.  
20 Q. But you wanted the ASFs for whom this would apply to know  
21 about it; right?  
22 A. That's my understanding. This predated me coming to the  
23 Division of Quality Assurance, but that's my understanding.  
24 Q. Dr. Haskell is the only one for whom this would apply at the  
25 time?

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1 of a variance currently that they needed to do anything about  
2 their current variance for the Written Transfer Agreement rule?  
3 A. I don't see anything.  
4 Q. So if I understand your testimony, then, somewhere after  
5 this December 11 letter was sent out with the new protocol  
6 internally at ODH, the process changed where a variance would  
7 need to be requested every time a renewal was requested; is that  
8 right?  
9 A. Yes. That's how I read the variance protocol.  
10 Q. And how was that decision communicated to Dr. Haskell or  
11 LRSC?  
12 A. I don't have knowledge of that.  
13 Q. Do you know if it ever was?  
14 A. I don't have knowledge of whether it was.  
15 Q. Are you familiar with House Rule 59, the Budget Bill?  
16 A. A little bit.  
17 Q. Does that make changes in the variance for a Written  
18 Transfer Agreement?  
19 A. I don't remember the exact details, but it does put the  
20 requirement for a transfer agreement and variance request in  
21 statute.  
22 Q. And if this isn't a fair question for you, just tell me.  
23 A. Okay.  
24 Q. Is it fair to summarize that all of your internal protocols  
25 in Exhibit B have been codified now into statute?

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1 A. I believe so.  
2 Q. His two clinics: Dayton and Cincinnati?  
3 A. I believe so.  
4 Q. Let's go back to the cover letter then, and that's Exhibit  
5 A. That's the letter explaining to the ASFs with an ODH  
6 variance the new procedure for reviewing variance requests; is  
7 that right?  
8 A. Yes. It's my understanding that this is a letter that was  
9 sent out to all licensed surgical facilities with the variance.  
10 Variance protocol.  
11 Q. In the second paragraph, it says, "Please take a moment to  
12 review the attached internal review process at the Bureau of  
13 Community Healthcare Facilities and Services within the Division  
14 of Quality Assurance. We'll use this operational procedure for  
15 certain variances requested in the future"; is that right?  
16 A. Yes.  
17 Q. Would it be fair for the recipient of this letter to expect  
18 that, if he were to request a variance in the future, this  
19 protocol would need to be followed?  
20 A. Yes.  
21 Q. Is there anything in this cover letter that alerts the ASF  
22 that currently has a variance that they need to follow the  
23 protocol in December of 2011?  
24 A. I don't see anything.  
25 Q. Is there anything in this letter that alerts the recipients

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1 A. I believe it's very -- I don't know if it's exact word for  
2 word, but it's very close.  
3 Q. And those changes take place at the end of this month?  
4 A. That's my understanding, yes.  
5 Q. And has the department issued any new rules or internal  
6 procedures or protocols to help you comply with House Bill 59?  
7 A. No, we have not adopted any rules at this time.  
8 Q. Have you proposed any or drafted any?  
9 A. Not that I'm aware of.  
10 Q. Has the department alerted the ASFs in any way how they need  
11 to comply with House Bill 59?  
12 A. I don't know if the department has. I'm not aware.  
13 Q. Who would know that, if there was?  
14 A. There could be notification by various different meetings.  
15 We have provider meetings where associations come to meet.  
16 Q. Who from the department would know the answer to that  
17 question? I'm looking for a witness.  
18 A. Communication comes out of our legal office. It could come  
19 out from various areas of our department.  
20 Q. You said in your testimony that the director is the only  
21 person of authority to grant a variance?  
22 A. Yes.  
23 Q. Do you know whether the variance is currently under review  
24 by the director for Lebanon Road Surgery Center?  
25 A. My understanding is that the variance request that was

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1 submitted in October with the renewal application is pending.  
2 Q. And do you have any input into that decision?  
3 A. I do not.  
4 Q. And has anybody asked you -- it's a Request for  
5 Information -- to send out any RFIs to Dr. Haskell or Lebanon  
6 Road Surgery Center?  
7 A. Not in the -- through our renewal process, no.  
8 Q. So nothing in the last year that you've needed to send out a  
9 RIF?  
10 A. I have not. Correct.  
11 Q. Do you know what's holding up that variance?  
12 A. I do not.  
13 MS. PACIOREK: Objection.  
14 BY MS. BRANCH:  
15 Q. Do you know anything about the Dayton license for the  
16 Women's Med Center, which Dr. Haskell also works at?  
17 A. I know that the renewal application is pending.  
18 Q. Okay. And that one's been pending for over a year?  
19 A. I believe so, yes.  
20 Q. And they submitted a new one for 2013; is that right?  
21 A. Yes.  
22 Q. And that's also pending?  
23 A. Yes.  
24 Q. And do you know whether that variance has ever been  
25 rescinded or revoked for the Dayton clinic?

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1 A. I don't know.  
2 Q. And do you know if that's also pending by the director?  
3 It's pending for the director's decision on that one as well?  
4 A. Yes.  
5 Q. Have you been asked to send out any Requests for Information  
6 on that one in the last year?  
7 A. No.  
8 Q. The renewal application that Dr. Haskell did submit for LRSC  
9 in October of 2012, did that application meet all of the ASC  
10 regulations and requirements other than the one for the Written  
11 Transfer Agreement?  
12 A. I'd have to look for sure, but that's what I recall is that  
13 they don't have a transfer agreement, and that was the  
14 only piece of the information that did not make the application  
15 complete. I guess, it was forwarded then to the Non Long-term  
16 Care Survey Group.  
17 Q. If there had been a Written Transfer Agreement, the  
18 application would have been approved?  
19 A. If there had been a transfer agreement?  
20 Q. Correct.  
21 A. I can't say that because there's another step in the  
22 process. The application gets forwarded to the Non Long-term  
23 Care Survey Group for an on-site visit.  
24 Q. Were you aware that the Lebanon Road Surgery Center had had  
25 several on-site visits in the calendar year 2012? The last one

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1 was in April of 2012.  
2 A. I do know that they had on-site visits, yes.  
3 Q. All of those visits found that they were in compliance with  
4 the regulations?  
5 A. That's my recollection. Yes.  
6 Q. Would a new survey be needed, then, in October or would the  
7 last one done in April be sufficient?  
8 A. That's really a decision that's made by the Non Long-term  
9 Care Survey Bureau.  
10 Q. Is that something Rebecca Maust would know?  
11 A. She may know that.  
12 Q. And the other rules for an Ambulatory Surgery Center cover  
13 everything from patient care to credentialing of doctors to  
14 policies and procedures to equipment?  
15 A. Yes.  
16 Q. All kind of things are covered under all the other rules?  
17 A. Yes.  
18 Q. And those are to ensure that the patients are cared for and  
19 get appropriate medical care while they're in the facility?  
20 A. Yes.  
21 Q. That's the purpose of having those rules; right?  
22 A. Yes.  
23 Q. And making sure the ASF is in compliance with those rules?  
24 A. Yes.  
25 Q. Are you aware of the reasons that the director gave in his

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1 Proposed Revocation and Proposed Nonrenewal letters?  
2 A. I'm only aware from reading the letter.  
3 Q. He had some concerns about information that he felt hadn't  
4 been provided in a timely manner to the department?  
5 A. That's what the letter seems to say. Yes.  
6 Q. Are you aware of any of the details of those issues?  
7 A. Only from what I've read in the letter.  
8 Q. Have you had any communication with the governor's office  
9 about Dr. Haskell or Lebanon Road Surgery Center?  
10 A. I have not.  
11 Q. Are you aware that the Department of Health communicates  
12 with the governor's office about the licensure for Dr. Haskell's  
13 two clinics?  
14 A. I'm aware that there is communication with the governor's  
15 office. My experience in the Office of the General Counsel is  
16 it's very common and very frequent for the department to  
17 communicate with the governor on any high-profile cases, and we  
18 are -- so I'm aware that there's been communication; I don't  
19 know what that communication is.  
20 Q. Let me see if you're on this e-mail. Were you aware that  
21 the Department of Health received any complaints by e-mail from  
22 the public about Dr. Haskell's variance at Lebanon Road Surgery  
23 Center?  
24 A. I haven't seen any, but I've heard there were e-mails that  
25 came in.

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1 Q. Okay. One of the summaries of all of those e-mails was from  
2 a Robert Jennings. Do you know who he is?  
3 A. Yes.  
4 Q. He's with the department's press --  
5 A. Yes. Head of our Public Affairs Office.  
6 Q. It looks like he tallied up 240 e-mails related to  
7 Dr. Haskell's variance.  
8 MS. SNYDER: Are you looking at a specific document?  
9 BY MS. BRANCH:  
10 Q. I'm looking at the -- you're welcome to look at this to see  
11 whether you were on it, and I notice you weren't. It's Exhibit  
12 CC in our book, and it's page 2.  
13 He just makes reference to 240 e-mails to the director of  
14 Health's public e-mail account from citizens who would like ODH  
15 to rescind a variance issued to Dr. Haskell.  
16 A. Yes.  
17 Q. And you're aware of that public communication to the  
18 department?  
19 A. I'm aware that e-mails came in. I did not see any of the  
20 specific e-mails.  
21 Q. There's mentioned in another e-mail about Dr. Haskell's  
22 clinics being red flagged. Are you familiar with that  
23 term? This would be in the next page, page 3.  
24 A. Under Exhibit CC?  
25 Q. Let me see if I can find the one that uses that word.

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1 A. No.  
2 Q. I guess it didn't use that phrase there. I think it must be  
3 a different e-mail.  
4 Were you aware that the legal department at ODH had anything  
5 to do with the variance requests?  
6 A. It's our policy, when the information is submitted to the  
7 director, it goes through our legal office.  
8 HEARING OFFICER KEPKO: The variance request goes through  
9 the legal department?  
10 THE WITNESS: Just about everything that goes to the  
11 director for signature is routed through our legal office first.  
12 HEARING OFFICER KEPKO: So after it's gone through a review  
13 process within your bureau, it then is sent to legal; is that  
14 correct?  
15 THE WITNESS: It goes from my bureau to the survey bureau.  
16 From there, oftentimes, the procedure I'm talking about, in  
17 general, will go through the division chief, through legal to  
18 the director's office.  
19 BY MS. BRANCH:  
20 Q. On page 4, I think you're on this e-mail. This is an e-mail  
21 about the Dayton center.  
22 A. I'm sorry. On page 4 of the same exhibit?  
23 Q. Yeah. You know, I numbered these pages on the bottom  
24 left-hand corner. There are lots of numbers on these pages.  
25 A. I didn't see that.

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1 Q. "We need to get the okay from legal before we renew." That  
2 was for the Dayton center?  
3 A. Yes.  
4 Q. Do you know what legal was doing with it?  
5 A. Because we would hear from legal oftentimes whether or not  
6 the variance request had been approved or denied, so that was  
7 just -- we don't go forward with either approving or sending it  
8 over to the enforcement bureau without knowing whether the  
9 director had granted a variance.  
10 Q. Legal was your -- the way of knowing what the director  
11 decided?  
12 A. That's a lot of times our communication goes through our  
13 legal office. Yes.  
14 Q. And that was true, also, I guess, for the Cincinnati center;  
15 that you're waiting for further notice from the legal department  
16 on the variance?  
17 A. Yes.  
18 Q. And from the director?  
19 A. Yes.  
20 Q. You mentioned Rule 3701-83-04.  
21 A. I believe that was the correct rule.  
22 Q. I'm not going to hold you to it.  
23 A. Thank you.  
24 Q. But you went back and looked at the regulations for an ASF  
25 to submit the renewal application?

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1 A. Yes.  
2 Q. And you did that when you came in as the assistant director?  
3 A. Yes.  
4 Q. I saw a bunch of e-mails about that. If I don't summarize  
5 correctly, just go ahead and correct me. When you came in and  
6 noticed that, you started to make some changes on how those  
7 processes would be done?  
8 A. Not me alone. I called in other people in the division and  
9 we discussed the language of the rule and our process; and we  
10 were in agreement that we should request the transfer agreements  
11 along with the renewal application.  
12 Q. Was it your understanding that that regulation required the  
13 Written Transfer Agreement to be submitted with each  
14 application?  
15 A. I believe the rule -- and don't hold me to it. I'm  
16 paraphrasing. I believe the rule lists different documents that  
17 need to be submitted with the renewal application, and it says,  
18 "Any other agreements that are required by the chapter." And  
19 since the transfer agreement is required under our rules, we  
20 felt that it needed to be submitted with the renewal  
21 application.  
22 Q. Were those agreements that had changed since the last time,  
23 or just any agreement?  
24 A. With every renewal application, we are asking for the  
25 transfer agreement. We believe that's what the rule requires.

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1 Q. Has there been any clarification of 3701-83 to make it a  
2 formal rule of the department about what needs to be submitted  
3 with an application with regard to Written Transfer Agreements?  
4 A. I'm not sure I can -- can you ask that again?  
5 Q. Sure. You interpreted this rule in a certain way?  
6 A. Yes.  
7 Q. Has the rule been amended to make it clear to AFSs?  
8 A. The rule has not been amended. I felt it was clear.  
9 Q. And that rule did not address variances; is that right?  
10 A. No. Variance is addressed in a different rule.  
11 MS. BRANCH: I have no further questions for you now.  
12 Thank you.  
13 THE WITNESS: Thank you.  
14 HEARING OFFICER KEPKO: Any redirect?  
15 MS. PACIOREK: Just a few.  
16 ---  
17 REDIRECT EXAMINATION  
18 BY MS. PACIOREK:  
19 Q. Can you turn back to State's Exhibit 22, please. This was  
20 the letter that went out in error confirming the renewal;  
21 correct?  
22 A. Yes.  
23 Q. At the time that this letter was sent, did the facility meet  
24 the requirements for licensure?  
25 A. No, they did not.

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1 Q. Does BIOS play any part in gathering information also for  
2 the director to consider to variance requests?  
3 A. No. Other than if the variance request itself come in, it's  
4 attached to the application and forwarded to the Non Long-term  
5 Care Survey Bureau.  
6 Q. Okay. So that is not your or your bureau's responsibility?  
7 A. Correct.  
8 Q. If you can go to State's Exhibit 11.  
9 HEARING OFFICER KEPKO: I'm sorry. What number?  
10 MS. PACIOREK: Since we started in theirs, we'll do it in  
11 theirs.  
12 BY MS. PACIOREK:  
13 Q. Exhibit B, page 4, Paragraph 7.  
14 In the second sentence of that, it says, "A variance shall  
15 not exceed the length of the requesting facility's license and  
16 shall be requested each applicable license period." Did I read  
17 that correctly?  
18 A. Yes, you did.  
19 HEARING OFFICER KEPKO: And if I just may ask, this is the  
20 variance protocol that we're discussing now?  
21 THE WITNESS: Yes.  
22 HEARING OFFICER KEPKO: And that's what's being codified in  
23 House Bill 59?  
24 THE WITNESS: Yes.  
25 HEARING OFFICER KEPKO: And even though it's being codified,

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1 this has been the practice of the department since these letters  
2 went out in October, November?  
3 THE WITNESS: This is the written protocol. I believe  
4 there's been a variance protocol much longer than that, but the  
5 written protocol was from November 2011.  
6 HEARING OFFICER KEPKO: Exhibit B?  
7 THE WITNESS: Yes.  
8 HEARING OFFICER KEPKO: And that has been the practice of  
9 the department since this protocol was published?  
10 THE WITNESS: Yes.  
11 HEARING OFFICER KEPKO: And that protocol now is going to be  
12 in the formal statute?  
13 THE WITNESS: Yes.  
14 HEARING OFFICER KEPKO: Okay.  
15 BY MS. PACIOREK:  
16 Q. And you also testified that this went out to Lebanon Road in  
17 December 2011; correct?  
18 A. Yes. It's my understanding this went out to all licensed  
19 Ambulatory Surgical Facilities.  
20 Q. And if you go to State's Exhibit -- I'm sorry. We're going  
21 back and forth. I apologize.  
22 A. That's okay.  
23 Q. State's Exhibit 3. This is Lebanon Road's variance request  
24 for 2012; correct?  
25 A. Yes.

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1 Q. And what's the date on this?  
2 A. October 8th, 2012.  
3 Q. And did this request come in around the same time as the  
4 application for renewal?  
5 A. Yes it.  
6 Q. So it was submitted with the application?  
7 A. Yes. Sometimes they come in -- if they come in  
8 electronically, the documents may be faxed, but it came in  
9 around the same time as the renewal application.  
10 Q. Okay. Is it normal for the department to communicate with  
11 the governor's office?  
12 A. Based on my experience, it is common for every level agency  
13 to have communication with the governor's office about a variety  
14 of policies.  
15 MS. PACIOREK: We have nothing further.  
16 HEARING OFFICER KEPKO: Thank you for your testimony today.  
17 THE WITNESS: Thank you.  
18 MS. SNYDER: The State would like to call Dr. Haskell,  
19 please.  
20 HEARING OFFICER KEPKO: Dr. Haskell, do you want to have a  
21 seat at the head of the table there.  
22 (Witness sworn.)  
23 HEARING OFFICER KEPKO: Do you want to state your full name,  
24 sir, and spell your last name.  
25 THE WITNESS: William Mudd, two D's, Martin Haskell,



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1 H-A-S-K-E-L-L.  
 2 HEARING OFFICER KEPKO: Very good.  
 3 ---  
 4 WILLIAM M. M. HASKELL,  
 5 being first duly sworn, as prescribed by law, was examined and  
 6 testified as follows:  
 7 CROSS-EXAMINATION  
 8 BY MS. SNYDER:  
 9 Q. Thank you. Hi, Dr. Haskell.  
 10 A. Hi. How are you today?  
 11 Q. We met off the record. I'm Melinda. I'm a lawyer for the  
 12 Department of Health. I understand there's a lot of background  
 13 noise. If you can't hear me, let me know. I'll just repeat the  
 14 question.  
 15 A. I sure will.  
 16 Q. You know, I think that your counsel has a copy of your CV in  
 17 that binder right there, and I believe it's been marked as  
 18 Respondent's H. If you could turn to that, I'd like to ask you  
 19 some information about your background.  
 20 MS. BRANCH: HH.  
 21 MS. SNYDER: Thank you.  
 22 BY MS. SNYDER:  
 23 Q. HH. All of the way to the back.  
 24 And I assume, since we're putting this into evidence today,  
 25 you've reviewed this before you came today?

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1 Q. Did you ever practice in Kentucky?  
 2 A. No.  
 3 Q. And your education here, in the middle of the page, it says  
 4 that you went to medical school at the University of  
 5 Alabama School of Medicine in Birmingham?  
 6 A. Correct.  
 7 Q. And you graduated in 1972?  
 8 A. Correct.  
 9 Q. You received your BA from Ohio Wesleyan in 1968?  
 10 A. Correct.  
 11 Q. And your professional training. Could you please walk me  
 12 through your postgraduate medical education, starting right out  
 13 of medical school?  
 14 A. Let's start down at the bottom of the page. That's the  
 15 rotating internship in anesthesia at the University of Alabama  
 16 in Birmingham. That was for one year, July '72 through June of  
 17 '73.  
 18 Subsequent to that, I took a year off and went to south  
 19 Alabama for an general practitioner. And, then, in the  
 20 meantime, I had found a residency in general surgery at the  
 21 University of Cincinnati. I came here in 1974 and did roughly  
 22 18 months in a general surgery residency program at the  
 23 University of Cincinnati.  
 24 There was a six-month hiatus during which I worked mostly in  
 25 emergency rooms around the state of Ohio on, sort of, a locums

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1 A. I've reviewed it in the past. I did not review it before  
 2 sending it to Ms. Branch.  
 3 Q. Does it look, as you sit here today, like a current and  
 4 accurate copy of your CV?  
 5 A. My District of Columbia, I did not review, so it would be  
 6 inactive.  
 7 Q. Walk me through. So DC -- you're under "Licenses" at the  
 8 top of the page?  
 9 A. Correct.  
 10 Q. District of Columbia, you did not renew. When did that  
 11 expire?  
 12 A. It expired within the last three months.  
 13 Q. So in 2013?  
 14 A. Yes.  
 15 Q. Okay. Are all of the other licenses active?  
 16 A. Indiana, Illinois, Maryland. Yes.  
 17 Q. Alabama, inactive; and Kentucky inactive?  
 18 A. Correct.  
 19 Q. Why are those licenses inactive?  
 20 A. It's been years.  
 21 Q. You just didn't renew them?  
 22 A. I trained in Alabama. At some point, I stopped renewing it.  
 23 Kentucky, initially, I thought, because I was writing  
 24 prescriptions for patients in Kentucky that I needed a Kentucky  
 25 license, and then I realized I didn't.

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1 tenens basis. In July of '76, I started residency in family  
 2 practice. I served as a chief resident, actually for, I think,  
 3 only for six months was the chief residency period, not a full  
 4 years. Otherwise, I was a senior resident during that period of  
 5 time. I completed a family practice residency and took my  
 6 boards and passed my boards in family practice in 1978, which is  
 7 indicated right above the word "Education."  
 8 Q. Thank you. I was looking at that.  
 9 So you, at one point, were board certified in family  
 10 practice?  
 11 A. That's correct.  
 12 Q. Are you currently board certified in any specialty area?  
 13 A. I am not.  
 14 Q. You are not?  
 15 A. Yes.  
 16 Q. Okay. And is there a reason that you let your board  
 17 certification go in 1985?  
 18 A. I had not been practicing family practice for over six  
 19 years, and I didn't feel, nor was I doing any kind of general  
 20 practice or general medicine of any kind. At that point, my  
 21 practice was 100 percent pregnancy terminations, and I just did  
 22 not feel the need to put forth the effort to bring myself up to  
 23 date on all of the broad spectrum of activities that are  
 24 required in family practice.  
 25 Q. Okay. Let's look at your professional experience on page 2,

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1 please.  
2 A. Uh-huh.  
3 Q. I think you've already testified about your emergency room  
4 work. That was 1974 to 1978?  
5 A. Well, I did moonlight. I mean, what I indicated earlier was  
6 that in the hiatus between '75 and '76, I was doing full-time  
7 emergency room work with and a hiatus between my two residency  
8 programs. But all through my residency programs, I did do some  
9 evening or weekend moonlighting in various emergency rooms  
10 around the state.  
11 Under "Professional Experience," that would be -- well, I  
12 said '74 through -- correct there. I was also medical director  
13 of the emergency room in Jewish Hospital after I finished with  
14 my family practice residency, from '78 through '79, for a period  
15 about a year and a half. I was actually running the Jewish  
16 Hospital emergency room.  
17 Q. And while we're on the topic of Jewish Hospital, you have in  
18 the middle of the page, "Hospital Affiliations."  
19 A. Uh-huh.  
20 Q. You have that you're currently affiliate staff at Jewish  
21 Hospital; is that correct?  
22 A. That is correct.  
23 Q. Do you hold admitting privileges at any other hospital right  
24 now?  
25 A. No.

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1 Q. It states that you, at one point, held courtesy staff  
2 positions at Jewish Hospital from 1978 to 2011?  
3 A. Correct.  
4 Q. Why the change to affiliate from courtesy staff?  
5 A. Lack of admissions. In other words, the hospitals in  
6 Cincinnati -- and I don't know if this is a JACO requirement or  
7 a CMS Medicare requirement. But they are having to develop  
8 rubrics or processes for determining the quality of care on a  
9 physician-by-physician basis. In order for them to do that, you  
10 have to have admissions.  
11 So, if you have no admissions, they have no way of attesting  
12 to the quality of your care being delivered. So all physicians  
13 at Jewish Hospital that I'm most familiar with -- I'm also  
14 familiar with several instances at Christ Hospital -- physicians  
15 with few or no admissions don't have privileges elsewhere where  
16 they have a high volume of patients that could be used as a tool  
17 for measuring quality. Physicians in a situation like mine who  
18 have no hospital admissions are being converted to this  
19 equivalent of affiliate status.  
20 Q. You held that courtesy staff position for a long time?  
21 A. Yes. This rule change, if you will, is recent.  
22 Q. Did the hospital notify you of the reason why they changed  
23 your status from courtesy to affiliate?  
24 A. Yeah. As I explained, because I have no admissions.  
25 Q. Did they notify you by letter?

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1 A. They notified me in a meeting.  
2 Q. Did you get any follow-up documentation regarding your  
3 affiliate staff privileges?  
4 A. Well, I would have gotten a letter that said I had been  
5 approved for affiliate staff. Yes.  
6 Q. You'll have to bear with me. I'm not a physician, so I'm  
7 going to muddle my way through the process here. Dr. Wymyslo is  
8 actually the physician. So I'm going to defer to him.  
9 A. Excuse me. Would you pronounce his name again?  
10 Q. Wymyslo. There's a Y in there.  
11 A. The Y is silent.  
12 Q. Yeah. There's a Y in there that's silent.  
13 Under your "Professional Experience," you have medical  
14 director and chief surgeon, Women's Med Plus Centers, 1979 to  
15 the present.  
16 A. Correct.  
17 Q. Does that title include the Lebanon Road Surgery Center?  
18 A. Yes.  
19 Q. So you're the medical director for Lebanon Road Surgery  
20 Center?  
21 A. That's correct.  
22 Q. Are there other facilities -- there are plural of Women's  
23 Med Centers. What are the other facilities that you're the  
24 medical director for?  
25 A. The Women's Med Center, Dayton, and Women's Med of

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1 Indianapolis.  
2 Q. And are you the medical director at all three facilities?  
3 A. Yes.  
4 Q. Do you also practice medicine or perform surgeries at all  
5 three facilities?  
6 A. Not so much at Dayton currently, occasionally, maybe. But  
7 Indianapolis and Cincinnati regularly.  
8 Q. And how do you divide your time between the facilities?  
9 A. A day at a time.  
10 Q. Really? So you just -- one day a week at a different  
11 center?  
12 A. I do a couple of days in Cincinnati, then I do a couple of  
13 days in Indianapolis, and I have an office day.  
14 Q. Lebanon Road. If you don't mind, I'll refer to it as  
15 Lebanon Road, and you'll know that I'm referring to the surgery  
16 center. Lebanon Road has been licensed as an Ambulatory  
17 Surgical Facility in Ohio; right?  
18 A. Yes.  
19 Q. It was originally licensed 2010?  
20 A. Right.  
21 Q. And you were the medical director in 2010?  
22 A. Correct.  
23 Q. Without getting into too much of the business structure of  
24 that facility, are you also an owner of that facility?  
25 A. Indirectly. Actually, no. Not at the facility itself.

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1 Well, not of the building.  
 2 Q. Oh, okay.  
 3 A. The license is owned by the building corporation. The  
 4 professional cooperation, TriOn, operates the facility for the  
 5 license holder.  
 6 Q. And your wife is also involved with the running of the  
 7 facilities; is that right?  
 8 A. Not directly in running the facilities, no.  
 9 Q. How is she involved in the facilities?  
 10 A. She provides administrative -- she oversees the  
 11 administrative corporate functions, H.R., leases, property  
 12 management. Those kind of things.  
 13 Q. I believe, in your 2010 application, it refers to her as the  
 14 office manager, and we'll look at it in a minute. But is that  
 15 what you would characterize her work at the facility as an  
 16 office manager?  
 17 A. I would have to look.  
 18 Q. Let's take a look. You want this binder now. This one has  
 19 the numbers.  
 20 A. Okay.  
 21 Q. If you could go to what's been marked at State's Exhibit 4,  
 22 and I can take you right to the page. It's Bates stamped at the  
 23 bottom. It's page 3. At the top of the page, there's a  
 24 Paragraph 27. Do you see where I am?  
 25 And it says, "Officer's names, titles, addresses and phone

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1 numbers."  
 2 A. Okay. This says "manager," not "office manager." She's the  
 3 managing member of the LLC. LLCs are typical Chapter C  
 4 Corporations so she's the managing member.  
 5 Q. So as managing member, what are her jobs responsibilities?  
 6 A. As a managing member of the LLC, it's to collect rent.  
 7 HEARING OFFICER KEPKO: I'm sorry. I didn't hear you.  
 8 THE WITNESS: To collect rent.  
 9 BY MS. SNYDER:  
 10 Q. Is she good at it?  
 11 A. Very good.  
 12 Q. Okay. Does she have --  
 13 A. My pound of flesh.  
 14 Q. She's in this application, however, and she's, you know,  
 15 No. 28, the statutory agency's name. I think that we'll see, as  
 16 we go along through these exhibits, that her name occurs in  
 17 several pieces of correspondence with the Department of Health.  
 18 A. Yes.  
 19 Q. What involvement does she have in running the actual medical  
 20 clinic?  
 21 A. Day-to-day operations, she has no involvement.  
 22 Q. Okay. Lebanon Road Surgery Center is currently open?  
 23 A. Right.  
 24 Q. And performing surgery as we sit here today?  
 25 A. Right.

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1 Q. There has not been any break in the facility's business  
 2 since October of 2012; right?  
 3 A. Correct.  
 4 Q. And by "break," I mean an unscheduled one. Obviously, not  
 5 days off, but unscheduled in breaks in performing medical care;  
 6 is that right?  
 7 A. Right.  
 8 Q. Do you personally currently perform surgeries at this  
 9 clinic?  
 10 A. Yes.  
 11 Q. Could you estimate -- I think you testified that you do kind  
 12 of a rotating visit. Are you there once a week?  
 13 A. I'm there Tuesdays and Wednesdays for the most part.  
 14 Occasionally, I'll work a Friday.  
 15 Q. So how many hours, approximately, a week do you work at  
 16 Lebanon Road?  
 17 A. Ten to 12.  
 18 Q. Are there other physicians that also work at Lebanon Road?  
 19 A. Yes.  
 20 Q. Who are those other physicians?  
 21 A. Neil Strickland and Roslyn Kade, K-A-D-E.  
 22 Q. Dr. Kade, how long has she been with that facility?  
 23 A. Since it started. I think the same for Dr. Strickland also.  
 24 Q. Does Dr. Strickland had admitting privileges at any local  
 25 hospitals?

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1 A. No, he does not.  
 2 Q. Is he board certified in anything that we know of?  
 3 A. I'm not aware, off the top of my head. I know he practiced  
 4 obstetrics and gynecology for many years and he also worked  
 5 emergency rooms for many years, but I'm not sure about board  
 6 certification.  
 7 Q. And I'll ask you another layman's question. OB and GYN,  
 8 those are two different specialties; right?  
 9 A. They're two different -- it's considered one specialty but  
 10 with two subcomponents, if you will. In other words, when  
 11 physicians train, they are trained in obstetrics and gynecology,  
 12 they're not just trained in one or the other. They are trained  
 13 in both and become board certified typically in both.  
 14 Then, later, they may choose a path that leads them  
 15 either -- most general OB/GYNs do both until they get tired of  
 16 getting up in the middle of the night, and, then, they may drop  
 17 the obstetrics part and continue with the gynecology part. But  
 18 there are some people who specialize in gynecology oncology,  
 19 gynecologic cancer. The initial training for anyone that is  
 20 board certified includes both the obstetrics and gynecology,  
 21 and, then, you have additional subspecialty training beyond  
 22 that.  
 23 Q. Thank you.  
 24 Do you have an anesthesiologist on site at Lebanon Road?  
 25 A. No. We use a nurse anesthetist.

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1 Q. If you could look in your exhibit book, please, to what's  
2 been marked as State's Exhibit 3. I'm going to take you back  
3 one more. If you can go to Exhibit 2, we'll start there,  
4 please. This is an application for a renewal of Lebanon Road's  
5 license to operate as an Ambulatory Surgical Facility; correct?  
6 A. Uh-huh.  
7 Q. This is the application that was submitted in October of  
8 2012? If it might help, I'm looking at page 2. The very bottom  
9 right-hand corner.  
10 A. That's correct.  
11 Q. This facility does not currently have a Written Transfer  
12 Agreement with the hospital; right?  
13 A. That is correct.  
14 Q. This facility has never had a Written Transfer Agreement  
15 with a hospital?  
16 A. That is correct.  
17 Q. So in order to meet the licensure requirement in the past,  
18 this facility has asked for a variance of that requirement;  
19 right?  
20 A. That is correct.  
21 Q. And those variances have typically relied on what I'm going  
22 to refer to as backup physicians to meet that requirement in  
23 alternative ways; correct?  
24 A. Right.  
25 Q. We're probably going to talk a lot about backup physicians.

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1 So what is your understanding of what a backup physician is with  
2 respect to meeting the variance requirement for a Written  
3 Transfer Agreement?  
4 A. Sure. A backup physician is a physician who would agree to  
5 accept your patients for admission to a hospital, if you had a  
6 patient who, for some reason, needed admission to the hospital  
7 because they needed care beyond the scope or the ability of the  
8 Ambulatory Surgical Facility to provide that care.  
9 Q. And backup physicians don't necessarily have to work within  
10 your facility; is that your understanding?  
11 A. Correct.  
12 HEARING OFFICER KEPKO: I'm going to ask you both to speak  
13 up just a little bit. I'm having a little trouble, and I'm sure  
14 the court reporter is. I know you get comfortable --  
15 THE WITNESS: If you'd like me to move down next to her --  
16 HEARING OFFICER KEPKO: No, it's good where you are. Just  
17 make believe you're talking to her.  
18 THE WITNESS: Okay.  
19 HEARING OFFICER KEPKO: Go ahead.  
20 MS. SNYDER: Thank you.  
21 BY MS. SNYDER:  
22 Q. Do you have backup physicians at your facility solely to  
23 meet the variance or to get a variance of the transfer agreement  
24 requirement?  
25 A. No.

