ORIGINAL

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

IN THE MATTER OF:	:	**Case No. CI020143405**
CAPITAL CARE NETWORK OF TOLEDO	:	
Appellant,	:	**Judge Myron C. Duhart**
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	**APPELLANT CAPITAL CARE NETWORK OF TOLEDO'S**
Appellee.	:	**APPEAL BRIEF**

I. INTRODUCTION

Capital Care Network of Toledo appeals the Adjudication Order (Attachment 1) issued by the Interim Director of the Ohio Department of Health Lance Himes on July 29, 2014 because the decision is not supported by the reliable, probative, and substantial evidence in the record and because the decision is not in accordance with the law. Capital Care therefore requests the Court reverse the Director's decision.

II. STANDARD OF REVIEW

A decision of the Ohio Department of Health is appealable under O.R.C. § 119.12. On appeal this Court must determine whether the Department of Health's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. "In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." O.R.C. § 119.12. "[A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent,

impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993).

III. STATEMENT OF FACTS

Capital Care Network of Toledo ("Capital Care" or "CCNT") is an ambulatory surgical facility located in Toledo, Ohio. Capital Care provides pregnancy termination services to women from Ohio, Indiana, Michigan, and West Virginia. Hubbard TR. 141. Terrie Hubbard became the owner of Capital Care in 2010, and prior to that worked for Capital Care as a registered nurse for eight years. Hubbard TR. 140. Ms. Hubbard also manages Founder's Women's Health Center, another abortion provider located in Columbus, Ohio. Hubbard TR. 52. Capital Care has held an Ambulatory Surgical Facility ("ASF") license as required by Ohio Revised Code § 3702.30(E)(1) since before Ms. Hubbard became the owner. Hubbard TR. 143. Capital Care has never needed to transfer a patient to a hospital since Ms. Hubbard began working there twelve years ago. Hubbard TR. 140; 142.

In August 2012, Capital Care entered into a written transfer agreement ("WTA") with University of Toledo Hospital as required by OAC § 3701-83-19(E). Hubbard TR. 146; CCNT Ex. A. University of Toledo Hospital notified Capital Care and ODH in April 2013 that it did not intend to renew the written transfer agreement when it expired on July 31, 2013. CCNT Ex. B; Hubbard TR. 147. Ms. Hubbard immediately began searching for another hospital that would agree to a written transfer agreement. Hubbard TR. 150-151. She contacted more than nine hospitals, some as far as Detroit, Cleveland and Columbus. Hubbard TR. 151-152, 154-156.

In June 2013 the Ohio legislature enacted House Bill 59, which included O.R.C. § 3702.303 codifying the written transfer agreement regulation. State Ex. K. Section 3702.303

added a requirement that the transfer hospital be "local." H.B. 59 also prohibited all public hospitals from entering into written transfer agreements with abortion providers. O.R.C. § 3727.60.

When the University of Toledo WTA expired on July 31, 2103, Ms. Hubbard was in negotiations with OhioHealth to secure a WTA, but had not yet reached an agreement. Hubbard TR. 153. On August 2, 2013 ODH issued a letter to Ms. Hubbard proposing to revoke and refuse to renew Capital Care's ASF license for failure to comply with O.A.C. § 3701-83-19(E). State Ex. D. Ms. Hubbard's attorney immediately requested a hearing before ODH on the matter. State Ex. E. A hearing was scheduled but immediately continued by motion of the Director of Health. State Ex. F.

On September 29, 2013, O.R.C. § 3702.303 codifying the written transfer agreement regulation went into effect, adding a requirement that the transfer hospital be "local" and prohibiting all public hospitals from entering into written transfer agreements with abortion providers. When Ms. Hubbard learned of the new requirement that the transfer hospital be "local," she narrowed her search to hospitals within 50-75 miles of the Capital Care facility. Hubbard TR. 156. Prior to her learning about the "local" requirement, she had been contacting hospitals in Cleveland and Columbus, which are 120 to 140 miles away, respectively. Hubbard, TR. 152, 154. On January 20, 2014, Capital Care entered into a written transfer agreement with University of Michigan Health System in Ann Arbor, Michigan ("University of Michigan" or "UMHS"). Hubbard TR. 46; CCNT Ex. C. 12.