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1 Q. Would you have backup physicians if it weren't for the need  
2 to get a variance of the transfer agreement requirement?  
3 A. I always have.  
4 Q. And when you say "always have," take me back to when that  
5 started.  
6 A. 1978.  
7 Q. Why do you have backup physicians, and especially in 1978  
8 when you had admitting privileges at that time?  
9 A. Well, I had admitting privileges, but that doesn't  
10 necessarily mean that I had the privileges that would allow me  
11 to personally deliver the care that was needed. I've always had  
12 physicians that I could call upon if a patient needed abdominal  
13 surgery, for instance. If there was a perforation of the uterus  
14 that required repair, my admitting privileges would never have  
15 allowed me to do that type of surgery in a hospital, nor am I  
16 qualified to do that type surgery in the hospital.  
17 Q. There is a letter where you are -- and we can look at it in  
18 a minute, but I want to ask you a question about it first.  
19 There's a letter where you were responding to an inquiry from  
20 the Department of Health, and you are referring to consultants.  
21 A. Uh-huh.  
22 Q. Does your definition of backup physician differ from your  
23 definition of a consultant?  
24 A. Not necessarily. I mean, you could have consultants that  
25 aren't necessarily backup physicians, but I'm not sure that

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1 there's necessarily a difference in the sense of how I used the  
2 two words.  
3 Q. With respect to backup physicians that you had to meet the  
4 variance for the transfer agreement requirement in the past,  
5 have you kept a list of your backup physicians, so, in the event  
6 of an emergency, you could go down a list? How did that work?  
7 A. I know who they are.  
8 Q. You know who they are. What if it's not you? What if it's  
9 a nurse?  
10 A. We're a very small group practice, and we all know who they  
11 are, the three of us.  
12 Q. Do you have their numbers memorized?  
13 A. No, they're written down and they're available.  
14 Q. How do you pick which one to call?  
15 A. They're in my cell phone. It depends on the circumstance,  
16 and, you know, the issue. To the degree that there are  
17 different hospitals, there might be a choice of hospital.  
18 Q. Do your backup physicians provide 24-hour-a-day coverage for  
19 your facilities?  
20 A. Yes.  
21 Q. Do you keep a schedule to know who's available during what  
22 times?  
23 A. I rely on them to let me know when they're going to be out  
24 of town. Two of our physicians are currently in practice  
25 together, and they're not out of town at the same time.

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1 Q. I'm sorry. I missed that.  
 2 A. The two physicians that are in a practice together, one of  
 3 them is always in town.  
 4 Q. The physicians that practice at the clinic?  
 5 A. No. Two of the backup physicians.  
 6 Q. Who are your backup physicians currently?  
 7 A. Chandra Gravely, Cynthia Hansel and David Schwartz.  
 8 Q. I'll refer you to what's been marked as State's Exhibit 5.  
 9 This letter is dated September 15th, 2010; correct?  
 10 A. Yes, that's correct.  
 11 Q. And it signed by Valerie Haskell, managing member, at the  
 12 bottom of the document?  
 13 A. That's correct.  
 14 Q. And this was the facility's request for a variance of the  
 15 transfer agreement requirement in 2010; correct?  
 16 A. That is correct.  
 17 Q. And I'm going to read into the record, starting with the  
 18 third paragraph down, "The medical director." Do you see where  
 19 I am?  
 20 A. Uh-huh.  
 21 Q. "The medical director for the proposed facility, Martin  
 22 Haskell, M.D., has courtesy admitting privileges at Jewish  
 23 Hospital in Cincinnati." Did I read that correctly?  
 24 A. Uh-huh.  
 25 Q. Thank you.

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1 I'm going to skip down to the next paragraph. "In  
 2 addition." Do you see where I am?  
 3 A. Uh-huh.  
 4 Q. "In addition, his associate, Roslyn Kade, M.D., has  
 5 admitting privileges at Christ Hospital in Cincinnati." Did I  
 6 read that correctly?  
 7 A. Yes.  
 8 Q. At this time, in 2010, you held courtesy privileges at  
 9 Jewish Hospital?  
 10 A. That's correct.  
 11 Q. And if you could turn to the next page, please. Page 2 of  
 12 this document, Exhibit 5. This is a letter from the hospital  
 13 reappointing you to that position; correct?  
 14 A. That is correct.  
 15 Q. And it says, at the bottom of the last sentence of that  
 16 first paragraph, "This appointment is effective 10-1 of 2009 and  
 17 remains valid through 9-30 of 2011." Did I read that correctly?  
 18 A. That is correct.  
 19 Q. And so, as your CV indicates, when your courtesy privileges  
 20 expired, you were transferred to the affiliate for the --  
 21 A. That's correct.  
 22 Q. If you could look at page 3 of this document, please. This  
 23 is a letter dated February 23rd, 2010, from Christ Hospital;  
 24 correct?  
 25 A. Uh-huh.

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1 Q. And this is Dr. Kade's letter of reappointment; right?  
 2 A. That is correct.  
 3 Q. And it says, in the Re line, "Reappointment (Cycle) 3-1-2010  
 4 through 2-28-2012."  
 5 A. Uh-huh.  
 6 Q. Did I read that correctly?  
 7 A. Yes.  
 8 Q. Thank you.  
 9 So her appointment, at that point, was set to expire  
 10 February 28th of 2012?  
 11 A. Correct.  
 12 Q. And if you could flip one more page to page 4 of this  
 13 document. This was provided with your Request for Variance;  
 14 correct?  
 15 A. Yes.  
 16 Q. And this is a delineation of Dr. Kade's privileges at Christ  
 17 Hospital; correct?  
 18 A. Correct.  
 19 Q. And at the top of the page, there are columns down the  
 20 left-hand side, and there are places where you can check. This  
 21 was one has an X next to "admit patients."  
 22 A. That's correct.  
 23 Q. And it says, "Admit, treat patients to inpatient services  
 24 and direct the course of treatment." Did I read that correctly?  
 25 A. Yes.

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1 Q. When it says "direct the course of treatment," what does  
 2 that mean?  
 3 A. That means that you can give orders for the hospital nursing  
 4 staff to execute and/or order diagnostics for the patient. It  
 5 means you can direct what the patient's care will be in the  
 6 hospital.  
 7 Q. Okay. So at the time that you submitted your Request for  
 8 Variance in 2010, you believed that Dr. Kade's and your  
 9 privileges met the requirements of a Written Transfer Agreement  
 10 in the alternate way?  
 11 A. That is correct.  
 12 HEARING OFFICER KEPKO: I'm sorry. In an alternate way?  
 13 MS. SNYDER: In an alternate way.  
 14 BY MS. SNYDER:  
 15 Q. And your privileges with Jewish Hospital, at that time, were  
 16 limited to family practice; is that correct?  
 17 A. That is correct.  
 18 Q. And, similarly, Dr. Kade's privileges were limited to family  
 19 practice at The Christ Hospital?  
 20 A. That is correct.  
 21 Q. You could both admit patients -- do you need some water?  
 22 THE WITNESS: I do as, a matter of fact.  
 23 MS. SNYDER: I'm happy to take a five-minute break.  
 24 HEARING OFFICER KEPKO: Why don't we take five or ten  
 25 minutes.

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1 MS. SNYDER: Obviously, with the understanding that we don't  
2 talk to the witness while we're breaking.  
3 HEARING OFFICER KEPKO: Absolutely.  
4 (Recess taken.)  
5 HEARING OFFICER KEPKO: Go ahead. Back on the record.  
6 BY MS. SNYDER:  
7 Q. Doctor, when we left off for the break, I think we were  
8 talking about your and Dr. Kade's admitting privileges in 2010.  
9 A. That's correct.  
10 Q. And I think you've already testified that your privileges --  
11 your courtesy privileges with Jewish Hospital expired. Did you  
12 request for your courtesy privileges to be renewed at Jewish  
13 Hospital?  
14 A. Yes.  
15 Q. And what was the response to your request?  
16 A. Well, like I said, we had a meeting with the officials of  
17 the medical staff and the hospital, and they explained to me why  
18 they would be changed to affiliate status, not having anything  
19 to do with -- you know, it wasn't a disciplinary type of change;  
20 it was due to the fact of this new requirement in the JACO or  
21 CMS rules with being able to attest to the quality of care  
22 delivered by physicians with admitting privileges.  
23 Q. Have you applied for privileges since your privileges  
24 expired at the Jewish Hospital, your courtesy privileges?  
25 A. Uh-huh.

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1 Q. Have you applied for privileges at any other hospital?  
2 A. I attempted to apply, at one point. I'm not sure exactly  
3 the time table for Christ. But most -- I think all hospitals in  
4 the city of Cincinnati require board certification for  
5 privileges at this point.  
6 Q. Your request for a variance in 2010 was granted; right?  
7 A. That's correct.  
8 Q. If you could look at Exhibit 6, please, in your binder. On  
9 page 1 of that document, the very bottom paragraph, the very  
10 last sentence starts with, "This variance is conditioned upon."  
11 Do you see where I am?  
12 A. Uh-huh.  
13 Q. I'm going to read that for the record.  
14 "This variance is conditioned upon:  
15 "No. 1. The continued association with Lebanon Road Surgery  
16 Center of the two physicians named with admitting privileges to  
17 a Cincinnati area hospital."  
18 Did I read that correctly?  
19 A. That's correct.  
20 Q. And, in the paragraph above, it indicates the two physicians  
21 with admitting privileges are you and Dr. Kade; correct?  
22 A. That's correct.  
23 Q. If you could now flip to Exhibit 8, please. This is a  
24 letter from your wife to the Department of Health, or to  
25 Mr. Croy, dated August 31st of 2011; is that correct?

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1 A. Uh-huh. That's correct.  
2 Q. Thank you. And this letter is asking the department for,  
3 essentially, a modification of that 2010 variance; is that  
4 correct?  
5 A. That's correct.  
6 Q. And it's asking to take you off the variance and put in  
7 Drs. Bowers and Schwartz; is that correct?  
8 A. The intent was just to have it be for Drs. Bowers and  
9 Schwartz.  
10 Q. The intent was to take you out?  
11 A. And Dr. Kade too.  
12 Q. And Dr. Kade too. This letter doesn't mention Dr. Kade,  
13 does it?  
14 A. Doesn't mention her. That's correct.  
15 Q. So let's look at this letter. Paragraph 2, "Recently." Do  
16 you see where I am, Dr. Haskell?  
17 A. Uh-huh.  
18 Q. "Dr. Haskell has expressed a desire to be less involved with  
19 the day-to-day activities of the center and that he wishes to  
20 spend an increased amount of time traveling away from Cincinnati  
21 in the coming year." Did I read that correctly?  
22 A. Uh-huh.  
23 Q. And then going down to the last paragraph starting with, "I  
24 wish to substitute."  
25 A. Uh-huh.

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1 Q. "I wish to substitute Dr. Schwartz and Dr. Bowers as the  
2 physicians providing hospital admitting services in the variance  
3 granted to the center." Did I read that correctly?  
4 A. That is correct.  
5 Q. So Dr. Kade is not mentioned in the letter; right?  
6 A. That is correct.  
7 Q. If you could flip to the second page of that document, still  
8 in Exhibit 8. This appears to be a letter from Dr. Bowers to  
9 Mrs. Haskell, and it appears to be kind of an agreement to act  
10 as a backup physician for the center; is that right?  
11 A. That is correct.  
12 Q. And the next page appears to be the same thing, but from  
13 Dr. Schwartz; is that correct?  
14 A. That is correct.  
15 Q. Now, the language in these two letters is identical, except  
16 for the phone numbers of the physicians.  
17 A. That is correct.  
18 Q. Did LRSC write these letters?  
19 A. Yes. I wrote the letters subject to their review, and then  
20 they put it on their letterhead.  
21 Q. All right. And so we're in August of 2011. We are about a  
22 month before your privileges are set to expire at Jewish;  
23 correct?  
24 A. Right.  
25 Q. And Dr. Bowers and Dr. Schwartz both signed off on these

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1 letters; right?

2 A. Right.

3 Q. How did their coverage work? I mean, earlier, you testified

4 that you don't necessarily keep a list of your backup

5 physicians. What was your arrangement with Dr. Bowers and

6 Dr. Schwartz about when they would be covering the facility?

7 A. Well, they were available 24 hours a day. Dr. Schwartz,

8 when he is out of town, has another physician whom he had

9 cleared who would be willing to take our patients at the time he

10 was out of town. So we had an alternative that wasn't

11 necessarily named in the letter, but he was reachable through

12 the same phone number that Dr. Schwartz was.

13 Q. How did you know Dr. Schwartz?

14 A. I've known him for years. We didn't train together. He

15 trained, I think, a few years after I did. But he worked for

16 Dr. Bliss at Women for Women, which was -- he owned a clinic on

17 Jefferson Avenue that I subsequently bought. Anyway,

18 Dr. Schwartz had worked for Dr. Bliss, and I knew him somewhat

19 by reputation. I didn't know him very well personally, but I

20 knew who he was and knew of his abilities.

21 Q. When you say -- just a point of clarification. When you say

22 "We didn't train together," you did not formally have any

23 post-graduate medical education in OB/GYN; correct?

24 A. No, that's not correct. As family practice, we did

25 rotations on OB/GYN because basic obstetrics and gynecology is a

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1 part of the family practice curriculum.

2 Q. Did you do any fellowships in OB/GYN specifically?

3 A. I didn't do any formal training. The question was: Did I

4 have some formal training in OB/GYN? I did have some formal

5 training in OB/GYN. Was I trained as an obstetrics and

6 gynecologist, no, I was not.

7 Q. And my follow-up question is: You didn't have any

8 fellowships in OB/GYN?

9 A. You don't get a fellowship in a specialty until you do a

10 residency in that specialty. It would not have been appropriate

11 as a family practice physician.

12 Q. And how did you know Dr. Bowers?

13 A. I knew him by reputation also. He had worked for Women's

14 Services, which was another abortion clinic in town. I knew him

15 by reputation.

16 Dr. Schwartz had actually -- when I approached

17 Dr. Schwartz -- actually, I've had a -- what's the date of

18 Dr. Schwartz's letter here. He didn't have a date on his

19 letter. I've had, actually, an earlier agreement with him just

20 because I was concerned with having, you know, quality backup

21 and care. When I knew that I was going to be stepping out,

22 slowing down, I was concerned about having a second qualified

23 backup physician. Dr. Schwartz, actually, recommended

24 Dr. Bowers, and, actually, did all of the negotiations getting

25 Dr. Bowers on board with us. I think I had one phone

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1 conversation with Dr. Bowers and sent him this letter for his

2 approval.

3 Q. With your one phone conversation that you had with

4 Dr. Bowers, what did you discuss?

5 A. Just confirming his willingness, and I thanked him for being

6 willing to sign a backup Letter of Agreement and to get his

7 phone number so that I had it.

8 Q. Are you on Dr. Bowers' letter?

9 A. I am.

10 Q. I'm in State's Exhibit 8 on page 2. Dr. Bower's letter,

11 middle paragraph, "I have unrestricted admitting privileges in

12 obstetrics and gynecology at The Christ Hospital in Cincinnati."

13 Did I read that correctly?

14 A. Yes, you did.

15 Q. Okay. So you testified that you wrote this letter; right?

16 A. Correct.

17 Q. And Dr. Bower's signed off on that?

18 A. Correct.

19 Q. Do you know, as we sit here today, whether that's true; that

20 Dr. Bowers had unrestricted admitting privileges in obstetrics

21 and gynecology at The Christ Hospital?

22 A. Partially true.

23 Q. What part isn't true?

24 A. Based on the information that you provided to counsel

25 yesterday, I believe the letter from Christ Hospital --

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1 apparently, he had not renewed his obstetrical privileges prior

2 to the signing of this letter, maybe just some months prior.

3 Q. Did you receive -- in the 2010 variance request, you

4 provided the Department of Health with the reappointment letters

5 for you and Dr. Kade; right?

6 A. That's correct.

7 Q. Did you receive, when you entered into agreements with

8 Dr. Bowers and Dr. Schwartz, similar appointment letters from

9 those physicians?

10 A. No, I did not.

11 Q. Did you have any proof that their privileges were what they

12 said they were?

13 A. No, I believed them. I know that Dr. Schwartz was admitting

14 patients regularly at Christ and so was Dr. Bowers. There

15 wasn't any question that they were admitting patients, so they

16 had to have privileges to admit patients.

17 Q. Did you verify with the hospitals that the physicians held

18 those privileges?

19 A. No, not specifically.

20 Q. If you could turn, please, to State's Exhibit 9. I'm going

21 to go to page 2 of that document. Have you seen this document

22 before? And by "this document," I'll narrow it down. It's

23 Bates stamped 2 and 3. That document.

24 A. Well, I'm not sure about this specific letter. I doubt that

25 I've seen this letter. I have previously reviewed the hearing

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1 file that was available online. At some point, I reviewed that.  
2 Q. By "hearing file," do you mean through the e-licensing  
3 website for the State Medical Board of Ohio?  
4 A. Yes.  
5 Q. On that website, you looked up Dr. Bowers, I assume?  
6 A. Yes.  
7 Q. So that website brings up his information, and it says  
8 "Formal action exists"?  
9 A. Yes.  
10 Q. Did you click here for "Formal action exists"?  
11 A. Right.  
12 Q. That likely had this letter. If you want to take a minute  
13 to review just page 2 and 3.  
14 A. I read it this morning.  
15 Q. You read this this morning? You're one step ahead of me.  
16 All right.  
17 So the date of this letter is May 11th, 2011; correct?  
18 A. That's correct.  
19 Q. And this is a letter from the State Medical Board of Ohio to  
20 Dr. Bowers; correct?  
21 A. Correct.  
22 Q. And it's essentially a Notice of Opportunity for hearing;  
23 right?  
24 A. Right.  
25 Q. And the basis of the board's proposal to take action on

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1 Dr. Bowers' license is the fact that he had action taken again  
2 him in Kentucky; right?  
3 HEARING OFFICER KEPKO: I'm sorry. I didn't hear you.  
4 BY MS. SNYDER:  
5 Q. It's the fact that he had action taken against him in  
6 Kentucky?  
7 A. Right.  
8 Q. If you turn to page 4 of this document, still in Exhibit 9,  
9 did you also then have an opportunity to review this document  
10 either this morning or on the board's website?  
11 A. Probably both.  
12 Q. Okay. So this is an Agreed Order from the State of  
13 Kentucky; correct?  
14 A. That's correct.  
15 Q. And it is for Dr. Bowers; right?  
16 A. That's correct.  
17 Q. And if you could, go to page 7 of that document, please.  
18 And under "Agreed Order," Paragraph 2, I'm going to start with,  
19 "During the effective period." Do you see where I am?  
20 A. Starting with what word?  
21 Q. Paragraph 2, "During the effective period."  
22 A. Uh-huh.  
23 Q. "During the effective period of this Agreed Order, the  
24 licensee's medical license shall be subject to the following  
25 terms and conditions:

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1 "A. The licensee shall not engage in the practice of  
2 obstetrics and shall not perform any obstetric procedure."  
3 Did I read that correctly?  
4 A. That's correct. This would apply only to the state of  
5 Kentucky.  
6 Q. Which applied to the state of Kentucky. Thank you.  
7 If you look above that, in Paragraph 1, it says, "shall be  
8 subject to this Agreed Order for a period of five years from the  
9 date of the filing of this Agreed Order." Did I read that  
10 correctly?  
11 A. That's correct.  
12 Q. Thank you.  
13 And, then, at the very end of this document, it is Bates  
14 stamped page 11 -- actually, I'll take you back one to 10.  
15 Under Paragraph 4, it says, "So agreed on this 20th day of  
16 January, 2011;" correct?  
17 A. Yes.  
18 Q. So as of January of 2011, Dr. Bowers' ability to practice  
19 obstetrics in the state of Kentucky had been limited; correct?  
20 A. That is correct.  
21 Q. He couldn't do it; right?  
22 A. In Kentucky.  
23 Q. In Kentucky. Okay.  
24 Were you aware, before you reviewed the documents in  
25 preparation for today's hearing, that Dr. Bowers' license was

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1 limited in the state of Kentucky?  
2 A. Before today, yes, I knew before today.  
3 Q. Were you aware before you entered into the agreement that he  
4 act as a backup physician for your facility that his license had  
5 been limited in the state of Kentucky?  
6 A. No, I was not.  
7 Q. Did you check Dr. Bowers' license status with the State  
8 Medical Board of Ohio before entering into an agreement that he  
9 act as backup for your facility?  
10 A. No, I did not.  
11 Q. Why not?  
12 A. Because I knew he was practicing medicine at Christ  
13 Hospital, and I relied on their credentialing process, and I saw  
14 the recommendation of Dr. Schwartz.  
15 Q. If you could turn in the other exhibit binder, please, to  
16 what's been marked as Respondent's Exhibit E.  
17 HEARING OFFICER KEPKO: Let me ask you, before we go on.  
18 Are we going to have any dispute about these exhibits in terms  
19 of admissibility?  
20 MS. SNYDER: Not from my end.  
21 HEARING OFFICER KEPKO: So as far as identification, they  
22 are all going to be -- there's also going to be a request to  
23 admit all of these exhibits? I'm keeping track of identities,  
24 and I don't want to really do that if everyone's going to agree  
25 that both books are going to be made part of this record.



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1 MS. SNYDER: There are numerous Joint Exhibits that we both  
2 have in our binders. I'm happy to mark those as Joint Exhibits.  
3 HEARING OFFICER KEPKO: I don't care, as long as I know that  
4 Respondent's exhibits are going in without objection, as well as  
5 the State's are going in without objection, then I don't have to  
6 maintain any kind of list, nor does the court reporter have to.  
7 MS. BRANCH: Could I ask a question?  
8 HEARING OFFICER KEPKO: Sure  
9 MS. BRANCH: The State had two new exhibits this morning.  
10 One was the 6th Circuit decision. What was the other one?  
11 MS. SNYDER: The other one was the adjudication order for  
12 WNPC with the attached court recommendation.  
13 HEARING OFFICER KEPKO: Are they in your book?  
14 MS. SNYDER: They are. They're 24 and 25.  
15 MS. BRANCH: I think the only objection I can foresee that I  
16 would make is on the one we're talking about now, the Medical  
17 Board file on Dr. Bowers. That has more to do with relevancy  
18 than identity and foundation so I don't think you need to keep  
19 track.  
20 HEARING OFFICER KEPKO: Not so much as to admission?  
21 MS. BRANCH: Right.  
22 HEARING OFFICER KEPKO: I'm going to take it that both of  
23 these volumes will be admitted.  
24 MS. BRANCH: That's fine.  
25 HEARING OFFICER KEPKO: We can go from there. Good. Go

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1 ahead. I'm sorry to interrupt you.  
2 MS. SNYDER: Thank you.  
3 BY MS. SNYDER:  
4 Q. Dr. Haskell, are you on Respondent's Exhibit E?  
5 A. Yes, ma'am.  
6 Q. This is a letter to Dr. Jackson of the Ohio Department of  
7 Health; is that correct?  
8 A. That is correct.  
9 Q. And Dr. Jackson was the then director of the Ohio Department  
10 of Health?  
11 A. That's correct.  
12 Q. This letter is dated February 28th of 2008; is that right?  
13 A. Yes. Uh-huh.  
14 Q. And this letter concerns Women's Medical Professional  
15 Corporation, DBA Women's Med Center of Dayton; is that right?  
16 A. That's correct. Uh-huh.  
17 Q. And I'll let your counsel cover the rest of this letter in  
18 her questions. But I want to go right down to Paragraph 2,  
19 second sentence. Well, we'll start with the first sentence.  
20 Are you in Paragraph 2?  
21 A. Uh-huh.  
22 Q. All right. "The backup physicians have admitting privileges  
23 at Miami Valley Hospital and maintain a regular presence in the  
24 hospital for patient care. They are all licensed medical  
25 doctors in good standing with the Ohio Medical Board (license

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1 information attached)." Did I read that correctly?  
2 A. That's correct.  
3 Q. So, in 2008, for WMPC, you've provided the department with  
4 the license information for your proposed backup physicians;  
5 right?  
6 A. That's right.  
7 Q. I assume, since it's in the letter, you thought that that  
8 information was pertinent to the Department of Health's  
9 consideration; is that right?  
10 A. My attorney certainly did.  
11 Q. She's very smart.  
12 A. She's more detailed than I am.  
13 Q. Okay. Would it have affected your decision to ask  
14 Dr. Bowers to act as a backup physician for your facility if you  
15 had known at the time you entered the agreement that his license  
16 had been limited in the state of Kentucky?  
17 A. Yes. That was a concern when I learned of it.  
18 Q. Was it equally concerning, then, when you learned that the  
19 State Medical Board of Ohio is proposing to take action on his  
20 license?  
21 A. It was a concern. Yes.  
22 Q. Because if a state takes action on a physician's license,  
23 that can affect his credentials at the hospital; right?  
24 A. It could, depending on the type of discipline that's  
25 involved. Yes.

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1 Q. Going back to your Request for Modification. That request  
2 was granted; right?  
3 A. Yes.  
4 Q. We're in 2011 now.  
5 A. Yes.  
6 Q. So if you could turn to State's Exhibit 10, please. This is  
7 a copy of the variance that was granted to Lebanon Road Surgery  
8 Center by the Ohio Department of Health in 2011; correct?  
9 A. Correct.  
10 Q. In the middle of the page, it indicates, "David B. Schwartz  
11 has unrestricted admitting privileges at The Christ Hospital."  
12 A. Uh-huh.  
13 Q. "And Walter T. Bowers, II, has unrestricted admitting  
14 privileges at The Christ Hospital"; correct?  
15 A. That's correct.  
16 Q. And, then, if you go down to the third full paragraph,  
17 starting, "Lebanon Road Surgery Center's variance." Do you see  
18 where I am?  
19 HEARING OFFICER KEPKO: Where are you at?  
20 MS. SNYDER: I'm in the third full paragraph. It starts,  
21 "Lebanon Road Surgery Center's variance continues to be," and  
22 then there are some numbers.  
23 HEARING OFFICER KEPKO: Got it.  
24 BY MS. SNYDER:  
25 Q. "Lebanon Road Surgery Center's variance continues to be

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1 conditioned on:  
2 "1. The continued association of the Lebanon Road Surgery  
3 Center with the three physicians named in this letter."  
4 Did I read that correctly?  
5 A. Yes.  
6 Q. So the first two are Dr. Schwartz and Dr. Bowers; right?  
7 A. Right.  
8 Q. And then the third was Dr. Kade?  
9 A. Correct.  
10 Q. And then the next paragraph of this letter, the second  
11 sentence -- the last sentence, "It is my understanding that  
12 Roslyn Kade, M.D. will continue working at the facility and that  
13 her privileges at The Christ Hospital remain valid through  
14 February 28th of 2012." Did I read that correctly?  
15 A. Right.  
16 Q. So Dr. Kade's privileges did change in 2012; right?  
17 A. They did.  
18 Q. And you told the Department of Health about that; right?  
19 A. That's correct.  
20 Q. If you could look at Exhibit 13, please. This is a letter  
21 from The Christ Hospital to Dr. Kade; correct?  
22 A. Uh-huh.  
23 Q. Dated 2-29-2012. You provided this letter to the Department  
24 of Health; right?  
25 A. I don't know specifically if I did. I just don't recall.

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1 Q. You've seen the letter before?  
2 A. I have seen the letter before. Yes. Yes, I did. I take it  
3 back. Yes, I did. I did submit it to the department. I just  
4 had to think through it.  
5 Q. I understand. A lot of facts going on here.  
6 So in 2011, you already testified that she had courtesy  
7 privileges; correct?  
8 A. She did at the time. Correct.  
9 Q. All right. This letter, I'm looking at the Re line. It  
10 says, "Re-appointment 2-29-2012 to 2-28-2014"; correct?  
11 A. Uh-huh.  
12 Q. It says, "Transferred to affiliate staff status with no  
13 clinical privileges." Did I read that correctly?  
14 A. That's correct.  
15 Q. So under affiliate staff status, Dr. Kade was able to refer  
16 patients to The Christ Hospital, but not to directly admit her  
17 own patients; correct?  
18 A. That is correct.  
19 Q. When you refer a patient, you stop having control of that  
20 patient at the door; right?  
21 A. That's correct.  
22 Q. So that patient is referred to another physician in that  
23 hospital?  
24 A. Well, it could be the emergency room physician first, and  
25 then the appropriate consultant physician would follow.

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1 Q. Whereas, if a physician direct admits a patient, that  
2 physician maintains control over that patient; right?  
3 A. That is correct.  
4 HEARING OFFICER KEPKO: Is that what courtesy admitting  
5 privileges are?  
6 MS. SNYDER: Thank you  
7 THE WITNESS: Shall I explain that?  
8 BY MS. SNYDER:  
9 Q. I'm going to ask it in two questions. First of all, if  
10 you're aware, do all hospitals have the same designation of  
11 privileges? So, in other words, do they all have the category  
12 courtesy versus affiliate?  
13 A. Some do.  
14 Q. So your understanding of courtesy privileges, what do  
15 courtesy privileges mean?  
16 A. If I may, let me distinguish between affiliate, courtesy and  
17 active.  
18 Q. Okay.  
19 A. Affiliate is used by Christ Hospital and used by Jewish  
20 Hospital, and it's sometimes also referred to as refer and  
21 follow. In other words, you refer the patient to the hospital,  
22 and, at that point, the hospital assumes care, as you previously  
23 described. The physician with those privileges is allowed to  
24 come into the hospital and follow the patient and make comments  
25 in the patient's chart, but not to direct care.

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1 In other words, he's not able to order medications. He's  
2 not able to order lab tests, not in a position to tell the  
3 nursing staff what to do in caring for the patient.  
4 Then admitting privileges, and there are courtesy admitting  
5 privileges, and full or active admitting privileges. The  
6 terminology, maybe, is a little different, but the concept is  
7 the same from hospital to hospital. Usually, when you're on the  
8 courtesy staff, you have full admitting privileges. You can do  
9 all of the same things for a patient a person with full  
10 admitting privileges can do, but you're typically limited to  
11 six, eight, ten admissions a year, depending upon the particular  
12 hospital.  
13 A person with courtesy admitting privileges doesn't have any  
14 duties for committee appointments or attending general staff  
15 meetings. They are permitted to come to staff meetings, but  
16 they're not required to. Whereas, a physician with an active --  
17 in Christ Hospital's terms, active membership on the medical  
18 staff, would have to attend -- would have to accept committee  
19 appointments and attend medical staff meetings to a certain  
20 percentage each year in order to maintain that active status.  
21 Courtesy privileges are fading away for the reasons I've  
22 discussed. It does apply to admissions. And the only place  
23 where they're really going to probably survive is with some  
24 consulting physicians, some specialty consulting for a specific  
25 practice, primarily at Hospital A, but could maintain courtesy

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1 privileges at B, C, and D; he could go into those hospitals and  
2 consult in his area of specialty.

3 So there will be some limited use of courtesy privileges  
4 still for those types of situations, but physicians in a  
5 situation like Dr. Kade and like me, and other general practice  
6 physicians that don't regularly admit patients to the hospital  
7 won't be, at least in Cincinnati, given something equivalent for  
8 that status.

9 Q. As you understand this movement, a physician with a board  
10 certification would still be able to have courtesy privileges  
11 just because of the board certification?

12 A. No. Not if they're not actively admitting patients in some  
13 hospital. In other words, Hospital A can ask Hospital B to  
14 certify -- say a physician has regular admitting privileges at  
15 Hospital B, he has a body of work there that can be reviewed and  
16 evaluated. Hospital A can ask for Hospital B to certify his  
17 credentials and then have courtesy privileges. But if he's not  
18 actively admitting -- for instance, a dermatologist who doesn't  
19 regularly admit patients, he will not get courtesy privileges.

20 Q. Thank you.

21 Going back to Dr. Kade. As of this letter, she was not able  
22 to direct admit patients?

23 A. That's correct. She can refer.

24 Q. She can refer.

25 And, at this time, she did not hold privileges with any

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1 A. Uh-huh.

2 Q. -- of Exhibit 21. This letter is dated January 24th of  
3 2012; right?

4 A. Correct.

5 Q. And this is to Mrs. Haskell; right?

6 A. That's correct.

7 Q. And this is a letter from Drs. Gravely and Hansel agreeing  
8 to be backup physicians for your facility; correct?

9 A. That is correct.

10 Q. Did they become active backup physicians for your facility  
11 at that point? In other words, if there had been an emergency  
12 in your facility in January, would you have called one of these  
13 physicians?

14 A. Possibly. I mean, you know, possibly. Dr. Schwartz or  
15 possibly Dr. Bowers.

16 Q. Because at this point, Dr. Kade can't; right?

17 A. She can. This is January.

18 Q. I'm sorry. You're right. January. Okay. So in another  
19 month, she can't?

20 A. I don't know that.

21 Q. You don't know that?

22 A. That's correct. I didn't know her status until I received  
23 the letter from Christ.

24 Q. I understand. But looking back now, you know that, as of  
25 February, she wasn't going to be able to be used?

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1 other hospital; correct?

2 A. That is correct.

3 Q. The department questioned you about whether Dr. Kade's  
4 affiliate status met the requirements of the 2011 variance;  
5 right?

6 A. They did.

7 Q. If you could look at Exhibit 12, please. This is a chain of  
8 e-mails back and forth between you and Roy Croy; is that  
9 correct?

10 A. That's correct.

11 Q. And Roy Croy, at that time, worked for the Department of  
12 Health, as far as you know; right?

13 A. That is correct.

14 Q. You didn't ask the Department of Health at this point for a  
15 modification of the variance, did you?

16 A. No, I did not.

17 Q. But you did go out and get two more backup physicians?

18 A. Right.

19 Q. Drs. Hansel and Gravely?

20 A. No. I did that much earlier.

21 Q. If you could look at Exhibit 21, please.

22 A. I did get them, but earlier, not in response to what we're  
23 talking about here.

24 Q. Let's just zero in on that date of when you got them. In  
25 this document, it's Bates stamped page 5 --

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1 A. I know now that, as of February, she could not be used.

2 Q. Right. You would have put these two physicians, kind of,  
3 into that active offer of backup physicians the facility could  
4 call?

5 A. Yeah. Sure.

6 Q. If you could look at Exhibit 19. Before we talk about this  
7 document, did you ever contact either Roy Croy or anybody from  
8 the Department of Health in January to let them know that you  
9 entered into this agreement with Drs. Gravely and Hansel?

10 A. I did not feel it was necessary. There was nothing in the  
11 department's communication to indicate that it would be  
12 necessary for me to inform them of every backup physician that I  
13 had.

14 Q. But you had done that in the past; right?

15 A. No.

16 Q. Well, let's think about your 2010 variance. That was  
17 conditioned on you and Dr. Kade.

18 A. Right.

19 Q. When your privileges were set to change, you asked for a  
20 modification to bring in Bowers and Schwartz; right?

21 A. Correct.

22 Q. You would agree that this is, kind of, a similar situation?

23 A. When it came up subsequently, yes. But the question was --  
24 as I understand the question, when I kind signed them on that I  
25 notified the department at that time. I had had backup letters

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1 with Dr. Schwartz long before I asked Dr. Schwartz to be put on  
2 the variance request with the department. So when it became  
3 necessary that I -- let me back up and say that my goal has  
4 always been to have a more robust plan in place for the care of  
5 patients that may need care beyond what we can do in the surgery  
6 center than what was required of me by the department.  
7 So the fact that I had Dr. Schwartz in a formal backup  
8 agreement letter long before he was ever listed as a backup  
9 physician with the department, the fact that I approached  
10 Drs. Gravely and Hansel before they were actually needed is just  
11 part of my wanting to be sure that I had a very robust plan in  
12 place to care for any patient that may need care.  
13 Q. So they became needed in February when Dr. Kade's privileges  
14 changed?  
15 A. I felt that it was a good idea to put them on in February,  
16 also with Dr. Bowers' problems.  
17 Q. And in February, you didn't tell the Department of Health  
18 that you had put them on; right?  
19 A. We still had Bowers in place and Schwartz in place, so they  
20 weren't necessarily needed, but they were available.  
21 Q. In your interactions with WMPC that we saw in Respondent's  
22 Exhibit E, and in some of interactions with the Department of  
23 Health, you had seen that the Department of Health checks the  
24 credentials of the physicians that you use as backup physicians;  
25 correct?

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1 A. That is correct.  
2 Q. Did you consider the fact that the Department of Health  
3 would have wanted to have checked the credentials of  
4 Drs. Gravely and Hansel before you started using them?  
5 A. No more than they checked the credentials of the physicians  
6 at transfer agreement hospitals. The department -- you know, my  
7 understanding is that the department needed to be sure that  
8 there was a plan in place, not that they needed to know every  
9 physician that we may call upon for care at any point in time.  
10 My understanding of the variance was that there was a  
11 minimum standard of care available, and so the fact that we  
12 exceeded that minimum standard of care by having redundant  
13 backup, to me, was -- I didn't feel that there was a need to  
14 inform the department of that. I had no objection to it. I  
15 didn't -- there was nothing in the department's communication,  
16 you know, over a long period of time that indicated that they  
17 need to know the physicians we might use.  
18 Q. You said your understanding of the minimum standard of care  
19 that a variance has to meet.  
20 A. Uh-huh.  
21 Q. Is that your testimony?  
22 A. Well, the minimum standard required in the variance.  
23 Q. What was your understanding of the minimum standard required  
24 to meet the variance?  
25 A. That the physicians that they accepted.

1 HEARING OFFICER KEPKO: I'm sorry. What was your answer?  
2 THE WITNESS: The physicians that they accepted in the  
3 acceptance letters of the variance requirements.  
4 BY MS. SNYDER:  
5 Q. Again, going back to the 2011 variance, which at this time,  
6 and currently we're still under, that relied on Kade, Bowers and  
7 Schwartz; right?  
8 A. That's correct.  
9 Q. But you've changed your list? You changed your list?  
10 A. No, no. Well, I didn't change my list. I had an additional  
11 resources available beyond what the department was requiring of  
12 me at the time.  
13 Q. If you could look at Exhibit 19, please. I think you are  
14 already opened to that.  
15 A. Yes.  
16 Q. This is a letter dated May 24th, 2012; right?  
17 A. That's correct.  
18 Q. And it's written by your counsel, Ms. Branch --  
19 A. That's correct.  
20 Q. -- to the Department of Health -- to Rebecca Maust at the  
21 Department of Health; right?  
22 A. Right.  
23 Q. This is the first time that your facility notified the  
24 Department of Health that you will be using Hansel and Gravely;  
25 right?

1 A. Correct  
2 Q. The second paragraph of this letter, starting with, "The  
3 facility has contracted." And I'll spare us all. I won't read  
4 that for the record. But, basically, the letter is telling the  
5 Department of Health that it's contracted with Drs. Gravely and  
6 Hansel for them to act as backups; correct?  
7 A. That's correct.  
8 Q. And, then, that bottom paragraph, second sentence,  
9 "Dr. Bowers." Do you see that? First line of the very last --  
10 A. Same thing.  
11 Q. It says, "Dr. Bowers, who was previously a backup physician,  
12 will no longer be serving in that role."  
13 A. Right.  
14 Q. When did you take Dr. Bowers off your list?  
15 A. The day before, May 23rd.  
16 Q. But he actually sold his practice on May 1st; right?  
17 A. That is what he informed me on May 23rd.  
18 Q. So he didn't tell you about it until May 23rd?  
19 A. He wrote a letter on May 21st; I received it on the 23rd.  
20 That was the first time.  
21 Q. And this letter was in response to an inquiry from the  
22 Department of Health; right? I'll just direct you to the first  
23 sentence of the letter.  
24 "This letter responds to your May 4th, 2012, letter to  
25 Dr. Haskell asking how the Lebanon Road Surgery Center meets the

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1 patient's safety and continuity-of-care concerns, address  
2 (inaudible) protocol." Did I read that correctly?  
3 A. Right.  
4 Q. All right. Now that we've mentioned the word protocol, I'd  
5 also like to talk to you about your facility's protocol. I'd  
6 like to take you back to Exhibit 10, please. This is the 2011  
7 variance that was granted by the Department of Health; right?  
8 A. Yes. Uh-huh.  
9 Q. Do you understand this variance to still be in effect?  
10 A. According to counsel, that is my impression. yes. Minus  
11 Dr. Bowers.  
12 Q. Minus Dr. Bower and Dr. Kade?  
13 A. And Dr. Kade. That's correct.  
14 Q. If you could -- again, I'm looking at the conditions set  
15 forth in the variance. It's the third paragraph down.  
16 A. Uh-huh.  
17 Q. It's No. 3. It says, "3. The strict adherence to the  
18 Lebanon Road Surgery Center emergency protocol by all staff of  
19 the facility."  
20 A. Uh-huh.  
21 Q. Did I read that correctly?  
22 A. That's correct.  
23 Q. You had submitted emergency protocol to the Department of  
24 Health as part of your variance request; right?  
25 A. That's correct. They asked for it.

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1 Q. They asked for it. They asked for it in 2010, too; right?  
2 A. I believe so.  
3 Q. If you could go to Exhibit 5, please, page 13. Actually, I  
4 guess if you would look at the first page, keeping your hand on  
5 page 13. If you look at the first page, we've already talked  
6 about this letter, but this is the facility's request for a  
7 variance; correct?  
8 A. Correct.  
9 Q. Of the transfer agreement?  
10 And, then, page 13, is the -- starting at page 13 is the  
11 emergency medical protocol that the facility provided to the  
12 Department of Health for consideration of that request; right?  
13 A. That's correct.  
14 Q. Your protocol has changed since then for Lebanon Road;  
15 right?  
16 A. It's changed for all of our facilities. Yes.  
17 Q. Do all of your facilities have the same emergency protocol?  
18 A. Yes.  
19 Q. And you provided the new protocol to the Department of  
20 Health. If could you turn to Exhibit 17, please. This is a  
21 letter from you to, again, Rebecca Maust; right?  
22 A. Uh-huh.  
23 Q. It's dated May 3rd of 2012. If you could look at the third  
24 page of the letter, last paragraph, it starts, "As requested."  
25 A. Uh-huh.

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1 Q. "As requested, attached is a copy of the emergency protocol  
2 that was in effect at the time this patient was transferred.  
3 The red-line type indicates additions and changes to the  
4 protocol made subsequent to the time the variance was granted."  
5 A. Uh-huh.  
6 Q. If you could now turn to page 4, the next page, this is the  
7 protocol with the changes that you provided to the Department of  
8 Health; correct?  
9 A. Uh-huh.  
10 Q. This protocol has, at the bottom of it, a date of  
11 February 22nd of 2012?  
12 A. That's correct.  
13 Q. Is that when the protocol went into effect?  
14 A. That's correct.  
15 MS. BRANCH: Do you have an extra copy? The book she gave  
16 me didn't have -- it stopped at page 3.  
17 MS. SNYDER: I'm sorry. Absolutely.  
18 MS. BRANCH: Thank you.  
19 MS. SNYDER: Do you want a minute to look through that?  
20 MS. BRANCH: No. You can go ahead.  
21 BY MS. SNYDER:  
22 Q. So I think you just testified that this protocol was  
23 effective February 22nd, 2012?  
24 A. Correct.  
25 Q. But you didn't provide it to the Department of Health until

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1 May of 2012; correct?  
2 A. Apparently not.  
3 MS. SNYDER: Thank you, Dr. Haskell. I don't think I have  
4 any further questions at this time.  
5 HEARING OFFICER KEPKO: Did you call him on cross?  
6 MS. SNYDER: I called him on cross.  
7 MS. BRANCH: I will reserve my questioning of Dr. Haskell  
8 until our case.  
9 HEARING OFFICER KEPKO: Very good. Thank you, Dr. Haskell.  
10 MS. SNYDER: Well, in that case, we don't have our next  
11 witness because I was anticipating that Dr. Haskell would go with  
12 Jennifer. We can get her down here, but we need a couple of  
13 minutes to do that.  
14 HEARING OFFICER KEPKO: That's good. I think it's about  
15 time for about a 20-minute break or a half-hour. How about you  
16 all? Do you want to do something about lunch?  
17 MS. BRANCH: Is there something close by?  
18 HEARING OFFICER KEPKO: There's a cafeteria downstairs, I  
19 believe.  
20 MS. SNYDER: They have sandwiches.  
21 HEARING OFFICER KEPKO: Good enough. Come back about 1:10.  
22 ---  
23 And, thereupon, a luncheon recess was taken.  
24 ---  
25

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1  
2 FRIDAY AFTERNOON SESSION  
3 SEPTEMBER 6, 2013  
4 HEARING OFFICER KEPKO: Let's go back on the record.  
5 Your next witness.  
6 MS. SNYDER: Thank you. The State would like to call  
7 Shannon Richey.  
8 (Witness sworn.)  
9 HEARING OFFICER KEPKO: State your full name and spell your  
10 last name for the record.  
11 THE WITNESS: Shannon May Richey, R-I-C-H-E-Y.  
12 HEARING OFFICER KEPKO: Thank you.  
13 - - -  
14 SHANNON M. RICHEY,  
15 being first duly sworn, as prescribed by law, was examined and  
16 testified as follows:  
17 DIRECT EXAMINATION  
18 BY MS. SNYDER:  
19 Q. Hi, Ms. Richey. How are you?  
20 A. I'm good.  
21 Q. So I'm a soft talker; you're a soft talker. Please keep  
22 your voice up for the court reporter, or else she'll tell you  
23 she can't hear.  
24 Ms. Richey, who is your employer?  
25 A. The Ohio Department of Health.

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1 Q. And what's your position with the Ohio Department of Health  
2 currently?  
3 A. I'm the assistant bureau chief in the Bureau of Community  
4 Health Care Facilities and Services, otherwise known as the  
5 Non Long-term Care Program.  
6 Q. Is your bureau different than the BIOS?  
7 A. Yes.  
8 Q. Okay. How are they different?  
9 A. They are different -- we are two different bureaus that fall  
10 under the same division. So there are four bureaus in the  
11 Division of Quality Assurance: BIOS, Bureau of Information  
12 Operational Support; Bureau of Community Health Care Services  
13 that oversees the regulation of non long-term care facilities.  
14 Q. Thank you. Could you give us an overview of your education,  
15 starting with your undergraduate?  
16 A. I have an undergraduate degree in nursing, and I am a  
17 Registered Nurse.  
18 Q. How long have you been with the Department of Health?  
19 A. Twenty-two years.  
20 Q. And have you always been in the same position that you're in  
21 today?  
22 A. No.  
23 Q. Would you walk us through your positions with the Department  
24 of Health, starting when the came on 22 years ago?  
25 A. Sure. When I came on in July of 1991, I was a health care

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1 facility surveyor in the Bureau of Long-term Care Quality until  
2 2000. From 2000 to 2003, I was an assistant supervisor in the  
3 Columbus district office in the Bureau of Long-Term Care  
4 Quality. From 2003 to 2008, I was the technical assistance  
5 program manager, and we provided education and training for  
6 nursing home providers. From 2008 to current, I have been the  
7 assistant bureau chief in Non Long-term Care.  
8 Q. Could you please give us a brief overview of your job duties  
9 as assistant bureau chief in Non Long-term Care? Non Long-term  
10 Care, is that the same as the very long title that you just  
11 testified to?  
12 A. Correct. The Bureau of Community Health Care Facilities and  
13 Services is otherwise known as the Non Long-term Care Bureau,  
14 and that's because we have oversight of all non long-term care  
15 facilities, so all other health care providers that are not  
16 nursing homes or residential care facilities.  
17 Q. Thank you.  
18 If you could now give me a brief overview of the job duties.  
19 A. Sure. I have an administrative and supervisory role in the  
20 regulation of non long-term care facilities. I oversee  
21 surveyors, and I answer questions for providers, and I respond  
22 to provider inquiries.  
23 Q. Are health care facilities considered non long-term care  
24 facilities under your purview?  
25 A. Yes.

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1 Q. Are Ambulatory Surgical Facilities under your purview?  
2 A. Yes.  
3 Q. Are Ambulatory Surgical Facilities kind of a subset of a  
4 health care facility?  
5 A. Yes. Ambulatory facilities fall under health care  
6 facilities.  
7 Q. Are you involved in the regulation of Ambulatory Surgical  
8 Facilities for the Department of Health?  
9 A. Yes, I am.  
10 Q. How?  
11 A. I provide an administrative and supervisory role. I review  
12 some of the survey reports that are submitted by the surveyors.  
13 I respond to provider inquiries, if there are questions about  
14 the regulations or rules surrounding Ambulatory Surgical  
15 Facilities, and I do participate in the processing of variance  
16 requests, and I review transfer agreements.  
17 Q. What is an ASF?  
18 A. An ASF is an Ambulatory Surgical Facility, and that is a  
19 facility who provides surgical procedures on an outpatient  
20 basis.  
21 Q. And I think you testified in an overview of your job duties  
22 about transfer agreements. You're familiar with the term  
23 "transfer agreement"?  
24 A. Yes, I am.  
25 Q. What is a transfer agreement?

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1 A. A transfer agreement is set forth in the rule; however, it  
2 is an agreement between a hospital and an Ambulatory Surgical  
3 Facility to provide care or medical care for patients in the  
4 event of medical complications, emergency situations, or for any  
5 other needs that might arise.  
6 Q. Does a facility have to have a Written Transfer Agreement  
7 with a hospital in order to receive a license to operate as an  
8 ASF in the State of Ohio?  
9 A. Yes. They may request a variance to the requirements of a  
10 transfer agreement.  
11 Q. And what is a variance?  
12 A. A variance is a method in which they can meet the intent of  
13 that rule in an alternate manner.  
14 Q. Since you started your position in 2008, how many facilities  
15 have requested variances of the Written Transfer Agreement  
16 requirement?  
17 A. To my knowledge, there have been two.  
18 Q. Are you aware of any Ambulatory Surgical Facilities that  
19 have requested a variance from the Written Transfer Agreement  
20 that have been denied that request?  
21 A. No.  
22 Q. Are you familiar with Lebanon Road --  
23 A. Yes, I am.  
24 Q. -- Surgery Center?  
25 A. Yes, I am.

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1 Q. How are you familiar with Lebanon Road?  
2 A. I have reviewed survey inspections from Lebanon Road Surgery  
3 Center, and I also have participated in gathering information  
4 for their variance request.  
5 Q. And what is your typical role in the processing of a  
6 variance request?  
7 A. Typically, I just gather the information, and if we're  
8 missing any information that might be helpful in the director  
9 making a determination as to whether or not to approve that  
10 variance, we would gather that information, and, then, that  
11 information is provided to the director.  
12 Q. And how does a facility request a variance of a Written  
13 Transfer Agreement requirement?  
14 A. In writing, either through a letter or as part of their Plan  
15 of Correction.  
16 Q. Historically, has the director required -- and I understand  
17 we're under multiple directors. But has the director required  
18 certain information to be provided by the facility in a request  
19 for a variance of the Written Transfer Agreement requirement?  
20 A. Yes. With our previous director, Dr. Jackson, he required a  
21 facility to send their emergency protocol and any evidence of  
22 emergency backup physician coverage providing 24-hour coverage.  
23 Q. And by emergency backup physician coverage, do you refer to  
24 those as backup physicians?  
25 A. Yes. We refer to those as backup physicians.

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1 Q. And does a facility have to provide the names of the backup  
2 physicians it intends to use in lieu of having a Written  
3 Transfer Agreement?  
4 A. Yes, they do.  
5 Q. Why?  
6 A. So that we can verify their credentials and their admitting  
7 privileges at the hospital.  
8 Q. Who decides whether to grant or deny a Request for Variance  
9 of the Written Transfer Agreement?  
10 A. The director of Health.  
11 Q. Do you make a recommendation to the director at the  
12 Department of Health how to proceed with a request for a  
13 variance of the Written Transfer Agreement?  
14 A. No, I do not.  
15 Q. When was Lebanon Road initially licensed to operate as an  
16 ASF?  
17 A. In 2010.  
18 Q. And when it originally applied in 2010, did it have a  
19 Written Transfer Agreement with the hospital?  
20 A. No, they did not.  
21 Q. Did it request a variance of that requirement?  
22 A. Yes, they did.  
23 Q. If could you turn, please, to State's Exhibit 5. Could you  
24 identify that document for the record, please?  
25 A. This is the request from Lebanon Road Surgery Center for a

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1 variance.  
2 Q. Was this Request for Variance granted?  
3 A. Yes.  
4 Q. If you could turn, please, to Exhibit 6. Could you identify  
5 this document for the record, please?  
6 A. This is ODH's approval of that request for a variance.  
7 Q. Was this variance that was granted by ODH conditioned on the  
8 facility's association with certain physicians?  
9 A. Yes.  
10 Q. And could you show us in the letter, if the letter  
11 designates those physicians, where are you finding it?  
12 A. In Paragraph 2, it specifically identifies Dr. Haskell and  
13 Dr. Kade as having privileges at Jewish Hospital and Christ  
14 Hospital, and that these two physicians have admitting  
15 privileges and have been verified.  
16 Q. Thank you. If you could turn to page 2 of this document.  
17 What would have happened to this granted variance had one of  
18 those physicians not had admitting privileges?  
19 HEARING OFFICER KEPKO: I'm sorry. I can't hear you.  
20 MS. SNYDER: I'm sorry.  
21 BY MS. SNYDER:  
22 Q. What would have happened to this granted variance if one of  
23 those physicians had, for some reason, lost their admitting  
24 privileges?  
25 A. It would no longer be valid.

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1 Q. Could you, please, turn to -- before we move off of that.  
2 Did you play a role in processing this requested variance?  
3 A. Not in 2010.  
4 Q. If you can go to Exhibit 8, please. Could you identify this  
5 document for the record?  
6 A. This is the request from Lebanon Road Surgery Center to  
7 modify the variance that was in place.  
8 Q. Okay. And how did they want to modify that 2010 variance?  
9 A. They wanted to add two backup physicians: Dr. David  
10 Schwartz and Dr. Walter Bowers and substitute them for  
11 Dr. Haskell.  
12 Q. Did you play any role in processing this Request for  
13 Modification?  
14 A. Yes, I did.  
15 Q. What did you do?  
16 A. I verified the admitting privileges and credentials of  
17 Dr. David Schwartz and Dr. Walter Bowers at Christ Hospital.  
18 Q. And was this modification granted?  
19 A. Yes.  
20 Q. If you could turn, please, to Exhibit 10. Was this variance  
21 granted by the Ohio Department of Health conditioned on the  
22 association of specific backup physicians?  
23 A. Yes.  
24 Q. And who would those physicians have been?  
25 A. Those would have been Dr. David Schwartz, Dr. Walter Bowers

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1 and Dr. Kade.  
2 Q. Does a variance have an expiration date?  
3 A. Currently variances have an expiration date. Prior to  
4 November of 2011, they did not have expiration dates unless  
5 there was a modification made to that variance.  
6 Q. And when you say "prior to November of 2011," is there an  
7 event that triggered that change?  
8 A. A new protocol was developed for processing variances.  
9 Q. If you could turn, please, to Exhibit 11. Could you  
10 identify this document for the record, please?  
11 A. This is the protocol that was developed for processing  
12 variance requests in November of 2011.  
13 Q. Was this the protocol that you were referring to in your  
14 earlier answer?  
15 A. Yes.  
16 Q. Do you know, are all of the materials in this protocol new  
17 conditions put on a facility?  
18 A. No. A number of these protocols -- a number of these were  
19 things we already did; however, we just put them in writing.  
20 Q. Did a facility always have to submit the names of its  
21 proposed backup physicians to the Department of Health in  
22 writing?  
23 A. Yes.  
24 Q. If you could go back, please, to Exhibit 8. Is Dr. Kade  
25 mentioned in this letter?

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1 A. No, she is not.  
2 Q. Was she included in the modified variance that was granted  
3 as a result of this letter?  
4 A. We continued to include Dr. Kade in that variance because  
5 our understanding was that only Dr. Schwartz and Dr. Bowers were  
6 added to replace Dr. Haskell. Our understanding was that  
7 Dr. Kade would remain as a backup physician.  
8 Q. If you could now look, again, at the Exhibit 10, the 2011  
9 variance. I'm looking at the second paragraph in this letter.  
10 Third line. If could you read that into the record. It starts  
11 with, "It is my understanding."  
12 A. "It is my understanding that Roslyn Kade, M.D., will  
13 continue working at the facility, and that her privileges at The  
14 Christ Hospital remain valid through February 28th, 2012."  
15 Q. Thank you. And, then, if you could skip down to the little  
16 paragraph, starting, "Should evidence." Could you please read  
17 that?  
18 A. "Should evidence of the reappointment to hospital staff or  
19 of unrestricted admitting privileges for any of the three named  
20 physicians not be provided to this department in a timely  
21 manner, this variance will no longer be valid."  
22 Q. Thank you.  
23 After that February 28th, 2012, date that this letter  
24 indicates Dr. Kade's privileges expired, are you aware of any  
25 communication that the Department of Health got telling us that

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1 say she, after that date, had unrestricted admitting privileges?  
2 A. No, I'm not aware of any.  
3 Q. If you could turn to Exhibit 13, please. Could you identify  
4 this document for the record?  
5 A. This is a letter from Christ Hospital notifying Dr. Kade of  
6 her reappointment and her transfer of her status to an affiliate  
7 staff status with no clinical privileges.  
8 Q. After this change in her status, did Dr. Kade still have  
9 unrestricted admitting privileges at The Christ Hospital as you  
10 understand privileges?  
11 A. No. According to this letter, she no longer had clinical  
12 privileges or admitting privileges.  
13 Q. Yes. Does the Department of Health have any evidence of why  
14 Dr. Kade's privileges changed from courtesy to affiliate?  
15 A. No.  
16 Q. So with Dr. Kade's status indicated in this letter of  
17 affiliate, did she meet the conditions of the 2011 variance?  
18 A. No, she would not have.  
19 Q. You testified earlier that a facility has to give the  
20 Department of Health the names of the backup physicians that it  
21 intends to use for the purpose of the variance. Does a facility  
22 also have to tell the Department of Health if it adds physicians  
23 to its backup list?  
24 A. Yes.  
25 Q. Why?



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1 A. So that they can verify their credentials and their  
2 admitting privileges.  
3 Q. If they add physicians to their group of backup physicians,  
4 is that considered a change in their variance?  
5 A. It would be a modification to that variance.  
6 Q. Did this facility apply for a renewal of its Ambulatory  
7 Surgical Facility license in 2012?  
8 A. Yes, they did.  
9 Q. If you could turn, please, to what's been marked as State's  
10 Exhibit 2. Could you identify that document for the record,  
11 please?  
12 A. This is Lebanon Road Surgery Center's Renewal Application  
13 for Licensure from 2012.  
14 Q. Is this a true and accurate copy of the renewal application  
15 that was received from Lebanon Road Surgery Center for the  
16 renewal period of 2012 to 2013?  
17 A. Yes, it is.  
18 Q. Thank you. Did the facility submit a Written Transfer  
19 Agreement with a hospital with this application?  
20 A. No, they did not.  
21 Q. Did this facility request a variance of the Written Transfer  
22 Agreement requirement?  
23 A. Yes, they did.  
24 Q. Could you, please, turn to Exhibit 3. Is this the request  
25 for the variance to the Written Transfer Agreement for the

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1 renewal period of 2012 and 2013 that the Ohio Department of  
2 Health received from Lebanon Road Surgery Center?  
3 A. Yes, it is.  
4 Q. Has the director made a decision of whether to grant or deny  
5 this variance request?  
6 A. Not that I'm aware of.  
7 Q. Can anybody besides the director make that decision of  
8 whether to grant or deny this request for a variance?  
9 A. No.  
10 MS. SNYDER: I don't have any further questions.  
11 HEARING OFFICER KEPKO: Counsel, before you cross, I'm going  
12 to ask one or two questions, just to clarify some of my notes.  
13 ---  
14 EXAMINATION  
15 BY HEARING OFFICER KEPKO:  
16 Q. You testified earlier that Director Jackson, when his tenure  
17 was ongoing, required certain information in the variance; and I  
18 believe you testified to the emergency protocol and evidence of  
19 backup 24-hour coverage. Was that a rule or was that his sort  
20 of personal --  
21 A. That was things that he deemed necessary in order to make a  
22 determination. It was not in rule. It was just information  
23 that he deemed necessary.  
24 Q. How does a provider know what the director required?  
25 A. They would have been told. If they had not provided it,

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1 they would have been told that that was needed.  
2 Q. Okay. And you also testified that, if a physician is added,  
3 that that's a modification. Again, is that just based on, sort  
4 of, common knowledge or is there a rule that says if a facility  
5 or an Ambulatory Surgical Center adds a physician, that's a  
6 modification?  
7 A. Because they know the requirement -- the reason for why they  
8 would want to notify us so we could check their admitting  
9 privileges and credentials, because the variance is based on  
10 that information being provided to the director so that he can  
11 make a determination as to whether or not to approve that  
12 variance.  
13 If they specifically identified physicians, and we had  
14 checked those admitting privileges, if any changes are made to  
15 that, they would have to notify us so that we could re-check  
16 those physicians' credentials and admitting privileges so that  
17 we can provide that information to the director.  
18 Q. Your testimony that "They would have to notify us," is that  
19 a rule?  
20 A. No, it would not be a rule. It's not a rule. It's just a  
21 requirement.  
22 Q. Okay. And is there a certain requirement as to the number  
23 of backup physicians that are necessary?  
24 A. No, but they do have to assure us there is 24-hour-a-day,  
25 seven-day-a-week coverage, and that if someone is gone, that

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1 there is another person to pick up that coverage.  
2 Q. Let me ask this way: If you approve a variance that has two  
3 backup physicians and they added a third physician, they still  
4 met the requirements that were granted under the variance that  
5 said they had two. Why would they have to notify you of a  
6 third?  
7 A. Well, that really is a decision for the director to make.  
8 Q. Okay.  
9 A. We actually don't make that decision. We would not, as the  
10 program, determine whether the number was appropriate or not.  
11 The director of Health would make that determination.  
12 Q. Could they add a third and you not know?  
13 A. They could, but then we would not have the ability to check  
14 the admitting privileges and the credentials of that physician,  
15 and so we would not know if that physician was appropriate to be  
16 added to that variance.  
17 Q. So your testimony, again, is if there are two backup  
18 physicians and a facility adds a third, they are required to let  
19 your department know, and you consider that to be a modification  
20 of the variance?  
21 A. Correct.  
22 Q. And go through the whole approval process again?  
23 A. Correct. The information would have to be set forth through  
24 the director.  
25 HEARING OFFICER KEPKO: Very good. Counsel.

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1 MS. BRANCH: Thank you.  
2 CROSS-EXAMINATION  
3 BY MS. BRANCH:  
4 Q. So there's no written regulation or rule that puts the  
5 provider on notice that if he adds a third, he needs to let you  
6 know; right?  
7 A. No.  
8 Q. There's no written rule or regulation that puts the provider  
9 on notice that he needs to request a modification of his  
10 variance?  
11 A. No.  
12 Q. Rules and regulations go through the whole rule-making  
13 process?  
14 A. Correct.  
15 Q. But the department also has what we've seen as a procedure,  
16 like, an internal written operational procedure; right?  
17 A. Correct.  
18 Q. And that procedure -- I assume you have them for more than  
19 just for the variance?  
20 A. Right.  
21 Q. Is there any written procedure that puts a provider on  
22 notice that if they add a backup doctor that they need to notify  
23 the department?  
24 A. Ask that again.  
25 Q. Right. My first question was: Is there a rule or reg. Now

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1 I'm going to ask: Is there a procedure or protocol, something  
2 in writing within the department that's not as formal as a  
3 regulation, that would put the provider on notice that if he  
4 adds a backup doctor, that he would have to notify the  
5 department?  
6 A. So are you asking if we send a procedure out to the  
7 providers with that -- we have a procedure.  
8 Q. My first question was: Do you have something in writing.  
9 And my second question was going to be: How do you notify the  
10 provider? If you want to answer both at the same time, that's  
11 fine.  
12 A. That is part of our procedure, and I am not aware as to how  
13 we communicate that, honestly. I do not send out the letters,  
14 and I have not even written the content of the letters, and I'm  
15 not aware of all the content in the letters that are sent out.  
16 I am not sure how they are notified.  
17 Q. Where is that written?  
18 A. In our protocol.  
19 Q. Which protocol is that? Is it the one that's for the  
20 variance? There's one in Exhibit B in the Respondent's book.  
21 MS. SNYDER: It's 11.  
22 BY MS. BRANCH:  
23 Q. You can look at the one in 11. What I'm looking for is the  
24 language that says, if you add a backup that you need to let the  
25 director know.

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1 HEARING OFFICER KEPKO: Your question was, if you add a  
2 backup?  
3 MS. BRANCH: Right.  
4 THE WITNESS: I will have to look at the rule quick.  
5 BY MS. BRANCH:  
6 Q. Sure. Take your time.  
7 A. On page 3, H, I, and J, refers to the backup physicians.  
8 Now, it does not state that they have to notify when they make  
9 modifications, but it does tell us that we have to have a  
10 written list of names, contact information and area of specialty  
11 for those consulting referral physicians who have agreed to be  
12 backup physicians. My understanding of the interpretation of  
13 that is we would have to have that information.  
14 Q. You know, maybe I should ask it this way: If a doctor --  
15 I'm sorry. If a facility wants to request a variance and  
16 submits two names as backups, and a variance is granted, is  
17 there anything in writing that tells that facility that if they  
18 have a consultant or extra coverage, or I think Dr. Haskell used  
19 the word "redundant coverage," that that also needs to be  
20 provided to the Department of Health, separate from the variance  
21 requirement?  
22 MS. SNYDER: May I just get a clarification of your question  
23 before we go on? Are you not asking about backup physicians?  
24 Are you using all of those terms interchangeably: Consultant  
25 and backup physician?

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1 MS. BRANCH: My question had nothing to do with the  
2 variance, I guess, is the point I'm making.  
3 BY MS. BRANCH:  
4 Q. Let's say an ASF has a variance, and they have two backups  
5 listed.  
6 A. Uh-huh.  
7 Q. Do you understand that?  
8 A. I do understand that part.  
9 Q. Separate from the variance request and the variance being  
10 granted, they want to add another backup doctor or a doctor who  
11 has a role -- exact same role as the backup doctor in the  
12 variance, wants to just add it so they have somebody else in  
13 their pocket to go to if they ever needed it. Is there  
14 anything -- do you understand that part of the question?  
15 A. I think I do.  
16 Q. Okay. So my next question is: Is there anything in writing  
17 that alerts the provider that the backup to the backup that  
18 they've got in their pocket needs to be notified to ODH at any  
19 point?  
20 A. I still believe that's a modification to the variance.  
21 Q. Well, answer this one, and then I'm going to ask that one  
22 next. The first question is: In that situation, is there  
23 anything in writing that tells the provider, "You need to tell  
24 us that you got backup for your backup"?  
25 A. I do not know.

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1 Q. And then the second question is: Is there anything that  
2 tells the provider that having redundant coverage is a  
3 modification of the variance, in which case they would need to  
4 notify you?  
5 HEARING OFFICER KEPKO: Counsel, let me interrupt because  
6 I'm getting confused with the backup for a backup.  
7 MS. BRANCH: I was calling it redundant.  
8 HEARING OFFICER KEPKO: Either you're a backup or you're  
9 not. It seems to me that a backup for a backup is a backup. I  
10 mean, it's just another physician who is acting in the role of a  
11 backup.  
12 MS. BRANCH: I'll use the redundant coverage which  
13 Dr. Haskell used in his testimony.  
14 HEARING OFFICER KEPKO: Or consultant.  
15 MS. BRANCH: Or consultant. Okay.  
16 BY MS. BRANCH:  
17 Q. If I ask it this way: If a facility adds a consultant to  
18 their resources, does ODH need to know that?  
19 A. If they're providing backup coverage for emergency care.  
20 Q. And where is that in writing?  
21 A. It's part of the terms of the variance.  
22 HEARING OFFICER KEPKO: I'm sorry. I didn't hear you.  
23 THE WITNESS: Part of the terms of the variance.  
24 BY MS. BRANCH:  
25 Q. Could you tell us where that is, then, in the one that's the

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1 the third paragraph, it states, "The variance continues to be  
2 conditioned on the continued association of the Lebanon Road  
3 Surgery Center with the three physicians named in this letter."  
4 My understanding is that it's those three physicians that  
5 are named in this letter. The variance was granted based on all  
6 the factors that went into play for those three physicians,  
7 their admitting privileges and credentials.  
8 If you add another physician, and that variance was  
9 initially granted based on these three physicians, you've added  
10 another component to that.  
11 BY MS. BRANCH:  
12 Q. I understand that's your position. I'm looking for  
13 something in writing that would put the provider on notice that  
14 that should be --  
15 A. My position is that this does that.  
16 Q. Does this talk about a modification?  
17 A. No, but it does talk about three physicians being named.  
18 Q. Is there anywhere in the rules, and I mean formal rule  
19 making versus procedures versus a letter, that puts the provider  
20 on notice when a modification needs to be made for a variance?  
21 A. Not to my knowledge.  
22 Q. And is there anything, again, in the rules, procedures,  
23 letters, that would put a provider on notice that they must  
24 only use, for backup admission to a hospital and transfer  
25 situation, they must only use the people in the variance?

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1 most recent, which would be exhibit --  
2 MS. SNYDER: That's Exhibit 10.  
3 BY MS. BRANCH:  
4 Q. Exhibit 10, that if he adds a consultant, he needs to let  
5 ODH know?  
6 HEARING OFFICER KEPKO: Well, but, she answered if that  
7 consultant is providing backup coverage, then that's a  
8 modification of the variance.  
9 THE WITNESS: Right.  
10 HEARING OFFICER KEPKO: Then your question was: Where is  
11 that written, and now we're looking at Exhibit 10; right?  
12 THE WITNESS: Right.  
13 MS. SNYDER: And I need to understand if we're talking about  
14 a consultant or a backup. I think those two things have  
15 different meanings.  
16 HEARING OFFICER KEPKO: Well, from what the witness  
17 testified, regardless of what you're calling this third person,  
18 if they're in any way providing backup coverage in that  
19 facility, then, in your opinion, that's a modification of the  
20 variance?  
21 THE WITNESS: Correct.  
22 HEARING OFFICER KEPKO: And in that case, the facility would  
23 be required to notify ODH, and now we're looking for the  
24 language that says that.  
25 THE WITNESS: Right. The conditions of that variance, in

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1 A. My position is the letter sent out telling them the variance  
2 is granted does that.  
3 Q. Well, is it your understanding -- before I get to the rules,  
4 is it your understanding that if a doctor -- if a facility has a  
5 variance with those two doctors, and the doctor uses a third  
6 doctor, not in the variance say: Dr. Smith. Never heard of him  
7 before.  
8 A. Uh-huh.  
9 Q. And uses Dr. Smith to admit the patient to a hospital, is  
10 there anything in your understanding of the way the variance  
11 works that that would be prohibited by the variance?  
12 HEARING OFFICER KEPKO: Do you understand the question?  
13 THE WITNESS: Not really. Ask that question one more time.  
14 BY MS. BRANCH:  
15 Q. Do you prohibit, you being ODH, prohibit a facility that has  
16 a variance to utilize a third doctor, not mentioned in the  
17 variance, to admit a patient to the hospital?  
18 A. No, there's nothing that would prohibit that.  
19 Q. So if there were a situation where, let's say,  
20 Drs. Schwartz, Bowers and Kade were unavailable, or, for  
21 whatever reason, Dr. Haskell decided to use Dr. Smith to admit  
22 the patient to the hospital, would there be any prohibition on  
23 his doing that?  
24 A. No. There's definitely no prohibition. Any doctor can  
25 admit a patient to the hospital.

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1 Q. You said there's been no decision made on the variance  
2 request from October of 2012?  
3 A. To my knowledge, that is correct.  
4 Q. Do you know why that's not happened yet?  
5 A. No, I do not know.  
6 Q. Do you know anybody at the department, other than the  
7 director, who would know?  
8 A. No.  
9 Q. If you could go back to Exhibit 8, that is the initial  
10 variance request. I'm sorry. That's not the initial one.  
11 That's the one with the modification adding Dr. Bowers. On page  
12 2 of Exhibit 8, that's Dr. Bowers' letter to Lebanon Road  
13 Surgery Center saying that he would be one of their backups; is  
14 that right?  
15 A. Correct.  
16 Q. And was it your job, then, to verify that he had admitting  
17 privileges at The Christ Hospital?  
18 A. Yes.  
19 Q. That's your name?  
20 A. Yes.  
21 Q. It's the only place I could find your name in the whole  
22 record.  
23 So did you call Christ Hospital to verify at the time, I  
24 guess this is in August of 2011, to see if he had privileges?  
25 A. Yes, I did. I called on September 8th.

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1 Q. And you learned that he had admitting privileges at Christ,  
2 and he was active and in good standing?  
3 A. Correct.  
4 Q. And that was good through May 13th, '13?  
5 A. Correct.  
6 Q. Any indication in August of 2011 that there was a problem  
7 with Dr. Bowers admitting patients on behalf of LRSC at The  
8 Christ Hospital?  
9 A. Not according to Christ Hospital.  
10 Q. And do you know, today, whether he still has admitting  
11 privileges at The Christ Hospital?  
12 A. I would have to look back at my notes because I don't  
13 remember. I believe I did call again.  
14 Q. Uh-huh.  
15 A. I would have to look back. I don't recall if I checked on  
16 this one. I've checked on some others since then, and I don't  
17 recall if he was one of those.  
18 Q. Have you checked on him in preparation for today's hearing?  
19 A. No.  
20 Q. Anybody has the ability to contact Christ Hospital to find  
21 out if a doctor has admitting privileges; is that right?  
22 A. That is correct.  
23 Q. I think I'll just have this marked as a new exhibit. I'm  
24 going to mark it II. I think that's the next number.  
25 HEARING OFFICER KEPKO: Is that your last one? I'm not

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1 sure.  
2 MS. BRANCH: I think HH was the CV.  
3 MS. SNYDER: Have we gotten this before or is this --  
4 MS. BRANCH: No, I didn't know if this is -- we got this  
5 yesterday from Christ Hospital after I got your letter from The  
6 Christ Hospital from June.  
7 ---  
8 And, thereupon, Respondent's Exhibit II was marked for  
9 purposes of identification.  
10 ---  
11 BY MS. BRANCH:  
12 Q. Is this a familiar privilege notice that you've seen when  
13 you've checked on privileges in The Christ Hospital?  
14 A. Actually, I have not seen anything that has looked like this  
15 before.  
16 Q. Okay. Does this indicate to you that, even today,  
17 Dr. Bowers has active status with the membership with Christ  
18 Hospital? Or, I guess, as of yesterday?  
19 A. Yes.  
20 Q. And you did the same for Dr. Schwartz, I take it?  
21 A. Yes, I did.  
22 Q. And that's page 3 of Exhibit 8?  
23 A. Yes.  
24 Q. Are you familiar with House Bill 59?  
25 A. No, I'm sorry.

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1 Q. Okay. Do you know if there are any new regulations being  
2 proposed or drafted at the Department of Health currently to  
3 change any of this variance to a Written Transfer Agreement?  
4 A. I believe there may be, but I do not know the details of  
5 those.  
6 Q. Who would be in charge of that? Who would know about that?  
7 A. Probably our legal counsel.  
8 Q. I'm just curious. If we go through this hearing and this  
9 process, based on the application from 2012, that's a year old,  
10 are things going to change at the department, and we would have  
11 to do a whole new variance request after the new rules come out?  
12 A. I do not know the answer to that.  
13 Q. And any idea when those new rules need to be out?  
14 A. I have no idea.  
15 Q. You said that there was a rule about what needs to be in a  
16 Written Transfer Agreement. Do you know what rule that is  
17 because I was unfamiliar with that?  
18 A. What is --  
19 Q. I wrote down that there was a rule about what needs to be in  
20 the agreement between the hospital and the ASF to provide care  
21 for patients.  
22 A. There is a rule --  
23 Q. I might have written that down wrong.  
24 A. There is a rule that speaks to the transfer agreements.  
25 Q. That there needs to be a transfer agreement?

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1 A. Correct.  
 2 Q. Does the rule say what needs to be in the transfer  
 3 agreement?  
 4 A. You know, I'd have to actually look at that rule to  
 5 determine that.  
 6 Q. Could it be the same rule that requires the transfer  
 7 agreement?  
 8 A. Correct.  
 9 Q. That's where I should look?  
 10 A. Yes.  
 11 Q. And does the Written Transfer Agreement -- is the whole  
 12 purpose behind the Written Transfer Agreement to make sure that  
 13 when an ASF has a patient who needs to be transferred to the  
 14 hospital, that the patient will be admitted?  
 15 A. Say that one more time.  
 16 Q. The purpose behind --  
 17 A. The purpose.  
 18 Q. -- the Written Transfer Agreement requirement is that  
 19 purpose to make sure, if an ASF has a patient who needs to be  
 20 admitted to the hospital, that the patient will be admitted?  
 21 A. They will provide medical care for that patient.  
 22 Q. Okay. And one way -- an alternative way of doing that is if  
 23 a doctor has admitting privileges and can admit the patient  
 24 directly, he doesn't need the Written Transfer Agreement?  
 25 A. That's why they would request a variance, and that's

1 affiliate?  
 2 MS. SNYDER: I'm going to object on hearsay.  
 3 MS. BRANCH: I'm just asking if she's aware. I'm not yet  
 4 asking what she knows.  
 5 HEARING OFFICER KEPKO: Overruled.  
 6 THE WITNESS: I know there was a conversation, but I don't  
 7 know the details of that conversation.  
 8 BY MS. BRANCH:  
 9 Q. Did you replace Roy Croy?  
 10 A. No, I did not replace Roy Croy.  
 11 Q. Did he have the job before you of checking out Dr. Kade?  
 12 A. Before, yes. I was the assistant bureau chief. I have  
 13 always been the assistant bureau chief. Roy would ask me to do  
 14 things related to processing and gathering information, so him  
 15 and I shared what we did. He didn't -- sometimes we did  
 16 different things for different variances. It's whatever he  
 17 asked me to do is what I did.  
 18 Q. I think he's coming up next. I'll save those questions for  
 19 him then.  
 20 A. Okay.  
 21 Q. Are you aware of what the status is of Dr. Haskell's current  
 22 privileges at Jewish Hospital? Did you check on him at any time  
 23 during your variance work?  
 24 A. I do not believe -- very honestly, I can't remember if I did  
 25 or not. I have not real recently, I can tell you that.

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1 typically how those variances are approved, if there are backup  
 2 physicians.  
 3 Q. And do you know when a physician has refer-and-follow  
 4 privileges what that -- does that allow the physician to have  
 5 the patient admitted to the hospital, but the doctor can't treat  
 6 in the hospital?  
 7 A. I do not -- I am not familiar with how privileges work at  
 8 each and every hospital. They differ. We are aware that they  
 9 differ from hospital to hospital, so I don't want to answer  
 10 that. I wouldn't have the knowledge necessary to answer that.  
 11 Q. So in your job, when you're checking out the privileges on  
 12 the variance request, if you saw that word "affiliate," or  
 13 "refer-and-follow privileges," how would you figure out what  
 14 that means?  
 15 A. I would ask. If they did not tell me they had admitting  
 16 privileges, active, in good standing and admitting privileges,  
 17 and they said they were an affiliate, I would ask.  
 18 Q. Who would you ask?  
 19 A. Whoever I was talking to on the phone. I always call the  
 20 medical staff office. If I can't get the answer from them, and  
 21 sometimes we don't get a lot of information from the medical  
 22 staff office, so we would then contact the facility and ask the  
 23 facility, "What does this mean?"  
 24 Q. And are you familiar with the discussion that Dr. Haskell  
 25 and Roy Croy had related to Dr. Kade switching from courtesy to

1 Q. All right. And the Dayton facility, you said there were two  
 2 facilities that requested a variance?  
 3 A. Correct.  
 4 Q. Those are both Dr. Haskell, where he's medical director?  
 5 A. Yes.  
 6 Q. Do you have any information on why the Dayton variance is  
 7 still pending from last year?  
 8 A. No.  
 9 Q. Or if there's any concerns that it's not going to be  
 10 compliant with your rules and regulations?  
 11 A. No, I do not know.  
 12 Q. You don't know.  
 13 The protocol that we discussed in Exhibit 11, the Department  
 14 of Health specifically asked Dr. Haskell to tell them how he was  
 15 going -- what was his intent of how to comply with that  
 16 protocol. That was in May of 2012. Were you involved in those  
 17 correspondence and discussions?  
 18 A. No, I was not.  
 19 MS. BRANCH: I have no further questions.  
 20 HEARING OFFICER KEPKO: Do you have any redirect?  
 21 MS. SNYDER: I do. Thank you.  
 22 ---  
 23 REDIRECT EXAMINATION  
 24 BY MS. SNYDER:  
 25 Q. Ms. Richey, you've been asked a whole slew of questions

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1 about adding backup physicians to a variance that already has  
2 designated backup physicians. Do you remember that line of  
3 questioning?  
4 A. Yes.  
5 Q. Okay. In association with that, you were asked if it was  
6 prohibited that the facility use a physician's admitting  
7 privileges if that physician is not one of those physicians on  
8 which the variance was conditioned. Do you remember being asked  
9 that?  
10 A. Yes.  
11 Q. And I think that your answer was nothing -- there's nothing  
12 to prohibit that?  
13 A. Correct.  
14 Q. But if a physician uses -- excuse me. If a facility uses  
15 the backup -- or the admitting privileges of another physician  
16 who is not listed as one of the physicians in the variance, is  
17 that facility in compliance with the terms of that variance?  
18 A. No.  
19 Q. Why?  
20 A. Because that is a modification to that variance. A variance  
21 is approved based on the circumstances in that variance and the  
22 physicians listed as backup.  
23 Q. You were also asked a lot of questions about backups and  
24 consultants. What do you understand a consultant -- well, first  
25 of all, let me ask you this: Do you consider those two things

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1 to be two separate people or types of physicians?  
2 A. They can be, yes.  
3 Q. They can be.  
4 If a physician is a consultant, but not a backup listed in  
5 the variance, what do you consider that physician to be? What  
6 is a consultant in that --  
7 A. A consultant can just be a physician that the attending  
8 physician has referred to to consult about an issue.  
9 Q. Thank you. If you could look at Exhibit 8, please. I'm on  
10 page 2 of that document. You were asked a question about this  
11 handwritten note at the bottom right-hand corner; correct?  
12 A. Correct.  
13 Q. Okay. You testified that you wrote that note; right?  
14 A. Correct.  
15 Q. And you testified that you called the hospital?  
16 A. Yes.  
17 Q. Okay. When you called the hospital specifically for  
18 Dr. Bowers, did you ask whoever you talked to whether he had  
19 unrestricted admitting privileges in both obstetrics and  
20 gynecology?  
21 A. No. We ask, "Does this physician have admitting  
22 privileges?"  
23 MS. SNYDER: I have no further questions.  
24 HEARING OFFICER KEPKO: Thank you for your testimony.  
25 THE WITNESS: Thank you.

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1 (Witness excused.)  
2 MS. SNYDER: Can we have about five minutes?  
3 HEARING OFFICER KEPKO: Sure. Five or ten?  
4 MS. SNYDER: Yeah, that would be great.  
5 (Recess taken.)  
6 (Mr. Croy joined the hearing.)  
7 HEARING OFFICER KEPKO: Back on the record. Your next  
8 witness.  
9 MS. SNYDER: Thank you. Actually, the State does not have  
10 any further witnesses at this point.  
11 HEARING OFFICER KEPKO: Very good. Do you rest?  
12 MS. SNYDER: Well, I'd like to reserve the right to recall  
13 witnesses and produce documents for the purpose of rebuttal.  
14 I have my exhibits that have been marked as 1 through 25. I  
15 do have an additional exhibit that I gave to Jennifer yesterday,  
16 which I'd like to talk about on the record, actually, because  
17 what I have done -- and I'll give you a copy of this.  
18 MS. BRANCH: Can we have this discussion with the witness  
19 not here?  
20 MS. SNYDER: Absolutely. He's your witness.  
21 MS. BRANCH: Okay. Well, again, Mr. Croy, you were called  
22 too soon to the room. I'll think I'll just be a minute or two.  
23 MR. CROY: I'll just lounge around here until somebody calls  
24 me.  
25 (Mr. Croy left the hearing.)

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1 And, thereupon, State's Exhibit No. 26 was marked for  
2 purposes of identification.  
3 ---  
4 HEARING OFFICER KEPKO: This is 26?  
5 MS. SNYDER: Yes. If admitted, this will be Exhibit 26.  
6 This is a letter that was written to me, obviously, dated  
7 June 7th, regarding Dr. Bowers. There has been some testimony  
8 about Dr. Bowers and about his unrestricted admitting privileges  
9 in both obstetrics and gynecology.  
10 I have contacted Dr. Broderick who signed the letter and  
11 asked him for an affidavit to authenticate this document and the  
12 information inside it. I have not yet heard back from him. I  
13 have been similarly dealing with Trish Williams, who is the  
14 person listed on the bottom of Jennifer's Christ Hospital's  
15 document. So I would request that we keep the record open for  
16 the State to produce that affidavit attached to this --  
17 HEARING OFFICER KEPKO: The affidavit is going to say, what,  
18 that this is authentic?  
19 MS. SNYDER: That the information in there is correct, and  
20 that this is his letter, and it also is going to -- there were  
21 two letters attached to my May 22nd letter that are also Christ  
22 Hospital documents, and I don't have a copy of those.  
23 Unfortunately, I sent them off to Christ, and I don't have a  
24 copy of those. He would also be authenticating those two  
25 documents. And so you could reserve your ruling on that until

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1 I've had an opportunity to give those to Ms. Branch, but I would  
2 request that the record be left open for the purpose of that.  
3 HEARING OFFICER KEPKO: For the purpose of admitting that  
4 document?

5 MS. SNYDER: Correct.

6 HEARING OFFICER KEPKO: Do you want to raise your objection  
7 now or do you want to wait?

8 MS. BRANCH: Both.

9 HEARING OFFICER KEPKO: You can't do both.

10 MS. BRANCH: Well, I can't object to the affidavit or the  
11 letters or --

12 HEARING OFFICER KEPKO: Until you see them.

13 MS. BRANCH: -- until I see them, but I can object to this  
14 Exhibit 26.

15 First, I would say I don't know why it's relevant because an  
16 attending staff physician has nothing to do with admitting  
17 privileges. The only issue the department seems to be concerned  
18 with for the variance is the admitting privileges, and we've  
19 already produced the exhibit that shows he still, today, has  
20 admitting privileges.

21 Whether he can supervise residents and be an attending at  
22 the hospital is totally irrelevant to the whole variance  
23 request. I'm not even sure why we're even talking about it. I  
24 think it needs explanation, and just a piece of paper -- a  
25 letter to a lawyer doesn't give us that background and that

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1 foundation to understand what's even being said in this letter.  
2 So I would object to that, and I'll reserve my objections if  
3 additional documents come in the record.

4 MS. SNYDER: May I respond?

5 HEARING OFFICER KEPKO: Sure.

6 MS. SNYDER: Thank you.

7 First of all, this letter from Dr. Broderick is no different  
8 from the letters of Drs. Bowers Schwartz. I mean, you know,  
9 it's a signed document; those are signed documents. This  
10 particular letter -- and with all due respect, I don't believe  
11 that you can rule on a relevancy objection in this particular  
12 case unless it's in that 119 portion because what's relevant to  
13 the director's sole discretion, you cannot rule on. So the  
14 relevancy I don't think is applicable either.

15 I will submit that this is an administrative proceeding, and  
16 so the Rules of Evidence are relaxed. I think that if you are  
17 inclined to consider the relevance of this document, then the  
18 relevance is that Dr. Haskell drafted a letter for Dr. Bowers  
19 that says, "I have unrestricted admitting privileges in  
20 obstetrics and gynecology." It was dated August 29th of 2011.  
21 This letter says that's not true at that date.

22 HEARING OFFICER KEPKO: Isn't there some hearsay issues?

23 MS. SNYDER: I think the letter from Dr. Bowers and the  
24 letter from Dr. Schwartz, those are also hearsay.

25 MS. BRANCH: It's not hearsay.

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1 HEARING OFFICER KEPKO: Hold on. One at a time.

2 MS. SNYDER: This is an administrative proceeding where  
3 those rules are relaxed, and if need be, then I can ask  
4 Dr. Broderick to come up, but really he's writing this letter as  
5 a records custodian, setting forth what he sees in the record.  
6 If he came in to testify, it would be, "I am the records  
7 custodian, and this is the information that I found in my  
8 records," which I'm happy to provide that affidavit.

9 HEARING OFFICER KEPKO: But if he came in, he'd be able to  
10 be cross-examined.

11 MS. SNYDER: Absolutely. On whether he's the records  
12 custodian and he saw the information.

13 HEARING OFFICER KEPKO: No. On the substantive statements  
14 that he makes in the letter. And with respect to the other  
15 documents, you know, it was my understanding that you all agreed  
16 on the exhibits; that everyone agreed that these exhibits, for  
17 the most part, were going to be admitted, and, clearly, there's  
18 hearsay in those documents. But this sort of came out of the  
19 blue.

20 MS. SNYDER: I'll continue. It's my position that he is  
21 simply putting this information forward as the records  
22 custodian, and I can have an affidavit that he considered the  
23 record, but I don't know what cross-examination would do. He's  
24 just basically authenticating information that's found in a  
25 file.

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1 HEARING OFFICER KEPKO: Is the record anywhere? The record  
2 that he's talking about, is it in the record?

3 MS. SNYDER: I don't know the answer to that.

4 HEARING OFFICER KEPKO: You don't know if it's in any of  
5 these documents?

6 MS. SNYDER: I'm sorry. In our record?

7 HEARING OFFICER KEPKO: Yeah.

8 MS. SNYDER: No.

9 MS. BRANCH: May I respond on the hearsay point?

10 HEARING OFFICER KEPKO: Go ahead.

11 MS. BRANCH: Dr. Bowers and Dr. Schwartz, in the backup --  
12 there are other backup letters you're going to see, those are  
13 not hearsay. Those are the documents that were provided to the  
14 department for their decision-making process and they relied on.

15 This is classic hearsay because the out-of-court statement  
16 is Dr. Bowers' services as an in-house attending physician were  
17 terminated on a certain date. What that means and how that  
18 relates to whether he has admitting privileges is critical, and  
19 I think this department is mischaracterizing the meaning of  
20 that, and without a witness to explain it, I think that's going  
21 to be difficult.

22 In addition, when I got this letter yesterday afternoon, I  
23 was surprised that it had a June 7th date because I didn't get  
24 it sooner. If I had gotten it sooner, we could have done a  
25 quick deposition of this doctor, or Dr. Nelson, or whoever, and

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1 had that already in the testimony or drafted an affidavit for  
2 him that would included the cross questions.  
3 HEARING OFFICER KEPKO: You're anticipating additional  
4 documents in support of this?  
5 MS. SNYDER: Correct.  
6 HEARING OFFICER KEPKO: Why don't we wait to receive those  
7 documents and give counsel an opportunity to review them, and  
8 I'll make a ruling.  
9 MS. SNYDER: Do I have a time frame within which I need to  
10 get those to everybody, if we are going to leave the record open  
11 for that?  
12 HEARING OFFICER KEPKO: Are you going to be able to do it  
13 today?  
14 MS. SNYDER: No.  
15 MS. BRANCH: You can take as long as you want.  
16 MS. SNYDER: I'll bet.  
17 HEARING OFFICER KEPKO: You can take as long as you want.  
18 MS. SNYDER: Thank you.  
19 With respect to the other Exhibits, Exhibits 1 through 25, I  
20 would like to move to enter into evidence State's Exhibits.  
21 HEARING OFFICER KEPKO: Any objections to 1 through 25?  
22 MS. BRANCH: The only one I objected to is the one I  
23 objected to earlier, Exhibit 9, a certified copy of Dr. Bowers'  
24 Medical Board file.  
25 HEARING OFFICER KEPKO: Your objection is overruled.

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1 MS. BRANCH: Okay. Whatever it is, it's overruled.  
2 HEARING OFFICER KEPKO: That's right.  
3 Do you want to put your objection on the record?  
4 MS. BRANCH: Yeah. That it's not relevant to these  
5 proceedings what the Medical Board did with Dr. Bowers, and I  
6 think the only thing that is relevant is what Dr. Haskell and  
7 the LRSC knew, and Dr. Haskell already testified he didn't know  
8 anything about this proceeding at the time that he was adding  
9 Dr. Bowers as a backup.  
10 HEARING OFFICER KEPKO: I think maybe it goes to weight,  
11 rather than admissibility. So, again, I'll overrule the  
12 objection.  
13 Exhibits 1 through 25 are admitted.  
14 MS. SNYDER: Thank you.  
15 ---  
16 And, thereupon, State's Exhibit Nos. 1  
17 through 25 were admitted into evidence.  
18 ---  
19 HEARING OFFICER KEPKO: We're reserving a ruling on 26 for  
20 some time in the future.  
21 MS. SNYDER: Thank you.  
22 HEARING OFFICER KEPKO: I imagine I'll do that in the Report  
23 and Recommendation.  
24 MS. SNYDER: And I have already reserved the right to recall  
25 witnesses on rebuttal.

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1 HEARING OFFICER KEPKO: You have rebuttal time, correct.  
2 MS. SNYDER: Thank you. Then the State rests.  
3 HEARING OFFICER KEPKO: Very good.  
4 MS. BRANCH: I'll call Roy Croy.  
5 (Witness sworn.)  
6 HEARING OFFICER KEPKO: Do you want to state your full name,  
7 sir, and spell your last name, please?  
8 THE WITNESS: Roy Duncan Croy, Jr. Last name is spelled  
9 C-R-O-Y.  
10 HEARING OFFICER KEPKO: Thank you. Counsel.  
11 ---  
12 ROY D. CROY, Jr.,  
13 being first duly sworn, as prescribed by law, was examined and  
14 testified as follows:  
15 DIRECT EXAMINATION  
16 BY MS. BRANCH:  
17 Q. Good afternoon. I'm Jennifer Branch, as you know. Thank  
18 you for coming today. I have a couple of questions for you.  
19 A. Okay.  
20 Q. Could you just tell us what your position was at the  
21 Department of Health the last three years before you retired?  
22 A. I was chief of the Bureau of Community Health Care  
23 Facilities and Services.  
24 Q. And in that position, did you review variance requests from  
25 Dr. Haskell and the Lebanon Road Surgery Center?

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1 A. Yes.  
2 Q. And did you also review the request for a variance from his  
3 Dayton Clinic, the Women's Med Center in Dayton?  
4 A. Yes.  
5 Q. Let me start with Dayton. Do you know of the pending  
6 request for a variance in Dayton that was filed last year, about  
7 August of 2012?  
8 A. I have to stop and think back. There was so much there at  
9 the end of the year. I believe so. I believe there was one  
10 filed somewhere in the summer. I was trying to think back in my  
11 mind when the Dayton facility's license was due to expire.  
12 Seems like it was October or something like that.  
13 Q. I think Dayton was the end of August.  
14 A. End of August.  
15 Q. And Cincinnati was the end of October.  
16 A. Okay.  
17 Q. Do you know why the Dayton variance -- I'm sorry. Let me  
18 stop and ask you, when did you retire?  
19 A. I retired on 30 November 2012.  
20 Q. All right. Before you retired, do you know if there was any  
21 problem with Dayton's variance request?  
22 A. No, I'm not aware of any problem, other than the fact that  
23 there was the Lebanon Road issue, and I think that probably was  
24 the only thing that would have held that up.  
25 Q. If the Lebanon Road variance is resolved, that may resolve



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1 the Dayton variance request?

2 A. Well, I would -- I'm not -- I don't think I'm in a position

3 to say that, but -- and the reason being is each facility is a

4 different issue, and, basically, each condition of the variance

5 depends upon the facility and the situation in that particular

6 area.

7 Q. With the Lebanon Road Surgery Center surgery variance, there

8 was an original variance granted, and, then, there was a

9 modified variance granted. Are you familiar with that?

10 A. Yes.

11 Q. And in the changes that were made to the variance, there was

12 Dr. Kade. Her privileges for admitting patient at The Christ

13 Hospital became an issue. Do you remember that problem?

14 A. Yes.

15 Q. And were you the person at ODH who was paying attention to

16 the deadline for her needing to be re-credentialed, which was

17 February 29th, 2012?

18 A. I would say yes. By virtue of being the bureau chief, I

19 paid attention to everything and to that detail, yes.

20 Q. And did you ask Dr. Haskell for proof that she had been

21 re-credentialed at The Christ Hospital in March of 2012?

22 A. March of 2012. I recall that I probably would have, yes.

23 Q. And you sent him an e-mail about that?

24 A. I think probably would have been by e-mail because I don't

25 remember phoning Dr. Haskell.

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1 Q. And if you want to open up the other book in front of you,

2 it's Exhibit L.

3 A. All right.

4 Q. I'm going to orient you a little bit. This is a chain of

5 e-mails between you and Dr. Haskell.

6 A. Okay.

7 Q. If you go start at -- the first one, in chronological order,

8 would be at the bottom of page 2. It's an e-mail from you dated

9 March 6th to Martin Haskell. Do you see that?

10 A. Yes.

11 Q. All right. And then the body of your e-mail is at the top

12 of page 3.

13 A. Right.

14 Q. And that's where you're asking him if he got the

15 re-appointment letter from The Christ Hospital?

16 A. Yes.

17 Q. And he responded to you the same day. That's the e-mail

18 above sort of in the middle of the page of page 2.

19 A. Right.

20 Q. So on March 6th, he notifies you that -- it's not the

21 middle. It's maybe the bottom third of the page.

22 "Dear Mr. Cory, Dr. Kade's office received the appointment

23 letter today. Copy attached." Do you see that?

24 A. Yes.

25 Q. And he attached the letter from The Christ Hospital,

1 re-appointing her; is that right?

2 A. Yes.

3 Q. And then you had a question about that because her status

4 changed to affiliate status with no clinical privileges. Do you

5 remember that?

6 A. Yes. And if I vaguely remember the letter, I think that The

7 Christ Hospital letter, basically, had a subject line to that

8 nature. That's the reason I would have raised the question.

9 Q. And the letter, for your reference, is the exhibit prior,

10 Exhibit K.

11 A. Okay.

12 Q. If you want to look at that.

13 A. Yes. Because the rest of the letter raised no questions in

14 my mind. It was basically only the subject line, reference line

15 that basically raised the question.

16 Q. You learned that she was re-appointed --

17 A. Yes.

18 Q. -- to the staff at the hospital?

19 A. Yes.

20 Q. And that's something that the department wanted to know if

21 she got her re-appointment?

22 A. Yes.

23 Q. That's part of the variance? Well, let me put it this way:

24 The variance was granted, in part, because she was appointed and

25 had privileges at the hospital?

1 A. Yes.

2 Q. And the department wanted to know if that re-appointment

3 didn't happen?

4 A. Yes.

5 Q. So here you're on notice that it did happen?

6 A. Yes.

7 Q. The department also wanted to know if she could admit

8 patients to the hospital still; right?

9 A. I guess we're not referring to a particular question. But,

10 yes, that would be the logical question, when it says, "with no

11 clinical privileges."

12 Q. Okay. So let me back up. You're wanting to know could she

13 admit patients, because that would help fulfill the Written

14 Transfer Agreement requirement --

15 A. Yes.

16 Q. -- in an alternative way?

17 A. In an alternative way.

18 Q. And you were concerned, when you saw that heading,

19 "Affiliate status with no clinical privileges"; right?

20 A. Yes.

21 Q. Because you want to know, can she admit patients or not?

22 This is important to you?

23 A. Yes.

24 Q. And that's why you had the series of e-mails with

25 Dr. Haskell in Exhibit L; right?

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1 A. Yes.  
2 Q. Okay. And then he responded to you with the e-mail that's  
3 on the first page of Exhibit L. And that's the e-mail that's  
4 marked 7. It carries over to the top of page 2. Do you see  
5 that?  
6 A. Yes.  
7 Q. Did his e-mail to you explain and answer your questions  
8 about whether Dr. Kade could still have patients admitted to the  
9 hospital?  
10 A. Yes, by virtue of the responsibility of the limitations that  
11 Dr. Haskell put in his letter.  
12 Q. Is it your understanding that his explanation of what it  
13 means to be an affiliate member, that the doctor could still  
14 refer patients to the hospital?  
15 A. Yes, I understood that's what he was saying.  
16 Q. Did you understand that referring a patient to the hospital  
17 means sending the patient for admission to the hospital, just  
18 that first step?  
19 A. Yes.  
20 Q. Okay. So she can't follow the patient and treat the patient  
21 at the hospital anymore; right?  
22 A. Yes. My understanding of any physician that was referring a  
23 patient to a hospital, I guess, it would depend upon the  
24 hospital whether that physician can refer and follow or  
25 basically refer and then leave it up to the hospitalist or

1 affiliated privileges, et cetera.  
2 Q. Did you follow his link and go on their website and read up  
3 on their bylaws?  
4 A. Yes, I did look at the bylaws.  
5 Q. When you were done with your research, were you satisfied  
6 that Dr. Kade, even though her privileges changed, that she  
7 still could be the doctor on the variance?  
8 A. I was satisfied with that, yes.  
9 Q. And do you know if anybody at the Department of Health was  
10 not satisfied?  
11 A. Not until the variance request progressed further.  
12 Q. When was that?  
13 A. You know, you're asking an old man here to remember.  
14 Q. I'm sorry. If I had a document, I would definitely give it  
15 to you to help refresh your memory.  
16 A. March. Let's see. It would seem to me that this all didn't  
17 really come out in the open, you know, as an issue for a number  
18 of weeks, and I'm not sure why. It's just -- I can't think back  
19 what the -- you know, what went from Step A to Step B to Step C  
20 in a chronological order.  
21 Q. And do you know who was involved in questioning whether this  
22 was satisfactory?  
23 A. Well, again, I just would have to refer back to the various  
24 letters that transpired later in the year. I think probably in  
25 the April/May time frame, probably, where they would have, at

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1 another physician in the hospital to be the treating and the  
2 admitting physician, if admission is necessary.  
3 Q. All right. So in the description from The Christ Hospital's  
4 rules, did you understand that she could refer and follow the  
5 chart, get permission to read the chart, but couldn't treat the  
6 patient?  
7 A. Correct.  
8 Q. So the change in her status was she could no longer treat  
9 the patient after the patient's admitted to the hospital?  
10 A. Yes. I would say that's my general understanding.  
11 Q. All right. And did you understand that she could still get  
12 a patient admitted to the hospital, if need be? The referral  
13 part of her privileges.  
14 A. I'll say yes in that I had no doubt that a patient referred  
15 to the hospital, should that patient -- once that patient  
16 undergoes triage and stabilization, if it was determined by the  
17 emergency physician or hospitalist that admission was  
18 appropriate, that admission would take place.  
19 Q. Did you have any further questions for Dr. Haskell about  
20 Dr. Kade's status and what she could accomplish at The Christ  
21 Hospital after this series of e-mails in March of 2012?  
22 A. Not that I recall. I truly don't recall if I had any other  
23 questions because -- you know, besides Dr. Haskell's letter, I  
24 merely tried to educate myself on the hospital's bylaws and  
25 basically the differences between courtesy privileges,

1 least, been the general counsel's office. Assuming, if it was a  
2 general counsel's office, the director of Health.  
3 Q. Have you had any conversation with the director of Health  
4 about this variance for Lebanon Road Surgery Center?  
5 A. Probably I had conversations with him that were not  
6 particularly getting to a point where we needed to talk about  
7 this particular matter. But just, you know, over time, when  
8 something would come up, whether it was in the May time frame  
9 when the letters were being written or whatever the occasion  
10 would be, very possibly.  
11 Now, when I had an exit interview with Dr. Wymyslo upon my  
12 retirement, and, basically, one of the things that I did talk  
13 about was the abortion clinics, Ambulatory Surgical Facilities,  
14 and my view on the variance and waiver process in general.  
15 Q. Did you tell the director whether you had an opinion or  
16 recommendation whether a variance should be granted for Lebanon  
17 Road Surgery Center?  
18 A. In this instance, I basically did not give a specific  
19 opinion on either the variance, and I definitely didn't give a  
20 recommendation since I was going out the door within days.  
21 Q. In your discussions with the director about the variance,  
22 was the Lebanon Road Surgery Center variance still pending?  
23 A. Yes.  
24 Q. The request that was made last year?  
25 A. Yes.

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1 Q. And did you have an opinion, even if you didn't give it to  
2 the director, as to whether it should have been granted?

3 A. In my role as the bureau chief, I think it comes up, and you  
4 basically phrased it here about a recommendation. It's not  
5 necessarily a recommendation that I would make as the  
6 bureau chief in this case or in many instances. But in  
7 preparing the document that the director of Health would  
8 eventually sign either approving something or denying something,  
9 if I or my staff are preparing that message, and a certain  
10 position is stated in there as to the approval or denial, that  
11 while I would not actually call it a recommendation, as you  
12 would have in a decision paper going up to a director, these are  
13 not decision papers. This is de facto on its face. Here's a  
14 letter that basically, Roy Croy, as a bureau chief, is sending  
15 up to you, which basically is calling for your signature saying,  
16 "Approve this. Deny this."

17 So from that viewpoint, you can call it a recommendation,  
18 but, like I say, it's really not a recommendation. It's  
19 fait accompli. We think that this -- whatever it is, meets  
20 whatever requirements they are, and we're sending it to you for  
21 a final decision.

22 Q. And in your opinion, in November of 2012, did the Lebanon  
23 Road Surgery Center variance meet the requirements?

24 A. In my opinion, and, fortunately, in my retired status, I  
25 don't have to give my professional opinion. As an employee of

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1 knows how I put words together, it's me, and I can always read  
2 something and determine whether -- even though it may have been,  
3 you know, modified as something goes up the line, I pretty much  
4 can tell whether I basically wrote it or not.

5 Q. How about the October 19th, 2012, letter, which starts on  
6 page 7?

7 A. Still under Tab 1?

8 Q. Yes.

9 A. October 19th. I can't say with all certainty. Some of the  
10 paragraphs, you know, would appear to me to be some of the  
11 language that would have -- perhaps I would have written for one  
12 purpose for the other. I don't particularly remember drafting  
13 this letter. I'm sorry.

14 Q. I'll just finish this line of questioning by asking you:  
15 Did you agree that the Lebanon Road Surgery Center was meeting  
16 the requirements of a Written Transfer Agreement in an alternate  
17 way when you retired November 30th, 2012?

18 A. I don't want to weasel on this, but are we assuming --  
19 we're talking after 5:00 on November 30th when you -- the way  
20 you phrased the question, you know, did I agree once I retired  
21 or basically while I was still on the state payroll and  
22 answerable to the director of Health basically --

23 Q. Can I ask both questions?

24 A. All right.

25 Q. Sitting here today?

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1 the State Health Department, in my opinion, that, yes, with  
2 certain reservations. Those reservations being that there were  
3 perhaps omissions to the protocol that was in place at the  
4 department.

5 Q. Did you draft an approval letter for the director to sign  
6 for the Lebanon Road Surgery Center before you retired?

7 A. I think not. The last thing I would remember probably  
8 drafting was a letter for the approval of the modification to  
9 the 2010 variance.

10 Q. Did you draft anything for the director to see on the  
11 Lebanon Road Surgery Center in 2012?

12 A. The only way I can say with any specific assurance on your  
13 part and my part is I would probably have to look at any 2012  
14 letters that are perhaps in these exhibits and see whether it  
15 rang a bell or not. I would say, probably, some of them were  
16 drafted by me, but, then, they go through the process, through  
17 the division and the general counsel's office, before they'd go  
18 to the director.

19 Q. The letter I have from the director is Exhibit -- it's going  
20 to be in the other exhibit book, Exhibit 1. There's the  
21 proposed nonrenewal letter and the proposed revocation letter.

22 The revocation starts on page 1, and the nonrenewal starts on  
23 page 7. I'm not sure if both of those occurred before you left.

24 A. I do not remember drafting the November 23, 2012, letter. I  
25 can say that with some assurance because if there's anybody that

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1 A. Sitting here today.

2 Q. Do you believe that the Lebanon Road Surgery Center met the  
3 purpose of a Written Transfer Agreement requirement, but in an  
4 alternate way?

5 A. I believe it met the spirit and intent.

6 Q. And when you were still employed by the department, did you  
7 believe the same?

8 A. I believed that no two situations looked exactly the same  
9 and no two requests would be exactly the same. I believed,  
10 taking that into consideration, that what was being presented  
11 was an appropriate alternative to a transfer agreement.

12 Q. Let me make sure I heard you right. That it was an  
13 appropriate alternative to a Written Transfer Agreement. Is  
14 that -- I want to make sure I heard you correctly?

15 A. That was my final statement. But I did preface it by  
16 basically trying to make the point that did I consider it  
17 perfect? No, I didn't consider it perfect. Did I consider it  
18 meeting the spirit and intent of an alternative to a transfer  
19 agreement? Yes.

20 Q. While you were at the Department of Health, were you aware  
21 that a patient had been transferred from Lebanon Road Surgery  
22 Center to a hospital?

23 A. Yes.

24 Q. Were you aware that the department investigated that  
25 situation?

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1 A. Yes.  
2 Q. And the department found that Lebanon Road Surgery Center  
3 was in compliance with the department's rules at that time?  
4 A. Yes.  
5 Q. And the hospital that that patient was transferred to was  
6 Bethesda North Hospital; is that right?  
7 A. As I recall, it was Bethesda North. Yes.  
8 Q. And the doctor that was called to admit that patient was  
9 Dr. Gravely from Bethesda North Hospital?  
10 A. Yes.  
11 Q. Dr. Gravely was not somebody written on a piece of paper  
12 that Dr. Haskell submitted for his variance request; right?  
13 There were other names? Different names?  
14 A. Different names. I don't recall exactly when this event  
15 took place when the patient had to be transferred to Bethesda  
16 North. So when you say -- was Dr. Gravely on the piece of paper  
17 at that point in time?  
18 Q. That's fair.  
19 A. No. I don't know which preceded which. No.  
20 Q. Nonetheless, did you believe that that patient got good  
21 medical care and was transferred to the hospital in an  
22 appropriate manner?  
23 A. I had no indication otherwise, nor did my surveyors  
24 determine otherwise when they investigated.  
25 Q. The protocol that the Department of Health put into place in

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1 November of 2011 is purely for how to request a variance from  
2 the Written Transfer Agreement requirement. Were you familiar  
3 with that protocol?  
4 A. Yes.  
5 Q. If you need to look at that, that's Exhibit B, as in "boy"  
6 in the book, if you want to look at it. The last part -- the  
7 last page of the protocol, No. 8, says that -- I'm going to use  
8 the letters, "The BCHCFS chief."  
9 A. Me.  
10 Q. Is that you?  
11 A. That was me. Yes.  
12 Q. That was you.  
13 "Shall report the results of his review and recommendation  
14 to the Assistant director of Health, and the assistant of  
15 director of Health shall communicate the recommendation to the  
16 director."  
17 Was that the proper protocol and the process that ODH had in  
18 place at the time that you were the chief?  
19 A. That was the protocol that was in place.  
20 Q. And, at any point, did you make a recommendation in 2012 to  
21 the Assistant director of Health as to whether the variance  
22 request for Lebanon Road Surgery Center should be approved?  
23 A. I don't believe so. The reason I don't believe so is,  
24 again, the time frame that we're talking about with the  
25 protocol.

1 Q. I'll help you with the time frame. The October 2012 is when  
2 the new variance request was made.  
3 A. Right.  
4 Q. That's the letter from me to the director listing Gravely  
5 and Hansel as the new backups. Were you aware of that --  
6 A. Yes.  
7 Q. -- back in October of 2012?  
8 A. Yes. Right.  
9 Q. Did you investigate that request at all or direct anybody on  
10 your staff to investigate that?  
11 A. Yes. Basically I directed my assistant to, basically,  
12 verify the information on Drs. Hansel and Gravely.  
13 Q. And did you verify that they were licensed to practice in  
14 Ohio?  
15 A. Yes.  
16 Q. And they had admitting privileges at Bethesda North  
17 Hospital?  
18 A. Yes.  
19 Q. Was there anything in your staff's investigation of that  
20 variance reveal any problems with the variance request?  
21 A. With the October variance request?  
22 Q. October 12th. Yes.  
23 HEARING OFFICER KEPKO: I'm sorry. What was your question,  
24 counsel?  
25 MS. BRANCH: My question was if the review by his staff

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1 revealed any problems with the variance request made in October  
2 of 2012. And I think I should give you a copy of that to look  
3 at.  
4 THE WITNESS: I was going to say, which date that was?  
5 MS. SNYDER: You're looking for the request?  
6 MS. BRANCH: I thought I had it in my book. Maybe it's in  
7 your book.  
8 MS. SNYDER: Your 2012 variance request is 3 in State's  
9 Exhibit.  
10 MS. BRANCH: I'm sorry. I made you switch books. It's  
11 going to be Exhibit 3.  
12 THE WITNESS: Which book?  
13 MS. BRANCH: The one with the nice tabs. You can always  
14 tell my tabs are handwritten.  
15 THE WITNESS: No. As bureau chief, I had no questions about  
16 this letter and the information provided.  
17 BY MS. BRANCH:  
18 Q. Did you have any concerns that anything in this letter would  
19 not meet the variance requirement?  
20 A. No. What was done when this letter came in is, essentially,  
21 I took the protocol and used it as a matrix and then crossed  
22 each of your subparagraphs against the protocol item by item.  
23 Q. That's how I wrote the letter.  
24 A. I'm sure you did.  
25 Q. And every element of the protocol, was it satisfied by the

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1 letter?  
 2 A. By this letter, yes.  
 3 Q. Okay. And what you verified from this letter, were you  
 4 satisfied that the letter was accurate and met the variance  
 5 protocol?  
 6 A. Yes.  
 7 Q. Do you recall having a conversation with me by phone about I  
 8 and J of the protocol?  
 9 A. Vaguely.  
 10 Q. You were really unhappy to hear my voice.  
 11 A. And the protocol is at which tab?  
 12 Q. In this book, the one with the nice tabs, it's tabs --  
 13 HEARING OFFICER KEPKO: Is that 11?  
 14 MS. BRANCH: 11. Thank you.  
 15 THE WITNESS: Did you say J?  
 16 BY MS. BRANCH:  
 17 Q. I and J we had a discussion about.  
 18 A. Oh, yes. I remember this now.  
 19 Q. The protocol invites the facility to call you if there are  
 20 questions about the variance application process; is that right?  
 21 A. Not these particular paragraphs.  
 22 Q. Let me start with this: Is it appropriate for the facility  
 23 to call you if they have questions about the variance process?  
 24 A. Yes.  
 25 Q. The question that we discussed was I and J. This has to do

1 any facility -- any Ambulatory Surgical Facility could meet I  
 2 and J to the extent that it's possible with the hospitals that  
 3 they are dealing with.  
 4 Q. Okay. And just because the Hearing Officer doesn't know  
 5 what the heck we're talking about. These requirements are about  
 6 consulting doctors that the admitting doctors may need. For  
 7 example, a patient has a heart attack and is rushed to the ER,  
 8 the admitting doctor is an OB/GYN, and are there consultants  
 9 available for the OB/GYN to find a cardiologist; right? That's  
 10 what you're worried about in the protocol?  
 11 A. In the protocol, yes.  
 12 Q. And you felt that was satisfied by the explanation that  
 13 Lebanon Road Surgery Center gave, which is that the backup  
 14 doctor with admitting privileges at the hospital had an on-call  
 15 list to consult with; right?  
 16 A. Yes.  
 17 Q. While we're on the protocol, which is in the book, Exhibit  
 18 10, the paragraph above that is Paragraph H.  
 19 MS. SNYDER: Did you mean Exhibit 11?  
 20 MS. BRANCH: Oh, Exhibit 11. Thank you.  
 21 BY MS. BRANCH:  
 22 Q. And H, the second sentence in H --  
 23 HEARING OFFICER KEPKO: Let me get there. You're in Exhibit  
 24 11?  
 25 MS. BRANCH: Exhibit 11, page 3. I apologize.

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1 with having consultants --  
 2 A. Right.  
 3 Q. -- and physicians on file at the hospital?  
 4 A. Yes.  
 5 Q. Okay. And at the end of that conversation, you directed me  
 6 to Lance Himes, the legal counsel for the ODH?  
 7 A. I very well did.  
 8 Q. All right. And are you aware of my letter to Lance Himes  
 9 asking for clarification of what I and J meant?  
 10 A. I don't recall it specifically. Perhaps if I see it.  
 11 Q. All right. It's going to be in the other book, Exhibit T,  
 12 as in "Tom." No, that's not right. S as in "Sam."  
 13 A. Yes, I believe I saw that.  
 14 Q. And I had a conversation with Mr. Himes and documented that  
 15 in this letter. My only question really is: Is there any  
 16 problem with this October 2012 variance request that relates to  
 17 I and J or is I and J satisfied by the request that was made?  
 18 A. I think I and J was -- is satisfied or was satisfied by the  
 19 explanation as to how the facility could or could not or could  
 20 have complied with that in a certain fashion and to a certain  
 21 extent.  
 22 Q. Did you have any further questions about whether Lebanon  
 23 Road Surgery Center could meet the requirements of I and J after  
 24 you and your staff were done reviewing the request?  
 25 A. No. My belief was basically Lebanon Road Surgery Center, or

1 BY MS. BRANCH:  
 2 Q. H is referring to the protocol. There's a different  
 3 protocol. The protocol that the surgery center has to have;  
 4 right?  
 5 A. Yes. And so you're talking about the second sentence --  
 6 Q. Yes.  
 7 A. -- naming such protocol?  
 8 Q. Yes.  
 9 Does the second sentence require the facility to have a  
 10 substitute doctor available to admit patients to a local  
 11 hospital in the event that the named backup physicians are  
 12 temporarily unavailable and unable to admit patients to the  
 13 local hospital?  
 14 A. Yes.  
 15 Q. I'm going to call that the substitute doctors, just to give  
 16 it a title of what that's referring to. Is it permissible --  
 17 with the variance that the director granted to Lebanon Road  
 18 Surgery Center, is it permissible for Lebanon Road Surgery  
 19 Center to use a substitute doctor to admit a patient to the  
 20 hospital?  
 21 A. There is and should be only one concern here, and that's the  
 22 patient and the safety of the patient. Whether it's the doctor  
 23 that's named as a backup who happens to be temporarily  
 24 unavailable and another physician covers is immaterial at the  
 25 time. Now, it may be argued later that the Department of Health

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1 did not know that substitute Dr. X, basically, was licensed in  
2 the State of Ohio, was credentialed by Bethesda North and had  
3 privileges at Bethesda North. All of those things may come into  
4 question later. But the existing issue is settled by getting  
5 the patient to the hospital where they can be triaged,  
6 stabilized and admitted, if necessary.  
7 Q. Is there any requirement that the facility alert the  
8 department as to who the substitute doctors are on their list?  
9 HEARING OFFICER KEPKO: Alert when?  
10 MS. BRANCH: At any time.  
11 HEARING OFFICER KEPKO: In the variance? Just any time?  
12 BY MS. BRANCH:  
13 Q. I think I'll start with at any time.  
14 A. I would not consider it appropriate. At the moment, the  
15 immediacy of the moment, I believe that it would be an  
16 appropriate -- it would be appropriate that the facility let the  
17 director of Health know that that has taken place, who the  
18 substitute physician was; and, that way, the department could  
19 satisfy all the questions that might arise from that physician.  
20 Q. You're talking about in all situations where the substitute  
21 was actually used to admit the patient?  
22 A. Uh-huh.  
23 Q. And that's what happened with that one patient from LRSC;  
24 right?  
25 A. Yes.

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1 Q. Is there a written requirement that the facility tells ODH  
2 who is on their list of substitute doctors before they ever need  
3 to utilize the substitute doctor?  
4 A. There is no requirement so spelled out in those terms.  
5 Q. And is there any notice given to the facility that they must  
6 tell ODH who their list of substitute doctors are?  
7 A. I would say no. I would say no by virtue of the fact that  
8 there is no recognition in this particular requirement dealing  
9 with substitute physicians in this case. The assumption of the  
10 protocol has always been that any additional doctors would be  
11 additional backup physicians named by the facility.  
12 Q. You said assumption. Assumption by ODH?  
13 A. Well, I think the assumption is that if -- let me say, for  
14 instance, that Dr. Haskell or any other facility contacts us and  
15 says that, you know, "Dr. Smith is going to substitute, if  
16 necessary." I think our immediate question that would come  
17 back, "Are you telling us that Dr. Smith is going to be one of  
18 your backup physicians?" And, if so, then, basically, we will  
19 verify everything in accordance with the protocol.  
20 Q. And if Dr. Smith is being used to substitute if one of the  
21 backups is unavailable, as outlined in the protocol, Paragraph  
22 H, does --  
23 A. Then, I guess, being the devil's advocate, if it were me, my  
24 next question would be: Is it your intent to, basically, use  
25 Dr. Smith in this role on a regular basis? Then I strongly urge

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1 you to submit, in writing, that you are adding Dr. Smith as a  
2 backup physician.  
3 Q. So if that communication was made with you, you would have  
4 responded by recommending that a variance --  
5 A. If it were made with me --  
6 Q. -- modification be made?  
7 A. Yes. Yes.  
8 Q. Is there anything in writing that tells the facility that  
9 that's what they should do, if they follow your protocol to have  
10 somebody substitute available; that they should communicate with  
11 you to determine whether that requires a modification or not?  
12 A. Now, as I recall, there's nothing in the protocol that  
13 states that. There is an acknowledgment in the protocol that  
14 this situation can arise. But, then, going forward from that  
15 point and saying, if that situation does arise, this is the way  
16 a substitute physician should be handled.  
17 Q. That's pretty much what happened with these doctors,  
18 Drs. Gravely and Hansel at Bethesda North. I'll help you with  
19 dates, if you need them. But at some point, Dr. Bowers resigned  
20 as a backup doctor. You're aware of that?  
21 A. Yes.  
22 Q. That was in May 2012?  
23 A. Yes.  
24 Q. Around the same time, Rebecca Maust sent a letter asking  
25 Dr. Haskell to explain how he was going to provide for patient

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1 care, and the response to her named Drs. Gravely and Hansel as  
2 new backups for Lebanon Road Surgery Center?  
3 A. Uh-huh.  
4 Q. Do you recall that sequence?  
5 A. I believe they were added to Dr. Schwartz.  
6 Q. So they were now requesting or explaining to the department  
7 that three doctors would be the backups: Hansel, Gravely and  
8 Schwartz. Do you recall that sequence?  
9 A. I recall that sequence.  
10 Q. And, at that time, that's in May, that's before the formal  
11 variance request was made in October. In May, did the  
12 department look up Drs. Gravely and Hansel to determine if they  
13 were qualified with admitting privileges and licensure in Ohio?  
14 A. Yes.  
15 Q. And were there any problems with the response that was given  
16 to that in May 2012 with the answers to the questions that  
17 Rebecca Maust had requested? Do you want to see it?  
18 A. As far as I know, there were no questions.  
19 Q. I'm sorry. I talked over you and I didn't hear you.  
20 A. I said, as far as I can recall, there wasn't a question or  
21 issue.  
22 Q. If you turn to Exhibit 19, that's the May 24th letter to  
23 Rebecca Maust from me explaining how Lebanon Road Surgery Center  
24 met the protocol.  
25 A. Okay.

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1 Q. And it listed Dr. Gravely and Dr. Hansel.  
 2 A. Right.  
 3 Q. And it explained that Dr. Bowers had resigned?  
 4 A. Yes.  
 5 Q. Now that you've seen that, to refresh your memory, did you  
 6 or your staff have any concerns with the explanation of how  
 7 Lebanon Road Surgery Center would meet the protocol as outlined  
 8 in Exhibit 19?  
 9 A. No, I don't remember that it had any questions.  
 10 MS. BRANCH: All right, Mr. Cory. I have no further  
 11 questions for you. Thank you.  
 12 HEARING OFFICER KEPKO: Questions?  
 13 MS. SNYDER: Yes. Thank you.  
 14 ---  
 15 CROSS-EXAMINATION  
 16 BY MS. SNYDER:  
 17 Q. Hi.  
 18 A. Hi.  
 19 Q. Nice to see you in person.  
 20 You know, Roy, I want to pick up in Exhibit 11 of your book  
 21 that you're in right now, which is that November protocol.  
 22 Okay. I want to start in Paragraph A of that. Page 2,  
 23 Paragraph A. It's at the top of the page. Okay.  
 24 This paragraph requires -- well, tell me. What does this  
 25 paragraph require?

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1 A. Well, this paragraph is the meat and potatoes of an  
 2 alternative to a transfer agreement; wherein, stated in very  
 3 succinct terms here, what we're looking for in terms of  
 4 24/7 backup, basically, the physician coverage being sufficient,  
 5 basically, that the coverage -- you know, basically, by  
 6 physicians that can admit patients to the hospital. So this is  
 7 a quick synopsis of, basically, what you would find if you were  
 8 going to have a true regulation or rule which says what's a  
 9 transfer agreement have to have in it, and, basically, if you  
 10 have to go with an alternative, what must you have.  
 11 Q. And does this paragraph say that the backup physicians have  
 12 to provide 24-hour coverage?  
 13 A. It basically says the facility has to provide 24/7 coverage.  
 14 Q. And if we're talking about a facility that has been granted  
 15 a variance of the Written Transfer Agreement by the Ohio  
 16 Department of Health, does the Department of Health envision  
 17 that that 24-hour-a-day backup is provided by approved backup  
 18 physicians?  
 19 A. State it one more time.  
 20 Q. Okay. If the Department of Health has granted a variance --  
 21 A. Yes.  
 22 Q. -- of the Written Transfer Agreement, does the Department of  
 23 Health expect that the 24-hour-a-day emergency coverage be  
 24 provided by the backup physicians named in that variance?  
 25 A. No. The 24/7 coverage essentially refers to, when you have

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1 an emergency situation, that the staff physician or physicians  
 2 are unavailable either for a number of reasons, including with  
 3 other patients, and cannot take care of the emergency situation,  
 4 whatever the case may be.  
 5 So, again, the facility has to provide for the patient  
 6 24/7. And, basically, does a backup physician have to be  
 7 available 24/7? That's the reason you have more than one backup  
 8 physician to make sure.  
 9 Q. Okay. I think that's where I was going.  
 10 A. I mean, the intent is to have enough backup physicians to be  
 11 available for coverage 24/7, in case of an emergency.  
 12 Q. If you go back to page 3, we talked a lot about that  
 13 Paragraph H and those substitute doctors. That discussion about  
 14 substitute doctors, does that, kind of, kick in or is that  
 15 triggered when none of the backup physicians are available?  
 16 A. That would be totally possible. Basically, let's say that  
 17 the owner/operator physician is with another patient, you've got  
 18 the emergency which needs to be taken care of. You have two  
 19 backup physicians, and both of them can be called. One may be  
 20 in surgery at the hospital, and the other one has patients in  
 21 their service or their practice that they can't -- so that they  
 22 could be temporarily unavailable. May go on vacation every now  
 23 and then.  
 24 Q. At the time that you retired, a year ago -- almost a year  
 25 ago -- your understanding of -- and let's take this facility,

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1 Lebanon Road Surgery Center facility's 2011 variance. Let's  
 2 take a look at it. It's the exhibit immediately prior Exhibit  
 3 10.  
 4 Under the variance granted by the director of the Ohio  
 5 Department Health, does that variance require the facility to,  
 6 first, turn to the backup physicians that have already been, for  
 7 lack of a better word, kind of, vetted by the Department of  
 8 Health before it turns to any substitute physicians?  
 9 A. Does it require? No, I would say, again, you know, I know  
 10 everybody hates the word, but I think we go back to the  
 11 assumption that, basically, with a variance approved in place,  
 12 based upon certain backup physicians being willing and able to  
 13 take emergency situations and complicated cases as backup, the  
 14 assumption there is that's who they're going to turn to.  
 15 Q. Does the Department of Health require a facility, in order  
 16 to receive a variance of the Written Transfer Agreement, to give  
 17 the names of the backup physicians that it intends to use to the  
 18 department?  
 19 A. Yes. Currently.  
 20 Q. Can you have --  
 21 HEARING OFFICER KEPKO: I'm sorry. What was your answer,  
 22 sir?  
 23 THE WITNESS: Yes.  
 24 HEARING OFFICER KEPKO: Currently?  
 25 THE WITNESS: I said currently. And I say currently because

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1 the precedence was set on an earlier case, which happened to be  
2 the Dayton case.  
3 BY MS. SNYDER:  
4 Q. Do you mean the WMPC case?  
5 A. Yes.  
6 Q. So can a facility give the department assurance that they  
7 have backup physicians, but we don't want to give you their  
8 name?  
9 A. No.  
10 Q. And is that pursuant to that case that you just --  
11 A. That's pursuant to that case.  
12 Q. Okay. Why does the Department of Health require the name of  
13 the physicians?  
14 A. To enable the Department of Health to verify the licensure  
15 in the State of Ohio that the physician and physicians named  
16 were credentialed in the hospital's name, and beyond  
17 credentialing, that the physician or physicians had certain  
18 privileges -- clinical privileges in the hospital or hospitals  
19 named.  
20 Q. Do you agree that this 2011 variance is conditioned on  
21 Drs. Schwartz, Bowers and Kade having privileges -- admitting  
22 privileges?  
23 A. Yes.  
24 Q. Was it your role, when you worked for the Department of  
25 Health, to -- and Ms. Richey just testified. Did you work with

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1 Ms. Richey? Shannon Richey.  
2 A. She worked for me. She was my assistant.  
3 Q. Ms. Richey just testified that one of her jobs is to gather  
4 information for the director to consider when determining  
5 whether to grant or deny a variance. Did you also play that  
6 responsibility? Did you gather information for the director to  
7 consider when making a decision?  
8 A. No. Mrs. Richey, basically, performed that function at my  
9 direction as the bureau chief. If Mrs. Richey was not  
10 available, I would not hesitate to call the medical director's  
11 office in the hospital and request the same information. But  
12 routinely, I would assign that to Shannon Richey.  
13 Q. And, then, did you convey the information that you gathered  
14 to the director for his consideration?  
15 A. We conveyed it up the line from the bureau to the division.  
16 Ostensibly, from the division to the general counsel's office.  
17 Q. Do you agree that the director has sole discretion to grant  
18 or deny a variance request?  
19 A. By regulation, yes.  
20 Q. You testified that -- you testified about your opinion about  
21 the 2012 request for a variance. You testified, and correct me  
22 if I'm wrong, that you reviewed the information in the request  
23 and that, to paraphrase, it looked good; is that right? Is that  
24 your testimony?  
25 A. Yes. I don't recall exactly what I said a few minutes ago.

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1 Q. I don't either. Do you agree -- since you agree that the  
2 director has the sole discretion of whether to grant or deny a  
3 variance, do you agree, then, that the director could consider  
4 information that's outside of this document, outside of the  
5 written request for variance of the transfer agreement?  
6 A. I agree that, in this case -- in any case, pertaining to the  
7 licensure, the director has the discretion to turn to as many  
8 sources as he needs, outside sources, as well as the process  
9 itself.  
10 Q. Do you agree that the director could consider whether the  
11 facility has been compliant with variances granted in the past?  
12 A. Past history, yes.  
13 MS. SNYDER: Thank you. I don't have any further questions.  
14 HEARING OFFICER KEPKO: Any redirect?  
15 MS. BRANCH: Yes, if you don't mind.  
16  
17 ---  
18 REDIRECT EXAMINATION  
19 BY MS. BRANCH:  
20 Q. If you turn back to Exhibit 11, that's the ODH protocol. At  
21 the time this protocol was drafted, was Dr. Haskell the only  
22 ASF in the state to whom this applied?  
23 A. Well, I don't -- I wouldn't say that. Basically, again, the  
24 reason it was listed as an Ambulatory Surgical Facility was it  
25 was meant to, basically, apply to variance request processing  
from any Ambulatory Surgical Facility. The fact that the only

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1 variance currently in place or at issue was Lebanon Road --  
2 well, Dr. Haskell's facilities. Yes.  
3 Q. And this isn't for any variance. This protocol is just for  
4 the variance of the Written Transfer agreement?  
5 A. To the Written Transfer Agreement.  
6 Q. And Lebanon Road Surgery Center and the Dayton clinic are  
7 the only two in Ohio, at the time you retired, that requested a  
8 variance?  
9 A. Yes. At that time, yes.  
10 Q. And if you could go to page 2 of the protocol, Paragraph  
11 little "a," which Ms. Snyder asked you to review. The last  
12 sentence in that paragraph says, "The protocol shall include a  
13 plan for such coverage in the event that the named physicians on  
14 the variance are temporarily unavailable." Right?  
15 A. Yes.  
16 HEARING OFFICER KEPKO: I'm sorry. Where are you,  
17 Counsel?  
18 MS. BRANCH: Page 2, Paragraph letter "a." The final  
19 sentence of that paragraph.  
20 BY MS. BRANCH:  
21 Q. And the coverage here is required in case the named backup  
22 doctors in the variance are not available; right?  
23 A. Yes.  
24 Q. And the coverage you're contemplating here would be  
25 physicians?



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1 A. The physician coverage. Yes.  
 2 Q. And one way a backup doctor could have coverage is he could  
 3 be part of a practice that has coverage available, so if you  
 4 call the doctor's office 24/7, whoever is on call would be  
 5 available. Is that one way to provide coverage for the backup?  
 6 A. Ostensibly, I would say, yes, that would be a likely  
 7 possibility.  
 8 Q. And another way would be to have those substitute doctors  
 9 available, if the named backup doctor was unavailable?  
 10 A. Yes.  
 11 Q. And if you had, as your named backup doctor in your  
 12 variance, somebody who was in a big enough practice that had an  
 13 on-call coverage system, would you need more than one named  
 14 backup in your variance?  
 15 MS. SNYDER: Objection. That's only for the director to  
 16 decide. I don't think Mr. Croy can make that decision.  
 17 HEARING OFFICER KEPKO: What was your question, Counsel?  
 18 MS. BRANCH: If the named backup in the variance was  
 19 somebody in a practice large enough to have on-call coverage,  
 20 24/7, would that satisfy -- would that be satisfactory?  
 21 HEARING OFFICER KEPKO: In his opinion?  
 22 MS. BRANCH: In his opinion as the former bureau chief who  
 23 makes the recommendation to the director.  
 24 HEARING OFFICER KEPKO: Overruled. Go ahead.  
 25 THE WITNESS: You were overruled?

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1 MS. SNYDER. Yes.  
 2 THE WITNESS: In my opinion, yes.  
 3 BY MS. BRANCH:  
 4 Q. Is there any requirement in any of these written rules,  
 5 regs, protocols from ODH that tells a provider how many backup  
 6 doctors he needs for a variance to be granted?  
 7 A. No.  
 8 Q. Is there a rule of thumb for that?  
 9 A. There's never been a stated rule of thumb, and, basically,  
 10 we haven't supplied it. Practice has shown, at the two  
 11 facilities, that it usually ends up being three physicians, but  
 12 there's no rule one way or the other on that, nor protocol on  
 13 that.  
 14 Q. At the Dayton clinic, Dr. Haskell's variance has always  
 15 listed three doctors; is that right?  
 16 A. In Dayton?  
 17 Q. Right.  
 18 A. Now I have to think back to 2003.  
 19 Q. Okay. Well, I'll strike that question.  
 20 A. In my recollection, we ended up with three, but I'm not sure  
 21 that there were four or five, you know, maybe names that were  
 22 put forward. I pretty much remember we ended up with three.  
 23 Q. That was a bad question. When the director granted the  
 24 variance --  
 25 A. Yes.

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1 Q. -- at the Dayton clinic, there were three names on the  
 2 variance; is that right?  
 3 A. Yes.  
 4 Q. And there have been three names maintained since then, until  
 5 your retirement?  
 6 A. Yes.  
 7 Q. Okay. And when Dr. Haskell's Cincinnati clinic, the Women's  
 8 Med Center on Jefferson, which is now closed -- when that had a  
 9 variance, that just had the two doctors: Dr. Haskell and  
 10 Dr. Kade?  
 11 A. Correct.  
 12 Q. Is that right?  
 13 A. Correct.  
 14 Q. And, then, when we made this request in October, we had  
 15 three names: Hansel, Gravely and Schwartz?  
 16 A. Yes. Once Kade was out of the picture. But at the time  
 17 your letter came in, Dr. Kade was still practicing at the  
 18 facility, as I recall.  
 19 Q. That's right. But Dr. Bowers had resigned?  
 20 A. Dr. Bowers had resigned?  
 21 MS. BRANCH: All right. I have no further questions for  
 22 you, Mr. Croy. Thank you.  
 23 ---  
 24  
 25

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1 EXAMINATION  
 2 BY HEARING OFFICER KEPKO:  
 3 Q. Mr. Croy, let me ask you a few questions before you go. I  
 4 surely am not going to keep you here very long.  
 5 The testimony about the variance and substitute doctors and  
 6 backup doctors, to say the least, is a little confusing. I take  
 7 it that your testimony is that the spirit and intent of the  
 8 variance rule is to get assistance for that patient when the  
 9 patient needs it. In other words, if an emergency arises or  
 10 some event occurs that the intent of that variance rule is to  
 11 make sure that someone, a doctor, is available to assist that  
 12 resident or patient to get into a hospital. Would that be a  
 13 fair statement?  
 14 A. That's a fair statement.  
 15 Q. Okay. And in terms of that spirit and intent, if a resident  
 16 or a patient has an event or an emergency in a facility, and the  
 17 two named backup doctors are not available, and the two named  
 18 substitute doctors are not available, you still want to know  
 19 that there is someone or some entity that can get that patient  
 20 into the hospital, whether they are named in the variance or  
 21 not; would that be correct?  
 22 A. Correct.  
 23 Q. And you're going to worry about the credentials of that  
 24 individual later?  
 25 A. (Witness nodded.)

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1 Q. Did that happen with regard to Lebanon Road, that, at some  
2 point, a patient was transferred to a hospital and you  
3 investigated it, or your bureau investigated that incident?  
4 A. Surveyors in my bureau.  
5 Q. And Dr. Gravely admitted that patient to the hospital?  
6 A. Yes.  
7 Q. And I may be incorrect, but Dr. Gravely was not a named  
8 backup?  
9 A. Well, again, that was when I asked the question about the  
10 timing, because I couldn't recall exactly when that emergency  
11 took place, but I believe in the time frame, that that would  
12 have been the case, yes.  
13 Q. That Dr. Gravely was not a named backup, nor even a  
14 substitute in the variance?  
15 A. That one time.  
16 Q. And when Dr. Gravely had that patient admitted, even though  
17 he wasn't a named backup or a substitute, you believe that met  
18 the spirit and intent of the variance rule; correct?  
19 A. Yes.  
20 Q. And when you investigated, found so, that the facility was  
21 in compliance?  
22 A. Yes. I think what raised the question, if there is a  
23 question at the time of that emergency, was that the patient was  
24 taken to the Bethesda North Hospital and admitted because  
25 immediately, in our mind, we said, "Wait a minute. Bethesda

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1 North." We would have expected a patient to be taken to Christ  
2 Hospital. So that's, basically, when -- you know, that's the  
3 reason that the -- how did the patient get to Bethesda North  
4 because, you know, the doctors that we knew did not have  
5 privileges at Bethesda North.  
6 HEARING OFFICER KEPKO: And perhaps one more. Can you go  
7 back to that testimony.  
8 (Reporter complied.)  
9 BY HEARING OFFICER KEPKO:  
10 Q. There was a question posed to a prior witness that went  
11 something along these lines:  
12 If a facility uses the backup -- or the admitting privileges  
13 of another physician who is not listed as one of the physicians  
14 in the variance, is that facility in compliance with the terms  
15 of that variance? The witness answered no.  
16 Would you agree with that answer?  
17 A. No, I wouldn't agree. Again, because the purpose of that  
18 variance is to assure that what would have occurred under the  
19 transfer agreement does occur.  
20 Q. In that regard, in State's Exhibit 11, the protocol  
21 contemplates a situation similar to that question, in that, if  
22 the substitute doctors are available in the event that backup  
23 physicians aren't available, the protocol itself contemplates  
24 that?  
25 A. Yes.

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1 HEARING OFFICER KEPKO: Thank you.  
2 MS. SNYDER: May I ask a follow-up question?  
3 HEARING OFFICER KEPKO: Sure.  
4 - - -  
5 RECROSS-EXAMINATION  
6 BY MS. SNYDER:  
7 Q. With respect to that, even though the protocol builds in  
8 that safety net, the Department of Health still has an  
9 expectation that a facility is going to give the department  
10 names of the backup physicians it intends to use; is that right?  
11 A. Yes.  
12 Q. Okay. And for the Hearing Examiner, you talked about  
13 Dr. Gravely, and Dr. Gravely using his admitting privileges --  
14 DR. HASKELL: Her.  
15 MS. SNYDER: Excuse me. Her. Thank you.  
16 BY MS. SNYDER:  
17 Q. Her admitting privileges to admit a patient. I'll take you  
18 through an exhibit first. If you could go to State's Exhibit  
19 21, page 5, please. Is it true that, at the time that  
20 Dr. Haskell used Dr. Gravely's privileges, according to this  
21 letter, did they already have an agreement for her to act as his  
22 backup physician?  
23 A. Well, this letter and that date, is, basically, where the  
24 two physicians agreed to Mrs. Haskell to perform as backup.  
25 Now, the next logical step is the letter from Mrs. Haskell or

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1 Dr. Haskell, basically, notifying the Department of Health that  
2 these two physicians shall be named as backups.  
3 Q. But in the incident that you were just talking about, that  
4 was in March 2012.  
5 A. That's what I've been saying all along. I couldn't remember  
6 when that happened. But everything in perspective, I needed to  
7 know, okay, I know there was the emergency. I know we  
8 investigated it, but when, because we've got a lot of dates  
9 here.  
10 Q. We do have a lot of dates here.  
11 A. That happened in March. Is that what you're telling me?  
12 Q. Yes. Does that sound correct to you?  
13 A. I would say it seems it was spring or early summer.  
14 Q. And one more question. Not to beat the substitute  
15 physicians to death here, but the protocol, you've testified,  
16 kind of, builds this safety net. You also testified that the  
17 facility has an obligation to have 24/7 backup with the named  
18 backup physicians. Does that mean that that 24/7 backup failed,  
19 so they have to resort to the substitutes?  
20 A. I don't see it that way. I'm sorry.  
21 Q. How do you see it?  
22 A. I see it, basically, again, that the requirement on the  
23 facility for the 24/7 capability to handle an emergency or a  
24 medical complication when, basically, the attending physician is  
25 not available, and you have to go to a backup because the

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1 protocol anticipates the possibility that those backups, two,  
2 three, whatever we're talking about, may be unavailable and a  
3 substitute has to be used. I don't see that as the facility  
4 failing to meet the 24/7.

5 You're always -- with me, it's always going to come back  
6 to -- the bottom line is, basically, was the patient taken care  
7 of appropriately? And, basically, again, I'm sorry, but I am a  
8 firm -- I've been a regulator for many, many years. But I'm a  
9 firm believer of spirit and intent, and I believe, as I've  
10 stated before, you know, not here today, but regulations,  
11 whether they are administrative regulations or protocols that  
12 are set down, basically, are as much an art as they are a  
13 science. And, basically, you may have a requirement in a  
14 protocol or in a regulation that you have to deal with it  
15 strictly as a science.

16 The example I always use is, basically, if the regulation  
17 says that the door to your operating room has to be 41 inches,  
18 then, by golly, it can't be 39 and a half inches, it can't be 40  
19 inches: It has to be 41 inches or more, because you have a  
20 gurney or hospital bed that has to go through that door.  
21 Basically, science says you have to follow that regulation.

22 On the other hand, you have a requirement that, in a case of  
23 an emergency or medical complication that your patient can be  
24 taken care of by being transferred to an appropriate facility  
25 for appropriate care. How you do that may be a little bit

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1 different from one facility to the other, and that's where the  
2 art of regulation comes in. I guess I take that opportunity to  
3 say that because the fact of the matter is I am retired.

4 MS. SNYDER: And I have no further questions.

5 HEARING OFFICER KEPKO: Thank you.

6 MS. BRANCH: No questions.

7 HEARING OFFICER KEPKO: Thank you for your testimony today.  
8 Enjoy your retirement.

9 THE WITNESS: I'm trying.

10 HEARING OFFICER KEPKO: Want to take a little break?

11 MS. BRANCH: I was going to ask for a break.

12 (Recess taken.)

13 (Witness re-sworn.)

14 HEARING OFFICER KEPKO: Just for the record, sir, state your  
15 name again, please.

16 THE WITNESS: Sure. William Mudd Martin Haskell.

17 HEARING OFFICER KEPKO: Go ahead, Counsel.

18 MS. BRANCH: Thank you.

19 ---

20 REDIRECT EXAMINATION

21 BY MS. BRANCH:

22 Q. Dr. Haskell, can you tell us your current occupation?

23 A. I'm a physician, surgeon.

24 Q. And how long have you been a physician and surgeon in the  
25 State of Ohio?

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1 A. Since approximately 1974, '75.

2 Q. And where do you practice?

3 A. Primarily at 11250 Lebanon Road in Cincinnati.

4 Q. That's the Lebanon Road Surgery Center?

5 A. Lebanon Road Surgery Center. Yes.

6 Q. Do you practice medicine anywhere else in Ohio?

7 A. Sometimes at our facility in Dayton, Ohio. Kettering.

8 Q. This morning, you went through your CV and your history with  
9 Ms. Snyder. Is there anything that you want to add in addition  
10 to what you've already testified to about your background? That  
11 was Exhibit HH.

12 A. Well, I'll just say that, in addition to the basic medical  
13 training I have had, I have been somewhat recognized as an  
14 expert in the area of the second-trimester abortions. I was  
15 asked to write chapter for a textbook on providing abortions,  
16 which is listed -- the publication is in my résumé. I've been  
17 asked to speak numerous times on various topics related to  
18 second-trimester abortions by our professional organization, The  
19 National Abortion Federation meetings, up through as recently as  
20 last spring, which is not on the résumé.

21 Q. And why do you practice in the area of reproductive rights?

22 A. When I was first introduced to this area in 1978, the  
23 standard of care in Cincinnati, and in the country, in general,  
24 was marginal at best in many instances. I saw an opportunity to  
25 make a relevant difference in the quality of the care that was

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1 being delivered to women, both in terms of not only the medical  
2 care, but also the emotional support and empathy that was  
3 demonstrated towards them during the course of their care.

4 Q. So when you started in 1978, abortion had only been legal  
5 for a few years.

6 A. Five years in Ohio.

7 Q. And do you feel -- what contributions do you feel you've  
8 made in the improvement in the medicine and the surgery for  
9 abortions?

10 A. Well, I think that, through example, I've demonstrated that  
11 good physicians can practice in the field of abortion by  
12 providing excellent care and encourage others to do so. And,  
13 then, through professional training and sharing, since my  
14 background is general surgery, it's a little different than a  
15 lot of OB/GYNs. It's certainly different than a lot of family  
16 practitioners who actually provide most of the abortions in this  
17 country. Through my general surgery training, I find that the  
18 techniques that I learned at the University of Cincinnati have  
19 been very helpful in the performance of some of the higher risk  
20 work that I do, and being able to share those experiences with  
21 physicians I think contributed to a degree.

22 Q. And you were asked this morning if you had any proof that  
23 you still had admitting privileges at Jewish Hospital. I have  
24 with me -- I hadn't planned to use it, but I have with me a  
25 letter from Jewish Hospital, which I guess just identify it as

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1 JJ.  
2 ---  
3 And, thereupon, Respondent's Exhibit JJ was marked for  
4 purposes of identification.  
5 ---  
6 BY MS. BRANCH:  
7 Q. This is a letter dated September 23, 2011. Do you currently  
8 have privileges at Jewish Hospital?  
9 A. What's called level zero at Jewish Hospital, equivalent to  
10 my privileges at Christ Hospital.  
11 Q. So what does that mean to be -- what can you do?  
12 A. I can do what's referred to as refer and follow.  
13 Q. Refer and follow. What does refer mean?  
14 A. I can refer patients to Jewish Hospital for treatment and/or  
15 admission. If they are admitted, I can follow them in the  
16 hospital, and I can make comments in the chart or observations  
17 in the chart, but I'm not allow to direct care.  
18 Q. If you had no backups, no consultants and no substitutes  
19 available, would you be able to get a patient admitted to Jewish  
20 Hospital?  
21 A. Yes. By right of my privileges, and, also, we had this  
22 discussion with the president of the medical staff and the  
23 president of the hospital at the time that I was informed my  
24 privileges were reduced to zero that I was assured by  
25 Mr. Holeman, who is the CEO of Jewish Hospital that they would

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1 never turn a patient of mine away.  
2 Q. And I know you've been through lot of litigation over the  
3 years over the Written Transfer Agreement requirement. In  
4 Dayton, have you ever been able to have a Written Transfer  
5 Agreement for your Dayton clinic?  
6 A. Briefly.  
7 Q. Which hospital was that?  
8 A. That was Miami Valley Hospital.  
9 Q. Why did that stop?  
10 A. Miami Valley Hospital had entered into a partnership with  
11 Good Samaritan Hospital in Dayton, and apparently, as part of  
12 this hospital -- I don't know if they are co-owned, but it was  
13 maybe a Joint Operating Agreement that they had. There was a  
14 clause written in that agreement that neither of the hospitals  
15 do anything that would promote abortion in any way. A member of  
16 the hospital board that had been involved in writing that  
17 agreement pointed that out to the administrative staff at Miami  
18 Valley and insisted that they rescind the transfer agreement.  
19 Q. And did you apply for a waiver of the variance?  
20 A. At some point.  
21 Q. In fact, then, they called it a waiver, but now we call it a  
22 variance?  
23 A. Uh-huh.  
24 Q. If you could turn to Exhibit E in the Respondent's book. Is  
25 that the variance request for Dayton back from February of 2008?

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1 A. Yes, it is.  
2 Q. And turn to Exhibit F. Is that approval of the variance for  
3 Dayton from March 2008?  
4 A. Yes, it is.  
5 Q. Now, at the time that that variance approval came through,  
6 you were in a similar position as we are here; right? You had  
7 an administrative hearing and a decision from the ALJ, and you  
8 had moved on to Common Pleas Court. Do you remember that?  
9 A. Correct.  
10 Q. At the time that the variance was granted in March of '08,  
11 did the director withdraw his proposed revocation of the license  
12 for Dayton?  
13 A. That is my recollection.  
14 Q. And we have that in the book as Exhibit G. Have you had any  
15 problems with your variance, keeping your variance in Dayton  
16 since 2008?  
17 A. Only that it hasn't been renewed under the new protocol.  
18 Q. And the license you applied for was for Dayton last year?  
19 A. Correct.  
20 Q. When was that?  
21 A. Well, it would have expired in August.  
22 Q. So you applied before?  
23 A. I applied sometime in July.  
24 Q. And what's the status of that?  
25 A. It's in limbo somewhere.

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1 Q. Did you reapply this year for another license for Dayton?  
2 A. Yes, I did.  
3 Q. And the status of that one?  
4 A. It's in limbo.  
5 Q. Has the Department of Health contacted you about either the  
6 renewal application or the variance for Dayton?  
7 A. Not for either one. Not for either application.  
8 Q. Are you still seeing patients and treating people in Dayton?  
9 A. Yes, I am.  
10 Q. So your license still remains in effect?  
11 A. That is my understanding.  
12 Q. Do you know why the Department of Health requires that there  
13 be a Written Transfer Agreement?  
14 MS. SNYDER: Before he answers, I just want to make sure,  
15 his understanding and not actually what the department -- well,  
16 never mind. I'm sorry. I didn't understand the question.  
17 THE WITNESS: Generally, Written Transfer Agreements are to  
18 ensure that patients that need care beyond the scope of the  
19 facility to provide them can get the care that they need at a  
20 facility that can provide that care.  
21 BY MS. BRANCH:  
22 Q. And, in this country, do hospitals have to admit patients  
23 through an emergency situation, even though there's no Written  
24 Transfer Agreement?  
25 A. If they accept Medicare, yes.

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1 Q. And are you familiar with the EMTALA, the federal law on  
2 emergency medical treatment?  
3 A. Somewhat, yes.  
4 Q. Now, your Cincinnati clinic that used to be on Jefferson,  
5 Women's Med Center of Cincinnati, were you ever able to get a  
6 Written Transfer Agreement for that clinic?  
7 A. Yes.  
8 Q. And which hospital?  
9 A. That was at Jewish Hospital.  
10 Q. And did that agreement end at some point?  
11 A. Yes. The agreement was for three years and did not have an  
12 automatic renewal clause so that it lapsed. When I asked that  
13 it be extended, I was told that it was time for some other  
14 hospital to put themselves out in the public.  
15 Q. Did any other hospital give you a Written Transfer Agreement  
16 for your Cincinnati clinic on Jefferson?  
17 A. No.  
18 Q. And you asked for a variance, then, at that point?  
19 A. Yes.  
20 Q. And what was the basis for the variance being granted for  
21 your Cincinnati clinic on Jefferson?  
22 A. That time -- is that in the book?  
23 Q. I don't think so.  
24 A. I can't remember if it was based on Dr. Kade's and my  
25 privileges or Dr. Lumpkins privileges who would have been

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1 working with me at that time.  
2 Q. And where did Dr. Kade have privileges?  
3 A. At Christ Hospital.  
4 Q. Where's Dr. Lumpkin?  
5 A. Christ Hospital.  
6 Q. And you had Jewish?  
7 A. Yes.  
8 Q. And for the folks in the room that don't know anything about  
9 our hospitals and where your clinic was on Jefferson, what's the  
10 closest hospital to that clinic?  
11 A. The closest hospital would be University of Cincinnati  
12 Medical Center, which is approximately four or five blocks. The  
13 next closest would be The Christ Hospital which is maybe ten  
14 blocks at the most. There is Deaconess Hospital, but I believe  
15 at that time it became more of a specialty hospital.  
16 Q. So Dr. Kade and Dr. Lumpkin's privileges at Christ would  
17 have been the closest -- would that have been closer to your  
18 clinic on Jefferson?  
19 A. Jewish Hospital was -- those two hospitals are on the north  
20 edge of downtown. The Jewish Hospital is further out, maybe  
21 another ten miles out.  
22 Q. Jewish Hospital is more in the suburban area?  
23 A. More suburban. In Kenwood, at the time. It is in Kenwood  
24 now.  
25 Q. Since your transfer agreement with Jewish Hospital has

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1 lapsed, has Jewish Hospital's ownership changed?  
2 A. Yes.  
3 Q. Who owns it now?  
4 A. It's owned by Mercy -- or Catholic Health Partners,  
5 operating under the name Mercy Health.  
6 Q. Have you attempted to get a Written Transfer Agreement from  
7 the Jewish Hospital that's now owned by the Catholic partners?  
8 A. Yes, I have.  
9 Q. Have you had any success?  
10 A. No, I have not.  
11 Q. All right. So the Lebanon Road Surgery Center, we've  
12 learned, opened in 2010. We've already gone through the  
13 exhibits. I will skip the background on that.  
14 We notice that your wife, Valerie Haskell, signed a lot of  
15 these letters for the application and for the variance; is that  
16 right?  
17 A. That's correct.  
18 Q. Why was she the one signing those instead of you?  
19 A. She's the officer for the entity that holds the license, the  
20 Lebanon Road Medical Building, LLC.  
21 Q. You were the medical director at the time?  
22 A. Yes.  
23 Q. You still are the medical director?  
24 A. Yes.  
25 Q. And the request for the variance at the Lebanon Road Surgery

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1 Center, before you asked for the variance, did you try to get a  
2 Written Transfer Agreement from any hospitals? Let me ask you  
3 this: As of today, have you tried to get a Written Transfer  
4 Agreement?  
5 A. I have subsequently, yes.  
6 Q. And which hospitals have you tried?  
7 A. The Christ Hospital and University Medical Center.  
8 Q. Did you try Bethesda North?  
9 A. Yes, we did. I forgot that.  
10 Q. Did you try again at Jewish?  
11 A. No, because I've been told flat out that they wanted to  
12 terminate their relationship with me altogether.  
13 Q. And what response did you get from U.C., University Medical  
14 Center?  
15 A. Recently, I got a response from U.C. Medical Center denying  
16 it because House Bill 59 is going to prevent them from entering  
17 into any agreements with abortion providers.  
18 Q. We have that one in the book at Exhibit AA. It's further  
19 back in the book. This letter is dated August 5th, 2013. When  
20 did you make your request to U.C. Medical Center?  
21 A. I began requests about a year earlier, about the same time  
22 as the request at Christ Hospital.  
23 Q. Had U.C.M.C. ever responded in writing in the last year,  
24 other than this August 5th letter?  
25 A. Just this one on August 5th.

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1 Q. Did you assume they had turned you down, just based on their  
2 silence?  
3 A. One would think so.  
4 Q. But they finally officially wrote to you and said, no, based  
5 on the new laws?  
6 A. Correct.  
7 Q. And why are they prohibited under the new law from granting  
8 you a Written Transfer Agreement?  
9 A. As they say in the letter here, the City of Cincinnati has  
10 some leasehold interest -- ownership leasehold interest in the  
11 University of Cincinnati and the University of Cincinnati  
12 Hospital. As I understand House Bill 59, it prohibits  
13 publicly-funded health care facilities from entering into --  
14 HEARING OFFICER KEPKO: I'm sorry. I didn't hear your  
15 last --  
16 THE WITNESS: My understanding of House Bill 59 is that it  
17 prohibits a publicly-funded health care facility from entering  
18 into any agreement with an abortion provider.  
19 BY MS. BRANCH:  
20 Q. And did you get a response from Christ Hospital?  
21 A. Yes, I did.  
22 Q. And that's the second page of the exhibit?  
23 A. Yes.  
24 Q. And they turned you down a year ago?  
25 A. That's correct.

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1 Q. Did they give a reason?  
2 A. They didn't want the public pressure, adverse publicity, I  
3 think, is the term they used.  
4 Q. What does that mean?  
5 A. Well, as I had seen at Jewish Hospital, and I'm sure what  
6 she's referring to here, is that the -- contingent activists  
7 opposed to abortion start either a letter-writing or e-mail  
8 campaigns or try to bring a great deal of pressure on executives  
9 of these hospitals to rescind or not enter into agreements with  
10 facilities that are abortion providers that would enable those  
11 abortion providers to comply with the department's regulation  
12 requiring a transfer agreement.  
13 Q. Now, you requested a change to your variance that was  
14 originally granted -- eventually, Lebanon Road got a variance;  
15 correct?  
16 A. That's correct.  
17 Q. And then there was a change, I think it's Exhibit 11 -- I'm  
18 sorry. Exhibit 8, in the State's book, is this your request for  
19 the change? What was the reason for the modification?  
20 A. Well, I was wanting to back out of the day-to-day  
21 operations, and, you know, I was anticipating my change in my  
22 privileges at Jewish.  
23 Q. All right. And did you also mention in there that you were  
24 going to -- your wife mentions in the letter that you were going  
25 to spend more time traveling?

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1 A. Back out of the day-to-day and spend more time traveling.  
2 Q. All right. And what was your plan in submitting this  
3 request for the modification? Was it to substitute just you or  
4 also Dr. Kade?  
5 A. Well, the intent was just to have the variance based on  
6 Dr. Schwartz and Dr. Bowers.  
7 Q. But it's not exactly clear that it says that, is it?  
8 A. That was not clear that it said that. That's correct.  
9 Q. Why did you add Dr. Schwartz?  
10 A. Dr. Schwartz -- you mean Schwartz or Bowers or both?  
11 Q. Start with Dr. Schwartz.  
12 A. Well, I've had a long relationship with Dr. Schwartz in  
13 terms of providing backup and being available if we had problems  
14 or complications since the time that Dr. Lumpkin left our  
15 practice. Dr. Lumpkin was a board-certified OB/GYN up until the  
16 time that he left our practice, which I think it was around  
17 2008, '07 or '08, somewhere in that neighborhood. Dr. Schwartz  
18 was the main person that both Dr. Kade and I would have called  
19 in the event we had a patient that needed a transfer. Even  
20 though we both had admitting privileges, we would have turned  
21 the patient over to Dr. Schwartz regardless.  
22 Q. Did you ever consult with Dr. Schwartz during that period of  
23 time?  
24 A. Consult with him, yes. Did we transfer any patients to him?  
25 Maybe one or two from Jefferson, but I don't recall specifically

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1 at this point.  
2 Q. And was that during -- the ones that you transferred to a  
3 hospital using Dr. Schwartz, was that while you had a variance?  
4 A. Yes.  
5 Q. And the variance was for you and Dr. Kade?  
6 A. That's correct.  
7 Q. But you used Dr. Schwartz?  
8 A. Yes.  
9 Q. Did the Department of Health have any concerns about that  
10 back then?  
11 A. No.  
12 Q. In Exhibit 10, the director, Dr. Wymyslo, approves this  
13 change. You've seen this several times now. You were on notice  
14 to -- I'm going to refer you to the second-to-the-last paragraph  
15 that starts, "Should evidence." You were on notice --  
16 MS. PACIOREK: I'm sorry. Which exhibit?  
17 MS. BRANCH: Exhibit 10. Second-to-last paragraph.  
18 MS. PACIOREK: Thank you.  
19 BY MS. BRANCH:  
20 Q. You were told you had to tell the department if something  
21 happened. What was your understanding of what you needed to  
22 inform the department of?  
23 A. Well, any change in the reappointment of the three  
24 physicians. The previous paragraph, you know, talks about us  
25 having a continuous relationship with the three physicians,

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1 admitting privileges, adherence to our protocol, and timely and  
2 quality backup emergency care.  
3 Q. Did you ever have a change that you needed to alert the  
4 department to regarding the admission or reappointment for any  
5 of the doctors?  
6 A. Dr. Kade.  
7 Q. What did you do to let ODH know about her change?  
8 A. I sent them a copy of her reappointment letter.  
9 Q. That was Exhibit L that we saw with Mr. Cory, the e-mail he  
10 sent you and your response to it?  
11 A. Yes.  
12 Q. How long did you wait to send the Department of Health  
13 Dr. Kade's reappointment letter?  
14 A. As soon as I received it, I e-mailed it to Mr. Croy.  
15 Scanned in the e-mail.  
16 Q. The same day?  
17 A. Same day I received it, yes.  
18 Q. And we've heard discussion about her affiliate status?  
19 A. Yes.  
20 Q. Did you research with that meant for The Christ hospital?  
21 A. Yes.  
22 Q. And what's your understanding of what her ability to admit  
23 patients to the hospital was, now that she had affiliate status  
24 instead of courtesy status?  
25 A. She could refer them for evaluation and admission.

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1 Q. Is that enough power to get the patient actually seen in the  
2 hospital?  
3 A. Yes.  
4 Q. And the word was "triaged"?  
5 A. Yes.  
6 Q. And if the hospital decided the patient needed to be  
7 admitted to hospital, the patient could be admitted?  
8 A. Yes.  
9 Q. Whether she's courtesy or a referral patient, she could  
10 still be admitted to and treated at the hospital the same way?  
11 A. That's correct.  
12 Q. Did you explain that to Mr. Croy in your e-mails?  
13 A. Yes, through these e-mail. Through this e-mail chain, yes.  
14 Q. Now, the Department of Health wrote you and asked for more  
15 information about this. I'm going to ask you turn to Exhibit  
16 14. This is a new exhibit we haven't seen before that. I don't  
17 think we've talked much about. This is a letter from Rebecca  
18 Maust. I've been saying it wrong for so many years in my head.  
19 This is a letter from Rebecca Maust dated March 29th, 2012,  
20 directed to you. Do you recall getting this letter?  
21 A. Yes, I do.  
22 Q. In the first paragraph, she wants to follow up on the issue  
23 with Dr. Kade's affiliate status?  
24 A. Right.  
25 Q. In this letter, the first paragraph, she's requesting --

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1 it's the last sentence. "This letter requesting clarification  
2 of Dr. Kade's privileges does not put your Ambulatory Surgical  
3 Facility license immediately at issue. But failure to resolve  
4 the issue could lead to licensure action in the future." Do you  
5 see that?  
6 A. Yes, I do.  
7 Q. And did you think your license was in jeopardy at this point  
8 in March of 2012?  
9 A. I was concerned. I mean, she reassured me that there was  
10 not an immediate problem, but she was certainly raising the  
11 issue that there could be a potential problem.  
12 Q. And did you respond to her request for additional  
13 information?  
14 A. Yes, I did.  
15 Q. So bringing up the next exhibit, Exhibit 15. Is this your  
16 response or is this your lawyer's response?  
17 A. This is my response.  
18 Q. Did you explain to her in this letter what you've explained  
19 to Mr. Croy? Let me direct you to Paragraph 3 of your letter.  
20 A. Yes. I approached it in a little bit different way. In her  
21 letter, she asked questions a little bit differently.  
22 Basically, I covered a lot of the same information that was  
23 covered to Mr. Croy.  
24 Q. Did you explain to her that you thought that Dr. Kade's  
25 current status was consistent with the variance?

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1 A. Yes, I did.  
2 Q. And did Rebecca Maust, or anyone from ODH, ask any  
3 additional questions after you sent your April 10th letter?  
4 A. I believe so.  
5 Q. I don't have any in the book. So did you have any  
6 conversations with ODH?  
7 A. There's an April 20th letter --  
8 Q. Okay.  
9 A. -- from Rebecca Maust. I guess that's on a different issue.  
10 That's a different issue.  
11 Q. Right. I want to just finish up the testimony on Dr. Kade's  
12 privileges.  
13 A. I understand now what you're asking me. I'm not aware. She  
14 responded to this letter. Without seeing it, I can't recall the  
15 details.  
16 Q. Okay. Did you believe there was still an issue with ODH  
17 about whether Dr. Kade's new status made any difference to the  
18 variance?  
19 A. Yes, I did.  
20 Q. What was that?  
21 A. They didn't feel that it was -- that her affiliate status  
22 was sufficient to satisfy the requirements of admitting  
23 privileges.  
24 Q. Was it ODH who decided she could no longer be a backup  
25 doctor on your variance?

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1 A. That was certainly the implication, without seeing the  
2 letter.  
3 Q. You didn't remove her?  
4 A. No.  
5 Q. You didn't ask for a modification to remove her from your  
6 variance?  
7 A. No.  
8 Q. There have been questions about Dr. Bowers' admitting  
9 privileges, so let me just start with that. He was listed as  
10 your backup physician on the variance that was granted in 2011.  
11 He resigned as your backup doctor in May of 2012; is that right?  
12 A. Yes.  
13 Q. And that's going to be in the other book, Exhibit R. The  
14 date of the letter is May 21, 2012. When did you actually  
15 receive it?  
16 A. Two days later, the 23rd.  
17 Q. And he's referencing his August 29th, 2011, letter, and  
18 that's his letter where he agreed to be your backup?  
19 A. Yes.  
20 Q. And he explained to you why he was resigning?  
21 A. Not precisely. He indicated that Christ Hospital had bought  
22 his practice and he's now employed by Christ Hospital. I  
23 presume it would have something to do with Christ Hospital  
24 telling me I had to give it up. That's a presumption on my  
25 part.

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1 Q. Okay. Give it up, meaning?  
2 A. Give up being a backup.  
3 Q. Now, he says he changed his contract with Christ Hospital on  
4 May 1st. Did you know that on May 1st?  
5 A. No, I did not.  
6 Q. When did you first learn that he was no longer available to  
7 you as a backup?  
8 A. When I received this letter.  
9 Q. In your original letter with him, he promised he would give  
10 you 30 days' notice.  
11 A. He did.  
12 Q. Did you do anything about that?  
13 A. No, I didn't.  
14 Q. How long did it take you to alert the Department of Health  
15 that Dr. Bowers had resigned as your backup and was no longer  
16 available?  
17 A. The next day, the 24th.  
18 Q. And that's exhibit -- we have to go back to the other book.  
19 That's Exhibit 19. That's that May 24th letter I wrote that  
20 included lots of information, but the bottom of the first page  
21 mentions that he will no longer be your backup; is that right?  
22 A. Correct.  
23 Q. The State has put in this new exhibit in their book that we  
24 were arguing over this morning. Let's see if I can find it in  
25 my book. It's Exhibit 26. I'm hoping it's in the witness' book

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1 as well.  
2 A. I've got a copy of it here.  
3 MS. SNYDER: What are you --  
4 MS. BRANCH: It's the exhibit from Christ Hospital to  
5 Ms. Snyder dated June 7th, 2013.  
6 MS. SNYDER: I don't think there's a witness copy. Here you  
7 go.  
8 BY MS. BRANCH:  
9 Q. You saw this letter yesterday?  
10 A. Yes, I did.  
11 Q. What does this letter mean?  
12 A. Well, it means that he's not able to serve as an in-house  
13 attending physician.  
14 Q. What's that?  
15 A. An in-house attending physician, depending on the situation,  
16 but at Christ Hospital, because Christ Hospital trains  
17 residents, the requirement now is that there always has to be an  
18 attending physician overseeing the performance of house staff.  
19 This primarily something called service patients; in other  
20 words, patients who come to the hospital unattached in any care.  
21 In teaching hospitals, those are put on the resident service.  
22 They used to be -- the hospital used to be able to bill for the  
23 activities of resident physicians taking care of patients, but  
24 they are no longer able to. It has to be billed under the  
25 attending's name. It can only be done if the attending is

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1 physically present whenever care is delivered. So attending  
2 staff physicians now have to spend the night in the hospital as  
3 long as there are residents in the hospital. This eliminates  
4 his ability to serve in that capacity.  
5 Q. And what does his capacity as an in-house attending staff  
6 physician have to do with his privileges to admit patients from  
7 Lebanon Road, if necessary?  
8 A. No impact at all.  
9 Q. And when you got this letter yesterday, did you contact  
10 Christ Hospital to see if Dr. Bowers still had privileges?  
11 A. Yes, I did.  
12 Q. And what did you learn?  
13 A. That he has continuously had active privileges since 1979,  
14 and he has no disciplinary actions in his file there.  
15 Q. And we've already admitted that as our Exhibit II. I don't  
16 know if there's one there.  
17 A. Yes.  
18 Q. Is it already up in the book?  
19 A. Yes.  
20 Q. Is that the letter you got from Christ Hospital yesterday  
21 asking you about the State's exhibit?  
22 A. Yes. I pulled it off the Internet. Uh-huh.  
23 Q. So, I guess, does that indicate he could have admitting  
24 privileges and not be an attending at the same time?  
25 A. It indicates he has admitting privileges and that there's



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1 been no lapse or break in his admitting privileges.  
 2 Q. Do you credential the doctors who work at the Lebanon Road  
 3 Surgery Center?  
 4 A. Yes, we do.  
 5 Q. How do you credential your doctors?  
 6 A. Well, there are, basically, three elements that we're  
 7 concerned -- three main elements we're concerned about -- four  
 8 we're concerned about in credentialing: Are they currently  
 9 licensed? Do they currently have any hospital privileges? And,  
 10 if so, what those are. Do they have malpractice insurance  
 11 coverage, and are they current in CPR and CLS? Now, malpractice  
 12 insurance is provided by us under a master policy, so it's  
 13 really not an issue.  
 14 You know, the hospital privileges, it's good to know what  
 15 they have, but it's not necessarily an issue in whether someone  
 16 is given privileges to work in the ASF. Ohio licensure  
 17 certainly is an issue. We have a tickler record, tickler file,  
 18 spreadsheet, if you will, that lists the expirations of all of  
 19 these various documents, and then we either go on the Internet  
 20 to provide them, because a lot of this information is available  
 21 directly from the source over the Internet, or we ask the  
 22 physician to provide us a copy of the appropriate document.  
 23 Q. Do you go through the same degree of credentialing for your  
 24 backup doctors?  
 25 A. To a more limited degree.

1 A. Probably within a week.  
 2 Q. And with that, will you be asking, again, for a variance for  
 3 the Lebanon Road Surgery Center?  
 4 A. Yes, I will.  
 5 Q. The Lebanon Road Surgery Center's request from 2012, that  
 6 included -- we've seen by an October 12th letter to the director  
 7 asking for a variance. Has anybody from ODH asked you for any  
 8 input or have any questions, points of clarification from that  
 9 October 2012 variance request?  
 10 A. No.  
 11 Q. Do you know why that's not been ruled on?  
 12 A. No.  
 13 Q. Let me ask you about what you call redundant coverage in the  
 14 Bethesda North doctors. First of all, who are the doctors that  
 15 you've asked for in your most recent variance for Lebanon Road  
 16 Surgery Center?  
 17 A. That would be Drs. Schwartz, Gravely and Hansel.  
 18 Q. And which is the -- what hospital is Dr. Gravely and  
 19 Dr. Hansel --  
 20 A. Bethesda North.  
 21 Q. The distance between Lebanon Road Surgery Center -- or which  
 22 is the closest hospital -- maybe that's a better way to ask  
 23 you -- to Lebanon Road Surgery Center?  
 24 A. The most easily accessible hospital would be Bethesda North.  
 25 Q. And accessible because of the highway?

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1 Q. How do you credential them?  
 2 A. Just make sure they have a current license and current  
 3 admitting privileges.  
 4 Q. How do you find out if they have current admitting  
 5 privileges?  
 6 A. Either by asking them to provide us with a copy of their  
 7 appointment letter or by accessing it over the Internet.  
 8 THE REPORTER: I couldn't hear the last part.  
 9 Q. There was a truck. She didn't hear the last part.  
 10 A. As I have with Schwartz.  
 11 Q. And how often do you credential your backup doctors?  
 12 A. During their -- whenever their renewal cycle comes up.  
 13 Q. Now that you've learned that ODH wants you to reapply for  
 14 the variance with each application of your renewal of the  
 15 license, how often are you credentialing backups?  
 16 A. Well, we'll start credentialing them as our renewal comes up  
 17 because ODH is going to know is it current today. And, so, we  
 18 will re-credential them with each licensure application, renewal  
 19 application.  
 20 Q. Have you reapplied in 2013 for your renewal of the ASF  
 21 license for Lebanon Road Surgery Center?  
 22 A. No, we're waiting on our final State Fire Marshal  
 23 inspection. The initial inspection's been done. We're waiting  
 24 for them to come back to complete the inspection.  
 25 Q. When do you think you'll have your renewal application in?

1 A. Because of the highway and route of traffic. From where we  
 2 are, it's the preferred hospital for our EMS.  
 3 Q. How much farther would it be to Christ Hospital, if you need  
 4 to do a --  
 5 A. Eight to ten miles.  
 6 Q. And is that a longer drive?  
 7 A. Bethesda is about two miles. Two to three.  
 8 Q. And we've seen the letter where you've had that January 2011  
 9 letter from Drs. Hansel and Gravely. Why didn't you -- well,  
 10 first of all, why did you ask them to be doctors to provide  
 11 coverage for your patients?  
 12 A. Because the Department of Health put me on notice that I  
 13 needed a plan of substitute physicians.  
 14 Q. When did you start trying to find substitute physicians?  
 15 A. When I received the November 11th memo. It would have been  
 16 in December when that was mailed out.  
 17 Q. The protocol?  
 18 A. Protocol.  
 19 Q. And how did you go back about find these two doctors?  
 20 A. I'm not sure who I asked. I knew that Dr. Gravely was on  
 21 the board of Planned Parent -- somewhere I learned she was on  
 22 the board of Planned Parenthood. I think Dr. Kade suggested I  
 23 approach Dr. Gravely because she was on the board of Planned  
 24 Parenthood, and was, therefore, pro choice.  
 25 One of the things we are sensitive of in selecting backup

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1 physicians is, you know, are they going to treat our patients  
2 with respect and consideration and empathy in view of the  
3 services that they have had; pregnancy termination.  
4 Q. Has it been hard for you to back find backup doctors in  
5 Cincinnati?  
6 A. It's not hard to find physicians who will agree to provide  
7 backup. It is hard to find physicians who will sign a backup  
8 letter.  
9 Q. Why is that?  
10 A. Because the backup letter becomes public record with the  
11 Ohio Department of Health.  
12 Q. And have you approached other doctors to sign a backup  
13 letter for you?  
14 A. Yes, I have.  
15 Q. And how many have turned you down?  
16 A. Three or four.  
17 Q. That's because they don't want it to be public?  
18 A. That's correct.  
19 Q. If you go to our exhibit book, Exhibit J. This is your  
20 letter from Drs. Gravely and Hansel to provide emergency backup  
21 services and hospital admission for your patients?  
22 A. That's correct.  
23 Q. Now, at this point in time, you already had a variance  
24 listing Dr. Schwartz and Dr. Bowers?  
25 A. That's correct.

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1 Q. Why did you want to have more doctors in January?  
2 A. I think I mentioned in my earlier testimony that I wanted to  
3 be sure that I had adequate coverage. My first concern was care  
4 of patients, making sure there's -- secondly, the November 11th  
5 letter protocol indicated a need that we plan for substitute  
6 physicians, and so it was a cautious, somewhat compulsive  
7 nature. I wanted to have additional physicians in the ready, so  
8 to speak.  
9 Q. Now, the protocol you're talking about -- I'm going to ask  
10 you to turn to Exhibit A and B in our book. Exhibit B is the  
11 protocol itself?  
12 A. Right.  
13 Q. Let's go to A, which is the cover letter.  
14 A. Okay.  
15 Q. Rebecca Maust sent you a letter dated December 19th, 2011?  
16 A. That's correct.  
17 Q. And she's alerting you to this new protocol; right?  
18 A. That's correct.  
19 Q. It says, in the second sentence, the second paragraph in the  
20 letter, that, "We'll use the operational procedure for certain  
21 variances requested in the future." How did you interpret that  
22 sentence?  
23 A. I interpreted it to mean that current variances would be in  
24 place of the old when a variance was requested, that the  
25 protocol would then come into play.

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1 Q. By "new variance," did you think that was if you opened a  
2 new facility and requested a new license?  
3 A. Or even modify the existing variance.  
4 Q. At this point in time, did you perceive that you were going  
5 to be modifying your variance request?  
6 A. No, I did not.  
7 Q. And you had Drs. Gravely and Hansel as your extra backups.  
8 I'm not sure what the right word is.  
9 A. My redundant coverage. Substitute backup. Substitute  
10 physicians.  
11 Q. So we'll use that. How did that help you, then, when  
12 Dr. Bowers resigned unexpectedly?  
13 A. That meant that I was able to respond immediately with a  
14 plan that I felt was more than adequate to meet the standards  
15 that had been in place for granting variances.  
16 Q. ODH seems to be saying that they wanted you to tell them  
17 back in January about Drs. Hansel and Gravely, instead of  
18 waiting until you needed them to be your backup and asking for  
19 variance changes. Did you have any reluctance in divulging  
20 their names in this contract with the Department of Health back  
21 in January?  
22 A. No, I just didn't see the need.  
23 Q. Were you concerned it would become a public record?  
24 A. They were aware of that.  
25 Q. Who was aware?

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1 A. Dr. Gravely and Dr. Hansel.  
2 Q. That it could be -- as soon as they signed a contract --  
3 A. They assumed it would be a public record.  
4 Q. When you got Exhibit B, being the new protocol, did you  
5 believe you needed to do anything to change your variances at  
6 that point?  
7 A. Not at that time.  
8 Q. At some point, did you learn that the Department of Health  
9 wanted you to follow the protocol?  
10 A. When I applied for the Dayton renewal in 2012, they wanted  
11 me to -- at that point, when I didn't submit a transfer  
12 agreement, I had told them that I had a variance in place, and I  
13 believe it was Mrs. Smith informed me that I needed to have a --  
14 to resubmit a new request for the variance.  
15 Q. And that's when we submitted the letter I drafted in October  
16 of 2012?  
17 A. Correct.  
18 Q. Could you turn to Exhibit 18 in the State's book. This is  
19 another letter from Rebecca Maust to you dated May 4th, 2012; is  
20 that right?  
21 A. That's correct.  
22 Q. And is this the letter that -- maybe this is what you were  
23 referring to earlier?  
24 A. This is what I was referring to earlier. Right.  
25 Q. Where they injected your interpretation of Dr. Kade's

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1 privileges?

2 A. Right.

3 Q. And she's asking you, in that third paragraph, to explain

4 how you're going to meet the protocol from November 2011?

5 A. Right.

6 Q. How did you respond to this letter?

7 A. I believe I may have turned it over to you at that point.

8 Q. Okay. And she gave you 21 days to respond; is that right?

9 A. Yes, that's correct.

10 Q. So let's go to 19, which would be my response dated

11 May 24th. Did we meet her deadline of 21 days?

12 A. I believe so. We had a day to spare.

13 Q. A day to spare.

14 So tell us how you -- with the three weeks you had, how were

15 you going to, all of a sudden, comply with this new protocol?

16 A. I was able to submit the backup letter of Drs. Gravely and

17 Hansel, in addition to the existing backup letter in

18 Dr. Schwartz.

19 Q. And did you have to get new letters from Dr. Hansel, Gravely

20 and Schwartz based on the protocol?

21 A. Yeah, I believe so.

22 Q. If we turn to pages 4 and 5, which letter is that?

23 A. So pages 4 and 5 would be the revised letter from

24 Drs. Hansel and Gravely.

25 Q. Was this letter -- it's different from that January letter.

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1 A. It itemizes each point in the protocol.

2 Q. And pages 6 and 7?

3 A. Would be Dr. Schwartz's new letter itemizing the protocol.

4 Q. Pages 8 through the end, what is that?

5 A. That's the emergency medical protocol that we used at that

6 time.

7 Q. All right. So you complied with the new protocol within the

8 21-day time frame to provide all of this information to the ODH?

9 A. That's correct.

10 Q. Did you get any -- did ODH have any questions about this?

11 I'm going to limit my time frame to the month of May when we

12 submitted it.

13 A. Not that I recall.

14 Q. How about June?

15 A. I don't have a thought at that point.

16 Q. Let's go to Exhibit 20 then. This is another letter to you

17 from Rebecca Maust dated July 27th, 2012.

18 A. Uh-huh.

19 Q. More questions about the variance?

20 A. Correct.

21 Q. And she's asking you questions about the protocol and your

22 response to the department's protocol; is that right?

23 A. That's correct.

24 Q. This letter, which is -- we've not seen before, I want to

25 take a little bit of time just to ask you some questions. In

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1 the second full paragraph on this, page 1 of Exhibit 20, sort

2 of, in the middle, she writes, "Now, after DH became aware of a

3 change in circumstances and asked about it, LRSC has apparently

4 decided unilaterally that Drs. Gravely and Hansel have been

5 added as backup physicians and will substitute for Drs. Bowers

6 and Kade."

7 Let me just stop there. Was Dr. Bowers, in 2012, no longer

8 your backup?

9 A. Yes. As of May 23rd, to my knowledge, according to his

10 letter, May 21.

11 Q. And Dr. Kade was rejected as a backup by the department?

12 A. Correct.

13 Q. That was in Ms. Maust's letter of May 4th?

14 A. Right.

15 Q. So, at this point in time, when you wrote your letter of

16 May 24th, was it your intent to have Drs. Gravely and Hansel

17 substitute for Bowers and Kade?

18 A. That was my request.

19 Q. Yes. Was that your intent to have them substitute for

20 Bowers and Kade back in January when you signed them up as your

21 redundant coverage?

22 A. No.

23 Q. Did you explain that to the Department of Health that you

24 did not intend to substitute?

25 A. I believe we did.

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1 Q. In response to this?

2 A. In response to this letter, yes.

3 Q. In the next paragraph, she's asking you about a gap in

4 coverage between when Dr. Bowers resigned. Was there ever a gap

5 in coverage for your patients at LRSC, if they needed to be

6 transferred to the hospital?

7 A. No.

8 Q. How can you explain that?

9 A. Dr. Schwartz was available to me throughout. To my

10 knowledge, Dr. Bowers was available up until March 21st, 23rd.

11 Dr. Schwartz was my preferred person anyway, and then I had my

12 substitute physicians if I needed to use them. So, no.

13 Q. Did you explain that to ODH in response to this letter?

14 A. I believe we did.

15 Q. If you need to refer to the next exhibit in the book,

16 Exhibit 21 is the August 9th, 2012, letter in response.

17 A. Correct.

18 Q. Now, I'm going to -- sorry to keep going back and forth.

19 Back to Exhibit 20, page 2. At the top of the page, "We remind

20 you that your variance continues at the director's discretion."

21 A. Uh-huh.

22 Q. When you got that letter, what did you understand was the

23 status of your variance as of July 2012?

24 A. Well, that the variance that we had was still in place.

25 Q. And did she request more information from you about travel

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1 time?  
2 A. Yes.  
3 Q. And a list of names?  
4 A. Uh-huh.  
5 Q. And was that part of the response in Exhibit 21?  
6 A. Yes, it was.  
7 Q. And, then, she says, in the second-to-last paragraph, "The  
8 department wants." Do you see that? "The department wants to  
9 continue this dialogue to ensure compliance."  
10 A. Uh-huh.  
11 Q. Did you feel, at this point in time, the summer of 2012,  
12 July 27th, 2012, that you were dialoguing with the department  
13 and answering their questions and giving them information?  
14 A. I thought I was being very forthright and very direct with  
15 them. I was certainly not intentionally withholding any  
16 information from the department, but I was feeling a little bit  
17 threatened.  
18 Q. And, then, in the response, Exhibit 21, that's dated  
19 August 9th, 2012, this is where we respond to the Request for  
20 Information and explain the concerns the department raised in  
21 that July letter?  
22 A. Right.  
23 Q. Now, at this point in time, in August, you've already  
24 reapplied for your -- or you had already applied for your  
25 renewal of the license; is that right?

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1 A. I don't remember exactly the date.  
2 Q. Strike that. That would be wrong. You would have applied  
3 for your renewal for Dayton?  
4 A. Dayton.  
5 Q. Not for Lebanon Road?  
6 A. Probably not Lebanon at that point.  
7 Q. Did you hear anything from the department after that  
8 August 9th response about the status of your license or your  
9 renewal until we get to the October 18th, 19th and November 23rd  
10 letters? I guess, between August 9th and October 18th, did you  
11 get any -- did you have any request for information from the  
12 Department of Health?  
13 A. No.  
14 Q. Let's talk about the patient that was transferred from  
15 Lebanon Road Surgery Center to the hospital.  
16 A. Okay.  
17 Q. First of all, because this is public, no names and no  
18 identifying information about the patient.  
19 A. Sure.  
20 Q. What happened?  
21 A. The patient had a procedure under general anesthesia. The  
22 patient was awakening from general anesthesia and was  
23 transported by gurney to the emergency room, which is our usual  
24 custom. There was nothing unusual about her surgery. There was  
25 nothing unusual about the anesthesia that she was given --

1 amount of medication. She was responding appropriately in the  
2 recovery room, and then she became silent and began making -- I  
3 was not there present at the time, but when I observed her --  
4 what I would refer to as athetoid movements.  
5 Q. What was the word?  
6 A. Athetoid, A-T-H-E-O-T-O-I-D. Of her arms legs and head,  
7 especially her head.  
8 Q. To a layperson, what does that mean?  
9 A. In lay terms, if you can imagine, now, a cerebral palsy  
10 person, how they move in a direction, but they don't actually --  
11 they're kind of rolling, kind of random movements, as opposed  
12 to -- a typical seizure would be very strong contractions of  
13 muscles. The body becomes very rigid. Her body remained very  
14 loose and very limp and very mobile.  
15 Q. Were you present in the building?  
16 A. I was not present when it started, but I was called  
17 immediately. I think I was completing a surgery in another room  
18 and I was called in to attend to her.  
19 Q. What did you do?  
20 A. The nurse anesthetist was standing there with her still. I  
21 instructed him to get her some Valium. I don't remember the  
22 dose. This patient did have a history of epileptic seizure and  
23 had been on Dilantin but stopped it while she was pregnant.  
24 Q. Why?  
25 A. Because it can have teratogenic effect.

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1 Q. It can have what?  
2 A. Teratogenic effect. It can affect the fetus. She wasn't  
3 sure that she was going --  
4 THE REPORTER: I'm sorry. I didn't hear the last part of  
5 the sentence.  
6 HEARING OFFICER KEPKO: You'll have to speak up a little  
7 bit.  
8 THE WITNESS: She wasn't sure she was going to terminate or  
9 not, so she had stopped -- we had advised her that, if she was  
10 going to terminate, that she should go ahead and restart her  
11 Dilantin; she did not. And, then, she started to have this  
12 activity that we initially interpreted as a seizure, but knew,  
13 most likely, was a reaction to the propofol, which is the  
14 anesthetic that was used. It's a rare reaction seen with the  
15 propofol with both epileptic and non-epileptic patients.  
16 BY MS. BRANCH:  
17 Q. And did you consider this a patient who needed to be treated  
18 beyond what you could provide at the Lebanon Road Surgery  
19 Center?  
20 A. Yes.  
21 Q. What did you do?  
22 A. Well, after two doses of Valium, not getting -- Valium is a  
23 typical drug administered intravenously to control epileptic  
24 seizures, and we had no response. We felt that the best we  
25 can -- we did not have Dilantin to start administering. We felt

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1 the best response was to have her transported where she could  
2 receive more care and that she might need to be admitted and  
3 have more evaluation than what we were able to provide.  
4 Q. Did you follow your protocols?  
5 A. To the extent that it applied, yes.  
6 Q. And what did you do?  
7 A. I called one of our consulting physicians and asked them if  
8 they would accept the patient. They said that they would  
9 contact the emergency room. Then we called 911.  
10 Q. Which physician did you call?  
11 A. I think I talked to Dr. Hansel, but I believe Dr. Gravely  
12 was actually on site at the hospital. Their office is about  
13 five minutes from the hospital.  
14 Q. When you called 911 --  
15 A. Uh-huh.  
16 Q. -- was there a recording made?  
17 A. Yes.  
18 Q. Have you heard it?  
19 A. Yes.  
20 Q. It got a lot of press, didn't it?  
21 A. Yes.  
22 Q. And that was what sparked a lot of those complaints to the  
23 Department of Health about your variance?  
24 A. Apparently so, yes.  
25 Q. There was reference to some of those complaints about you

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1 laughing on the 911 recording?  
2 A. Yes.  
3 Q. Can you explain that?  
4 A. Yes. The 911 operator, after I had given her the initial  
5 information, made a comment, "Well, you don't really want me to  
6 give you instructions about what to do next, do you?" And it  
7 was kind of a wry sort of statement, and she was a 911 operator  
8 telling a physician what to do, and I said, "No, that's not  
9 necessary."  
10 Q. Did the squad arrive?  
11 A. The squad arrived.  
12 Q. When a squad responds to a 911 call, do they have the power  
13 to transport the patient wherever they want?  
14 A. Once they accept the patient, yes.  
15 Q. Have you ever had that experience as a physician that you  
16 wanted the squad to go to a hospital maybe where you had  
17 privileges, but the squad overrode that?  
18 A. Dr. Lumpkin in our facility had that situation.  
19 Q. What happened in that situation?  
20 A. He had to spend ten minutes to convince them to take the  
21 patient the extra blocks to Christ Hospital instead of the  
22 University Hospital, which was their preference. The advantage  
23 of the patient going to The Christ Hospital is Dr. Lumpkin, who  
24 is familiar with the patient's injury, would then have been able  
25 to treat them. He was already familiar with the patient,

1 familiar with the nature of the injury and what needed to be  
2 done. The patient would not need any delay due to an evaluation  
3 by a stranger physician that is a stranger to that patient  
4 having first to evaluate and assess and delay. Dr. Lumpkin  
5 already was informed. The preferable course would be for  
6 Dr. Lumpkin to continue that care.  
7 Q. So even if you had a Written Transfer Agreement with a  
8 hospital, a squad can override that?  
9 A. Yes.  
10 Q. And as long as the patient is properly cared for at the  
11 hospital the squad takes them to, it doesn't matter?  
12 A. No, not as long as they are properly taken care of. Yes.  
13 HEARING OFFICER KEPKO: What's the time frame for all of  
14 these events?  
15 MS. BRANCH: Oh, excellent question. I'm sorry. I skipped  
16 that. It's right here in my notes.  
17 BY MS. BRANCH:  
18 Q. When did this occur that the patient who needed to go to the  
19 hospital?  
20 A. Dr. Lumpkins' patient that we're talking about?  
21 Q. Let's start with that one and I'll go back.  
22 A. Dr. Lumpkins' patient would have been in the early 2000s  
23 somewhere. Probably somewhere around 2005. I can't remember  
24 the exact date.  
25 Q. And that would have been for the Women's Center on

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1 Jefferson?  
2 A. Jefferson. That's correct.  
3 Q. The one we started off talking about at Lebanon Road Surgery  
4 Center, when was that?  
5 A. That was sometime early in 2012. I think maybe February. I  
6 can't recall without looking.  
7 Q. Have you had other transfers from the Lebanon Road Surgery  
8 Center to the hospital?  
9 A. That's the only one we've had in three years.  
10 Q. All right. And where did the patient -- which hospital did  
11 the patient go to, the one from Lebanon Road?  
12 A. Went to Bethesda North.  
13 Q. And why did you decide to call Dr. Hansel and have the  
14 patient transferred to Bethesda North?  
15 A. Well, it was a closer hospital, for one thing. Secondly,  
16 this patient was not in any urgent distress. The patient was  
17 unconscious, but it was not like she was in imminent danger.  
18 So I felt this would be a good opportunity to test this  
19 relationship with these physicians because we had time. If the  
20 patient had had a more severe injury, such as a rupture of her  
21 uterus or something of that nature, I may have leaned toward  
22 sending her down to Dr. Schwartz because I was, at that point in  
23 time, much more comfortable with his ability. I knew his  
24 ability. It's not that I had any doubt about their abilities, I  
25 just didn't know what their abilities were.

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1 Q. And did the patient get treated at Bethesda North?  
2 A. The patient was treated and released in about three hours.  
3 Q. Did you see her again?  
4 A. I did. Yes, I did see her in followup about three weeks  
5 later. She came back to the facility that afternoon when she  
6 was released because she had left some personal articles behind.  
7 Q. And was she adequately treated at the hospital for her  
8 medical needs?  
9 A. The neurological activity that she was exhibiting  
10 disappeared, so yes.  
11 Q. So even though you didn't call Dr. Schwartz, who would have  
12 been the doctor left on your variance, and called these other  
13 doctors, do you believe that the patient was given proper care?  
14 A. Yes.  
15 Q. And even though you didn't have a Written Transfer  
16 Agreement, was the patient given proper care?  
17 A. Yes.  
18 Q. And did she receive effective continuity of care that day?  
19 A. Yes.  
20 Q. Could you turn to Exhibit CC in our book. I'm going to ask  
21 you to turn to page 7. Can you tell us what this form is?  
22 A. This is what I refer to as a Plan of Correction form. It's  
23 the form that's sent out by the Ohio Department of Health after  
24 any type of inspections. Sometimes it's referred to as a Plan  
25 of Correction form at the top of the forth column, "Provider

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1 Plan of Correction." If there are any deficiencies that were  
2 noted during the inspection, you write your Plan of Correction  
3 in that column, the second wide column.  
4 Q. The Department of Health calls this a survey; is that right?  
5 A. It's a survey report.  
6 Q. And we call it an inspection report?  
7 A. Inspection report.  
8 Q. Are those words interchangeable for you?  
9 A. Yes. Actually, in the very upper left-hand corner, under  
10 "Ohio Department of Health" is "Statement of Deficiencies" and  
11 "Plan of Correction."  
12 Q. Okay. And on the right-hand side of the top row, it has the  
13 date survey completed, March 29, 2012?  
14 A. Correct.  
15 Q. Is this the inspection that ODH came in and did after your  
16 patient was transferred to the Bethesda North Hospital?  
17 A. Yes.  
18 Q. And in the initial comments section, it says that you were  
19 in compliance with the rules for the Ambulatory Surgery Center  
20 at the time the complaint/inspection was completed on 3-29-12;  
21 is that right?  
22 A. That's correct.  
23 Q. Were you there for the inspection?  
24 A. I believe I was. Best I can recall.  
25 Q. Did you talk to the person from ODH who was doing the

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1 survey?  
2 A. Yes.  
3 Q. Did she ask questions about this patient and how she was  
4 taken care of?  
5 A. Not directly.  
6 Q. Did she tell you what the complaint was about?  
7 A. No. They never do.  
8 Q. I'm assuming some facts here. What is a complaint  
9 inspection?  
10 A. Well, a complaint inspection means that the Ohio Department  
11 of Health has received a complaint about a facility that's under  
12 their purview, and then they go on site to do an investigation  
13 about the complaint. Typically, in the complaint inspections  
14 we've had, they ask to look at the appointment register for a  
15 particular day, and then they ask to examine five charts,  
16 typically five charts.  
17 Q. Is that to throw you off as to which one was the complaint?  
18 A. That's so you don't really know what they're looking for,  
19 but you always kind of figure it out.  
20 Q. Did you figure it out this time?  
21 A. Yes. When she went over to Bethesda North to start getting  
22 copies of their medical records, we knew what she was looking  
23 for.  
24 Q. Okay. Did she have questions of other people in the  
25 facility? Not just you, your staff?

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1 A. Yes.  
2 Q. Did she ask you about the 911 call?  
3 A. No, she did not.  
4 Q. That wasn't a concern for the department?  
5 A. No. I don't think it had been released at that time. They  
6 were out the next day.  
7 Q. This is the day after?  
8 A. Yeah. This is -- now that I can see the date, so the  
9 incident happened on 3-28, and they were there on 3-29.  
10 Q. Did they do an exit interview with you at the end of this?  
11 A. Not with me, no.  
12 Q. Did they with anybody on your staff?  
13 A. Somebody on staff.  
14 Q. Were there any concerns from ODH at the time of the exit  
15 interview?  
16 A. No.  
17 Q. Did anybody from ODH, at any time after this inspection,  
18 alert you that there were any problems with your backup plan,  
19 your emergency protocol or the transfer of the patient?  
20 A. A couple months later, Mrs. Maust started asking me a series  
21 of questions about this incident: Why we used Dr. Gravely other  
22 than our listed backup physicians.  
23 I will correct one thing. Now that I understand the date  
24 and sequence, I was not present when this inspection was done.  
25 I did talk to her on the phone at some point, but I was not

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1 present.  
 2 Q. And then Rebecca Maust's letter is May 4th and July 27th.  
 3 Those are the ones you're referring to --  
 4 A. That's correct.  
 5 Q. -- where she's asking questions about this incident?  
 6 A. Correct.  
 7 Q. Did she ever indicate that you were not in compliance?  
 8 A. Did I ever indicate? Did she ever indicate?  
 9 Q. Did she ever indicate?  
 10 A. No.  
 11 Q. If we turn to the next page, page 8 in the book, this is a  
 12 survey for 4-18-2012. It references in that paragraph, at the  
 13 time of the investigation, something about an ultrasound. Do  
 14 you know what the complaint -- did ODH tell you what the  
 15 complaint was this time?  
 16 A. No.  
 17 Q. So this is a couple weeks later, there's another complaint?  
 18 A. Yes.  
 19 Q. Did you figure out what that was about?  
 20 A. Yes.  
 21 Q. What was the problem?  
 22 A. A woman had come into the facility purporting to be seeking  
 23 an abortion, and was -- we were doing our usual intake. And one  
 24 of our first steps in the process, after they fill out a medical  
 25 history and some other registration information, we give them

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1 our informed consent documents to read. One of the first steps  
 2 is to do an ultrasound. This individual, after the ultrasound  
 3 was completed, according to the nurse who did the ultrasound,  
 4 got very huffy, I guess, is the word, and said, "You didn't do  
 5 that ultrasound right. You've broken the law," and left. A few  
 6 days later, I refunded her \$200, the fee we charge for the  
 7 ultrasound and pre-op visit. And then subsequently this event.  
 8 Q. What was the outcome of this complaint?  
 9 A. That no deficiencies were found.  
 10 Q. Have you had other complaint inspections for the Lebanon  
 11 Road Surgery Center?  
 12 A. Yes.  
 13 Q. Did those result in the finding of being out of compliance  
 14 with anything?  
 15 A. No.  
 16 Q. What were the reasons for those complaints?  
 17 A. We recently had a complaint that someone died. The two  
 18 surveyors came down, and -- well, first, the police arrived to  
 19 investigate that same day. Then the next day, the two surveyors  
 20 came down to investigate. We knew why they were there at that  
 21 point.  
 22 Q. Did the patient die?  
 23 A. No. We had a patient that had an 11-week pregnancy that had  
 24 a severe anomaly. It was a wanted pregnancy. There was a  
 25 change in Ohio law with regards to fetal death certificates

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1 about two or three years ago. Prior to that, you could only  
 2 obtain a fetal death certificate if the fetus was 20 weeks or  
 3 more. There was a change in the law, and a person could ask for  
 4 a fetal death certificate at any stage of pregnancy loss so that  
 5 they could bury or have cremated, whatever it was, even if it  
 6 was an early miscarriage.  
 7 And this couple was very distraught about this loss, and  
 8 they wanted to have the opportunity to -- I'm not sure if it's  
 9 bury or cremate. I think it was bury -- this pregnancy after  
 10 termination. We were working with a funeral home we had never  
 11 worked with before, and they, apparently, came in a car that had  
 12 their name on it so the picketers that are constantly around our  
 13 building phoned in that we had a death.  
 14 HEARING OFFICER KEPKO: I'm sorry. I didn't hear your  
 15 last --  
 16 THE WITNESS: Phoned in that we had had a death.  
 17 BY MS. BRANCH:  
 18 Q. So the death was of the fetus?  
 19 A. They were there to pick up -- the funeral home was there to  
 20 pick up the fetus.  
 21 Q. Do these complaint inspections cost you money?  
 22 A. Yes.  
 23 Q. What do you have to pay for each inspection?  
 24 A. \$879.  
 25 Q. Even the ones that are --

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1 A. Bogus. Yes.  
 2 Q. Did you have an annual inspection by the Department of  
 3 Health in the year 2012?  
 4 A. Yes.  
 5 Q. And that's one of their -- sometimes two every year?  
 6 A. Yes.  
 7 Q. And do you have to pay for the annual inspection?  
 8 A. Yes.  
 9 Q. If there's a problem found, do you have to pay for the  
 10 reinspection?  
 11 A. That's correct.  
 12 Q. What are the charges for that?  
 13 A. Well, the initial inspection is around \$1,700 or \$1,800.  
 14 The reinspection is the same as the complaint inspection, about  
 15 \$800.  
 16 Q. If we turn to pages 9 and 10 of Exhibit CC, is that the  
 17 survey report for March 12th, 2012?  
 18 A. Yes, it is.  
 19 Q. Looks like you were out of compliance on one issue?  
 20 A. Yes.  
 21 Q. Having to do with a patient satisfaction program?  
 22 A. Uh-huh.  
 23 Q. Have a Plan of Correction?  
 24 A. Yes. We were able to correct that in a couple of days.  
 25 Q. And if you turn to page 11, is that the revisit report that

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1 found you in compliance at that time?  
2 A. That's correct.  
3 Q. If you could turn to the State's book, Exhibit 1, page 7.  
4 That's the October 19th, 2012, letter recommending nonrenewal.  
5 The day before this, you got that e-mail from Bridgette Smith  
6 saying your license --  
7 A. Yes.  
8 Q. -- had been renewed?  
9 A. Correct.  
10 Q. Then she sent you an e-mail saying, no, that was an error?  
11 A. Yes.  
12 Q. And we saw your e-mail earlier. Nobody mentioned it, but  
13 you e-mailed her back when sent you -- what did you say in your  
14 e-mail?  
15 A. That was cruel.  
16 HEARING OFFICER KEPKO: I'm sorry. I couldn't hear.  
17 THE WITNESS: That was cruel.  
18 BY MS. BRANCH:  
19 Q. For a moment there, did you think your license had been  
20 renewed?  
21 A. I was joyous, of course.  
22 Q. Then you got this letter from the department saying it was  
23 proposed to not renew your license?  
24 A. Yes.  
25 Q. And then we got the November letter as well, and they both

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1 pretty much say the same thing. I won't have you go through  
2 both of those.  
3 What does it mean to you, as the medical director, owner and  
4 operator of this business to have your ASF license revoked?  
5 A. Well, it would mean that we would no longer be able to  
6 provide the surgical services that we provide  
7 Q. If you can't provide surgery services at the Lebanon Road  
8 Surgery Center, what happens to your business?  
9 A. Well, it evaporates.  
10 Q. You have to close?  
11 A. We certainly would have to retool, if you will. We could  
12 still provide medication abortions. But in Ohio, we have to  
13 follow the FDA protocol, which increases the cost of those by  
14 about \$200. It would certainly force us to curtail our business  
15 and our staff substantially.  
16 Q. In both of these letters from the director, he seems  
17 concerned that you've made changes to the variance without  
18 permission.  
19 A. That statement mystifies me because I know I'm not -- I  
20 don't have the authority to unilaterally make changes to the  
21 variance. All I can do is, when there's a need for changes,  
22 those were sent to the director how I wish to comply in a  
23 different way that what's currently approved. To suggest that I  
24 unilaterally substituted my physicians is just not the case.  
25 Q. What would you like to say to the director to reassure him

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1 that you will keep him informed?  
2 A. If I understand the rules, and if I understand what he  
3 wants, I can comply. But as the rules keep changing, and rules  
4 sometimes seem to change, from my perspective, after the fact,  
5 or the expectations change after the fact, it's very hard to  
6 anticipate what the director wants or needs.  
7 Q. And in those series of all of those letters back and forth  
8 between you and the department and me and the department, do you  
9 feel that that's an appropriate way to continue the dialogue  
10 with the department as the rules or the expectations change?  
11 A. Well, I mean, that's certainly one way. I think that  
12 there's an underlying tone in the department's letters that's  
13 kind of an "I got ya" moment. I'm not sure that the intent,  
14 since May of 2012, has been constructive.  
15 Q. The new bill that was passed this summer that goes into  
16 effect at the end of the month changes some of these variance  
17 rules?  
18 A. Yes.  
19 Q. Have you read the statute?  
20 A. No, I have not.  
21 Q. You have not.  
22 A. I've seen your summary. No, I have not.  
23 Q. Is it your intent to comply with the statute?  
24 A. It certainly would be my intent or my hope. Yes.  
25 Q. And right now, since the department doesn't have any rules

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1 or any guidance of how to comply with the statute, who are you  
2 going to rely on for figuring how to comply?  
3 A. You already know the answer to that. You are that person.  
4 Q. And if we get that wrong, and the department says you didn't  
5 comply with House Bill 59, the changes, how is that going to  
6 affect your continuing operation?  
7 A. It would depend on the action that the Department of Health  
8 takes, if they -- the termination of that.  
9 Q. Exhibit CC, if you can turn to page 17, and I'll be quick  
10 because I understand we're late in the day.  
11 MS. SNYDER: Are you still intending to do Becky today?  
12 MS. BRANCH: I don't think I need her. Let me just check my  
13 notes. I'm almost done with him. You want to let her go home?  
14 MS. SNYDER: Yeah. It's pushing 6:00  
15 BY MS. BRANCH:  
16 Q. Pages 17 through 83 -- I will just say, for the record, I  
17 compiled this. These are Written Transfer Agreements that I  
18 received from the department in a public records request. Have  
19 you had a chance to review any of these Written Transfer  
20 Agreements?  
21 A. Yes, I have.  
22 Q. Which hospitals are they associated with?  
23 A. The Christ Hospital, Bethesda North Hospital. There were a  
24 couple of Jewish Hospital.  
25 Q. Those are the three hospitals we've been -- you've attempted



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1 Q. And that he signed off on it?  
2 A. Well, I wrote it, sent him the Word doc, and then he took  
3 the Word doc and put it on his letterhead. He had an  
4 opportunity to review it and make changes, if he felt changes  
5 were necessary.  
6 Q. Did he make any changes?  
7 A. I don't believe so. Yes, he did. Yes, he did.  
8 Q. What did he change?  
9 A. He put in the term "Compensation for services will be billed  
10 to your organization."  
11 Q. Tell me -- where are you reading that?  
12 A. Third paragraph, one-sentence paragraph in the middle.  
13 Q. Okay. He wanted to get paid?  
14 A. Yes.  
15 Q. So that first paragraph, I'm just going to read that into  
16 the record because I think the wording of this paragraph is  
17 important.  
18 "This letter confirms our agreement that I will provide  
19 emergency backup services and hospital admission for patients of  
20 the Lebanon Road Surgery Center in the event of a surgical  
21 complication, emergency situation or other medical needs that  
22 require hospitalization." Did I read that correctly?  
23 A. Yes.  
24 Q. Okay. So you wrote that paragraph then; is that right?  
25 A. Yes.

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1 Q. Okay. And at the time that you wrote that, you considered  
2 Dr. Bowers -- you were putting Dr. Bowers out there as acting as  
3 a backup physician for your facility for the purpose of the  
4 variance; right?  
5 A. That's correct.  
6 Q. As we all have been talking about backup physicians, he was  
7 the traditional backup, not a substitute?  
8 A. That's correct.  
9 Q. If you could now, please, turn to Exhibit 21. And if you  
10 could turn to page 5 of this exhibit, please.  
11 A. Okay.  
12 Q. This is the letter from Drs. Gravely and Hansel written on  
13 January 24th, 2012; correct?  
14 A. Uh-huh.  
15 Q. I'm going to read this first paragraph for the record.  
16 "This letter confirms our agreement that we will provide  
17 emergency backup services and hospital admission for patients of  
18 the Lebanon Road Surgery Center in the event of a surgical  
19 complication, emergency situation or other medical needs that  
20 require hospitalization." Did I read that correctly?  
21 A. Yes, you did.  
22 Q. That is identical language to what we just read with  
23 Dr. Bowers; correct?  
24 A. Uh-huh.  
25 Q. So you wrote that paragraph?

1 A. Yes.  
2 Q. That paragraph --  
3 A. I may have copied them from an earlier agreement. That  
4 sounds like Jennifer Branch's because it covers the three points  
5 that are required in waivers at that time before the new  
6 protocol.  
7 Q. Regardless of who wrote it, you used it to enter into a  
8 contract with Dr. Bowers to act as a backup physician?  
9 A. Sure.  
10 Q. This contract, today you have testified, was not to act as a  
11 backup physician but to act as a substitute physician under that  
12 November protocol?  
13 A. Well, I'm asking them to provide backup services. As I have  
14 said, this is redundancy. It's to be sure that the patients  
15 have -- that I have in place necessary backup coverage,  
16 redundant, to be sure that -- when we do have a complication,  
17 sometimes it can be life-threatening, and so the goal here was  
18 to be overprepared rather than simply to meet the requirement.  
19 Q. Okay. And, now, when you say it was redundant, it was  
20 really only redundant for a month, because February of 2012,  
21 Kade's out, so then you're back to just Bowers and Schwartz?  
22 MS. BRANCH: Objection. Dr. Kade wasn't out in February.  
23 It was ODH who didn't approve of her as a backup in May.  
24 BY MS. SNYDER:  
25 Q. As of February 2012, Dr. Kade no longer had unrestricted

1 admitting privileges to admit patients at Christ Hospital;  
2 right?  
3 A. Uh-huh.  
4 Q. Okay. If you could turn to Exhibit F and go to page 2,  
5 please. You testified on direct that this is a letter that you  
6 wrote to Ms. Maust about the incident with the patient in March  
7 of 2012?  
8 A. Correct.  
9 Q. If you look at the "Underneath, to answer your questions."  
10 Do you see where I am?  
11 A. Yes.  
12 Q. It says "First," and then it says, "Second." Do you see the  
13 "Second"?  
14 A. Yes.  
15 Q. Okay. It says, "Second, the consultant requested the  
16 patient be transferred to Bethesda Hospital." Did I read that  
17 correctly?  
18 A. That's correct.  
19 Q. The consultant that you're referring to in this letter is  
20 Dr. Gravely; right?  
21 A. It was Dr. Hansel that I was speaking with on the phone.  
22 Gravely is the one who, ultimately, assumed the care of the  
23 patient.  
24 Q. Okay. So that practice, the consultant is that practice,  
25 and ultimately Dr. Gravely was the one who admitted the patient;

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1 right?

2 A. She was not admitted. She was released from the emergency

3 room.

4 Q. Okay. She was never admitted?

5 A. Correct.

6 Q. How long was she in the emergency room, do you know?

7 A. A maximum of three hours.

8 Q. Do you say that for a reason?

9 A. I don't know precisely because I haven't looked at the

10 record -- the hospital record to see.

11 Q. That's okay. It doesn't really matter. I don't know if you

12 said that because if you're there over three hours --

13 A. No, no, no, no.

14 Q. Thank you. So in this letter, when you're explaining the

15 incident, in no place do you say, "Oh, and these physicians were

16 acting as the substitute under the protocol," do you? You don't

17 make that argument in this letter?

18 A. No. There didn't appear to me to be a need to.

19 Q. This letter was written, I think, as you testified, before

20 you got your lawyer involved in the correspondence back and

21 forth with Health; right?

22 A. That's correct.

23 Q. Do you have a list of who you use as substitute doctors in

24 your facility?

25 A. No because there's always a physician present who knows --

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1 there are only three of us physicians, and so we all know who

2 our physicians are. We all have their numbers on our cell

3 phones.

4 Q. How many subs do you have on your list right now?

5 A. At the moment, we just have the three listed physicians.

6 Q. Only the backup physicians that you've mentioned in the

7 October request?

8 A. Right. I mean, I have other names I know I could call

9 personally. Dr. Kade has names I know that she knows that she

10 can call personally, but they're not on a formal list, if you

11 will.

12 Q. I wanted to talk to you about Dr. Kade and her inclusion in

13 the 2011 variance.

14 A. Okay.

15 Q. I believe it was your testimony today that you did not

16 intend for Dr. Kade to be included in the 2011 variance; was

17 that correct?

18 A. Correct.

19 Q. We've already talked about the letter requesting that

20 modification. After you received the variance, you never called

21 or wrote any letters to the Department of Health to let them

22 know that she shouldn't have been in there, did you?

23 A. No, I did not.

24 Q. Why not?

25 A. Well, the way I wrote the letter -- which exhibit is that

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1 letter? The granting of the variance.

2 Q. Exhibit 10.

3 A. And Mrs. Maust and I exchanged some correspondence on this

4 very point, and that's the second-to-the-last paragraph.

5 HEARING OFFICER KEPKO: What exhibit are we on?

6 MS. SNYDER: Exhibit 10.

7 THE WITNESS: So the way I read this letter, "The evidence

8 of reappointment to hospital staff or admitting privileges," I

9 read that has a conjunctive "or," or either/or. The department

10 saw it differently. But because of the way I read that

11 paragraph, I felt that because I was concerned that Dr. Kade's

12 privileges were going to be altered like mine, I did have that

13 sort of premonition, if you will. The way I read this

14 paragraph, I felt, well, as long as she's reappointed, it's not

15 a problem. According to Ms. Maust, it means something different

16 than the way I read it.

17 HEARING OFFICER KEPKO: I didn't hear all what you said.

18 Why didn't you think it was problem?

19 THE WITNESS: The way I read the sentence, it said it was

20 a -- I read it as an either/or not as an or meaning both. And

21 because, as long as she -- I knew she would be reappointed, but

22 I wasn't sure about her unrestricted admitting privileges. As

23 long as it was an either/or, which is how I read the sentence,

24 then it wouldn't be an issue whether she had unrestricted

25 privileges or not.

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1 BY MS. SNYDER:

2 Q. Under the way you read that sentence, if she was reappointed

3 to hospital staff, but she did not have unrestricted admitting

4 privileges, you believe she would have met the terms of the

5 variance?

6 A. That's the way I read it at the time.

7 Q. But you understood she was included in the variance because

8 of her privileges; right?

9 A. She was included because she was in it before.

10 Q. Because what?

11 A. She was there before. She was already there in the

12 variance.

13 Q. Well, let's go back to 2010. She was included in the 2010

14 variance because of her privileges; correct?

15 A. Because of her ability to admit patients to the hospital.

16 Q. Is it your testimony, then, that her ability to refer

17 patients is the same thing as having unrestricted admitting

18 privileges?

19 A. It's not the same thing, but it accomplishes the same goal.

20 Q. When you can only refer a patient under the affiliate

21 status, rather than the courtesy, rather than directly admit

22 that patient, does the physician that refers make the ultimate

23 decision on whether or not that patient gets admitted to the

24 hospital?

25 A. When you're doing -- when you have this affiliate status,

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1 the hospital is saying they'll accept your patients if you refer  
2 them. Now, whether or not the patient gets admitted will depend  
3 on the hospital's evaluation of the patient's condition.  
4 Presumably, you wouldn't refer a patient to the hospital if they  
5 didn't need admission or some care beyond the ability of the  
6 facility to care for them, such as the patient with this unusual  
7 neurological activity.  
8 Q. I might have to defer to Dr. Wymyslo's review of this on the  
9 next question. When a physician refers that patient to a  
10 hospital, I assume there's some kind of evaluation by the  
11 physician that's assuming that care --  
12 (Interruption.)  
13 When a physician is referring a patient to the hospital, I  
14 assume there's some kind of a triage or evaluation to determine  
15 by the physician that will actually be admitting that patient  
16 whether the patient is, indeed, fit to admit?  
17 A. Same as with a transfer.  
18 Q. But that is true, then, with the referring physician, that  
19 would be the case?  
20 A. If it's a blind referral, if it's a referral to the  
21 hospital, as opposed to a call to a backup physician, that would  
22 be the case. It would be the same as a transfer to the hospital  
23 under our transfer agreement.  
24 Q. Could you take a look at Respondent's Exhibit II. It's The  
25 Christ Hospital.

1 Q. Was this the first time that you had verified Dr. Bowers'  
2 privileges through Christ Hospital's portal?  
3 A. Yes, I think it's in the portal.  
4 Q. Do you know when that was?  
5 A. Relatively recently. I'm not sure when. I was happy to  
6 find it. I was having trouble getting Trish Miller, like you  
7 were.  
8 Q. Doctor, you testified about the variance, and I'm not sure  
9 which one it was, so I'm going to ask you after I tell my  
10 recollection of your testimony, that you had used Dr. Schwartz  
11 before he was named as a backup physician, so I assume it was  
12 for the 2010 variance.  
13 A. No, that would have been at Jefferson Avenue. That was also  
14 2010. It could have had Kade and I on it still. I had been  
15 using him -- I had an arrangement with Dr. Schwartz that if we  
16 had a problem patient that I could call him, and that  
17 arrangement had been in place since the time that Dr. Lumpkin  
18 left our practice, which I think was somewhere around 2007,  
19 2008. I don't remember the exact time. We have had a formal  
20 relationship with him since that time.  
21 MS. SNYDER: Thank you. I don't have anything further.  
22 HEARING OFFICER KEPKO: Counsel, anything further?  
23 MS. BRANCH: Oh, no. Thank you.  
24 HEARING OFFICER KEPKO: Thank you for your testimony, sir.  
25 (Witness re-sworn.)

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1 A. Uh-huh.  
2 Q. So this document tells us that Dr. Bowers had privileges,  
3 but it doesn't tell us that he had unrestricted admitting  
4 privileges in both obstetrics and gynecology, does it?  
5 A. No, it doesn't mention it. They have a department that they  
6 call Women's Health, and that department has, I think, five, six  
7 or seven divisions in it. One division will be obstetrics,  
8 another division would be gynecology, another division would be  
9 gynecologic oncology, and there are some others. I've looked at  
10 the list briefly yesterday.  
11 So it says he has active privileges, which means he could  
12 admit patients, and it's in the Department of Women's Health,  
13 but it doesn't tell us the specialty areas under which he can  
14 treat once a patient's admitted.  
15 Q. Okay. And my notes are kind of hard to read in this  
16 section. You testified that you called Christ Hospital  
17 yesterday?  
18 A. No, I went online and got this off.  
19 Q. I'm sorry. I had in my notes that you made a separate call  
20 to Christ Hospital to verify Dr. Bowers privileges. Was I  
21 incorrect in that?  
22 A. No, that's not correct. I think the question was whether I  
23 contacted them. Through the Internet, I contacted them.  
24 Q. Okay.  
25 A. For being able to verify privileges.

1 HEARING OFFICER KEPKO: Counsel, any other witnesses?  
2 MS. BRANCH: I'm just reviewing my notes for the last  
3 witness to see if I need to call her.  
4 HEARING OFFICER KEPKO: Take your time.  
5 MS. BRANCH: We'll rest. Thank you.  
6 HEARING OFFICER KEPKO: Very good.  
7 Do you want to move for admission of your exhibits?  
8 MS. BRANCH: Yes. I will move in A through JJ with the  
9 understanding that there was no BB, DD, or EE.  
10 HEARING OFFICER KEPKO: No DD. There was a CC.  
11 MS. BRANCH: There's a CC. You know what? For the double  
12 letters, the only ones I have are AA, CC, HH, II and JJ.  
13 MS. PACIOREK: What was JJ?  
14 MS. BRANCH: Dr. Haskell at Jewish.  
15 HEARING OFFICER KEPKO: A through Z, and then AA, CC, HH, II  
16 and JJ?  
17 MS. BRANCH: That's correct. And I have an additional  
18 exhibit that we hadn't talked about --  
19 HEARING OFFICER KEPKO: You've already rested.  
20 MS. BRANCH: -- which is law, and I was going to offer it if  
21 you wanted it. It's the Administrative Code Section and a  
22 printout of House Bill 59, which is -- I think it's 2,000 pages.  
23 These are the pages that just relate to the variance, if you  
24 felt that would be helpful to you. I was going to put that into  
25 the record. It doesn't need to be an exhibit.

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1 HEARING OFFICER KEPKO: Do you have an objection? I'll take  
2 it.  
3 MS. SNYDER: To the law? I never object to the law.  
4 MRS. HASKELL: At least it's not 2,000 pages long.  
5 MS. BRANCH: I was trying to make it easier.  
6 HEARING OFFICER KEPKO: So, again, we're at A through Z, and  
7 then AA, CC, HH, II and JJ.  
8 Any objection?  
9 MS. SNYDER: I'd like to talk about II and JJ, please. You  
10 know, there has been an objection to the State's letter from  
11 Christ Hospital. We are faced with the exact same situation  
12 with both of these letters.  
13 HEARING OFFICER KEPKO: Let me -- maybe we can short-circuit  
14 this. Did we admit I through 25?  
15 MS. SNYDER: Of mine, yes.  
16 HEARING OFFICER KEPKO: You had an opportunity to question  
17 your witness with regard to C, or Exhibit 26 and assumed that  
18 the material in 26 was true and asked for his opinion regarding  
19 what all this meant.  
20 MS. BRANCH: Without objection.  
21 HEARING OFFICER KEPKO: Yeah. Without objection.  
22 So I'm going to admit 26. I had some hearsay issues, but  
23 the only reason I had those issues is you've exchanged these  
24 other documents, and parties had an opportunity to either make  
25 them part of the record or take a deposition or do what with 26.

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1 Counsel did not. But since she had an opportunity to question  
2 the witness, assuming what's in here is true, that truthfulness  
3 is irrelevant and I can decide how much weight to take it. So  
4 26 will go in.  
5 MS. SNYDER: Thank you.  
6 HEARING OFFICER KEPKO: Maybe that will remedy your  
7 questions about JJ and II.  
8 MS. SNYDER: That will. It does remedy my concerns about  
9 them. I would like to note for the record that I just received  
10 them today, unlike the document that you just admitted which was  
11 received yesterday. But I do not have an objection to these.  
12 HEARING OFFICER KEPKO: Very good. And A through Z, AA, CC,  
13 HH, II and JJ are admitted, as well as State's Exhibits I  
14 through 26 then are admitted.  
15 ---  
16 And, thereupon, Respondent's Exhibits A through Z and AA,  
17 CC, DD, HH, II and JJ and State's Exhibit No. 26 were admitted  
18 into evidence.  
19 ---  
20 HEARING OFFICER KEPKO: Do we want to do a closing brief?  
21 MS. BRANCH: Yes, your Honor.  
22 HEARING OFFICER KEPKO: I think that's a good idea.  
23 One of the things that you might want to cover in the brief  
24 is, it seems like the procedure is not in dispute. What  
25 happened when and what letters were written, I think you all

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1 know them, but it's kind of confusing to sit -- especially when  
2 we're going through two books. I'm not saying you have to  
3 agree, but if you can jointly, sort of, lay out what happened.  
4 MS. BRANCH: I think we could stipulate to a lot of the back  
5 and forth.  
6 HEARING OFFICER KEPKO: Why don't you stipulate it in the  
7 brief so I know what facts are not in dispute. You know, what  
8 letters took place and what the procedure was, and then you can  
9 argue the law. I think you have two issues. You have the issue  
10 of the revocation itself, and if I understand you correctly,  
11 whether I can even rule on the variance.  
12 MS. SNYDER: Thank you. If I could just clarify. First, as  
13 we said in the opening, it's a two-part hearing. The first part  
14 is the 119 part, which you do have jurisdiction over. That's  
15 whether they meet the requirement for licensure, whether they  
16 have a transfer agreement. That second part is this kind of  
17 hearing was created the by 6th Circuit, and that is not within  
18 your jurisdiction is not held pursuant to 119.  
19 HEARING OFFICER KEPKO: That is the variance.  
20 MS. SNYDER: That is how to proceed on the variance. That  
21 is within the director's sole discretion as set forth by the  
22 department's rules.  
23 HEARING OFFICER KEPKO: Let me make sure I understand you.  
24 Someone applies for a variance or a modification, that's not  
25 subject to review in these kind of proceedings. That's your

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1 argument, or that's your position?  
2 MS. SNYDER: My argument is that the 6th Circuit has told  
3 the Department of Health that it needs to give the facility  
4 requesting the variance the opportunity to provide the director  
5 with evidence in support of the request, but that the director  
6 has the sole discretion after that hearing is held on how to  
7 proceed, how to deal with the request.  
8 HEARING OFFICER KEPKO: Once he exercises, that's like a  
9 final decision with no appeal rights administrative, judicial or  
10 otherwise?  
11 MS. SNYDER: That's right. According to the 6th Circuit  
12 decision, there are no appeal rights. It was not pursuant to  
13 119. It does not go up on 119.12 appeal.  
14 HEARING OFFICER KEPKO: Counsel, you differ, I take it.  
15 MS. BRANCH: Right. I would definitely like to brief that  
16 issue.  
17 HEARING OFFICER KEPKO: Good. Yeah. That's fine. I just  
18 wanted to make sure I understood everything.  
19 Do you want to do simultaneous briefs, opportunity for  
20 reply?  
21 MS. BRANCH: I was thinking we could either do simultaneous  
22 with an opportunity to reply or opening, closing and reply. I  
23 don't think it matters to me. I'm not sure who goes first in  
24 this proceeding.  
25 MS. SNYDER: I have the burden in the 119, so I would go

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1 first on the 119; but then the other part, I don't think I need  
2 to go first.  
3 MS. BRANCH: If we were going to try to come up with a  
4 stipulation as to the facts we agree to, especially regarding  
5 the process and all of that, I think we should do that first  
6 before we write our briefs.  
7 MS. SNYDER: Agreed.  
8 MS. BRANCH: I don't care who goes first on the briefs.  
9 MS. SNYDER: I would request, then, simultaneous filings.  
10 HEARING OFFICER KEPKO: When do you think you can have a  
11 stipulation?  
12 MS. SNYDER: Are you taking any days off next week for -- I  
13 don't know when Rosh Hashanah is.  
14 MS. BRANCH: I was supposed to take today off for Rosh  
15 Hashanah, and yesterday. You can see how I triple book my life  
16 here. I do have a mediation all day Monday and a deposition  
17 Tuesday. After that, I'm pretty free.  
18 MS. SNYDER: I have a board meeting Wednesday and I think a  
19 hearing Thursday. Next week will be tricky. I'm free the  
20 following week.  
21 MS. BRANCH: Okay. Do you want to say two weeks from today?  
22 I can take the first crack at it, if you want.  
23 HEARING OFFICER KEPKO: Let me grab my calendar.  
24 Let's go off the record.  
25 (Discussion off the record.)

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1 HEARING OFFICER KEPKO: Let's put that on the record.  
2 Counsel have agreed that these stipulations will be due no  
3 later than September 16th, 2013. The post-trial briefs will be  
4 due simultaneously on September 23rd, 2013. Rely brief due from  
5 both parties on September 30th, 2013. You can do that  
6 electronically, however you want to do it.  
7 MS. BRANCH: 11:59 p.m. e-mail?  
8 HEARING OFFICER KEPKO: Right. I get them all the time. I  
9 send them out all the time too.  
10 Thank you all. You both were very well prepared. I'm  
11 impressed.  
12 MS. SNYDER: Thank you.  
13 MS. BRANCH: Thank you.  
14 ---  
15 And, thereupon, the hearing was concluded at  
16 6:12 o'clock p.m.  
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C-E-R-T-I-F-I-C-A-T-E

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2  
3 I do hereby certify that the foregoing is a true, correct  
4 and complete written transcript of the proceedings in this  
5 matter, taken by me on the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_/  
6 and transcribed from my stenographic notes.  
7  
8  
9

Susan L. Coots, RPR  
Registered Professional  
Reporter and Notary  
Public

My commission expires 1-10-15.

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