Ms. Hubbard developed a policy to be followed in the event of a hospital transfer. The policy is posted in the Capital Care facility by the surgery rooms and at the front reception desk. Hubbard TR. 161; Capital Care Ex. M. The policy directs employees to call 911 in an

emergency. Capital Care's policy is to call 911 in the event of a life threatening emergency where a patient needs immediate treatment. Hubbard TR. 159. The responding EMTs will transport the patient to the hospital nearest to Capital Care, most likely the Toledo Hospital. Hubbard TR. 172. Patients experiencing less serious medical complications who do not need immediate treatment will be transferred to UMHS by helicopter. Hubbard TR. 171. The Capital Care policy gives the contact information for a helicopter air transport service. Hubbard TR. 159, Capital Care Ex. M. Ms. Hubbard coordinated transportation with the private helicopter service. The service will transport her patients from the Capital Care facility to UMHS, at Capital Care's cost. Hubbard TR. 160, 168. If the helicopter is not available or necessary, the patient will be driven to Ann Arbor, which is approximately 52 miles from Capital Care in Toledo. Hubbard TR. 46. The estimated drive (no lights and sirens) is 52 minutes.[1] The estimated helicopter flight time is 15 to 20 minutes. Hubbard TR. 160. Since the agreement with the University of Michigan has been in place, Capital Care has not needed to transport a patient to a hospital. Hubbard TR. 142.

From the date H.B. 59 was enacted at the end of June 2013 until February 2014 when Dr. Wymyslo proposed revoking Capital Care's license, ODH offered no interpretation of the word local. Hubbard TR. 157; Wymyslo TR. 75. On February 18, 2014, the Director of Health issued a second proposed order revoking and refusing to renew Capital Care's ASF license. State Ex. H. Dr. Wymyslo, relying solely on the statute, alleged that Capital Care's WTA with the University of Michigan does not meet the requirements of O.R.C. § 3702.303 because UMHS is not "local." He did not explain why he believed this or offer any explanation for the term "local." Ex. H.

[1] According to Google Maps the distance is 52.1 miles and a 52 minute drive via US 23. https://maps.google.com/maps?hl=en&tab=wl

A hearing on the matter was held before a hearing examiner on March 26, 2014, wherein Capital Care presented reliable, substantial, and probative evidence that its WTA meets the requirements of the statute, and that the statute is unconstitutional as applied to Capital Care. As of the date of the hearing ODH had issued no regulations, rules, guidelines, or protocols to define the meaning of "local." Wymyslo TR. 75-76. Ms. Hubbard testified that she believed that 50-75 miles from the facility met the definition of "local." She also testified that she consulted with her attorney at the time the law went into effect. He advised her 50-75 miles would meet the "local" requirement. Hubbard TR. 157. Tamara Malkoff, Chief of the Bureau of Information and Operational Support, testified that a hospital 50 miles away would be considered a local hospital. Malkoff TR. 30.

On June 12, 2014, the hearing examiner issued a report and recommendation (Attachment 2) upholding the director's decision to revoke Capital Care's license. Capital Care filed objections. On July 29, 2014, the Director of Health issued a final adjudication order approving the hearing examiner's decision to refuse to renew and to revoke Capital Care's license. Capital Care now appeals this order. Appellant moved this Court to stay ODH's order and a stay was granted on August 11, 2014.

IV. ARGUMENT

A. The Director's Decision to Not Renew and Revoke Capital Care's License Is Not Supported by Reliable, Probative, and Substantial Evidence Because Capital Care Does in Fact Have a Written Transfer Agreement.

Ohio Revised Code § 3702.303 requires that all ambulatory surgical facilities maintain "a written transfer agreement with a local hospital[.]" The purpose of the written transfer agreement is to specify "an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory

surgical facility is necessary, including when emergency situations occur or medical complications arise." O.R.C. § 3702.303. The Director of Health approved the hearing officer's erroneous conclusion that Capital Care's written transfer agreement with the University of Michigan does not meet the requirements of O.R.C. § 3702.303(A) because he does not consider UMHS to be a "local" hospital with respect to the Capital Care facility.

In interpreting statutory language, courts must first look to the plain language of the statute. If the language is clear, the court must give effect to the language as it is written. *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 38. If, however, the language is susceptible to more than one reasonable interpretation, the statute is ambiguous. *Bailey v. Republic Engineered Steels, Inc.*, 2001-Ohio-236, 91 Ohio St. 3d 38, 40, 741 N.E.2d 121, 123 (2001), citing *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St.3d 508, 513–514, 668 N.E.2d 498, 504. "In determining legislative intent when faced with an ambiguous statute, the court may consider several factors, including the object sought to be obtained, circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction." *Id.* citing R.C. 1.49; *State v. Jordan*, 89 Ohio St.3d 488, 492, 733 N.E.2d 601, 605 (2000).

The term "local" in the context of O.R.C. § 3702.303 is ambiguous because it is susceptible to more than one reasonable interpretation. *Black's Law Dictionary* defines "locality" as "a definite region; vicinity; neighborhood; or community." *Black's Law Dictionary* 957 (8th ed. 2004). This definition alone encompasses several different interpretations of the word "local." The narrowest interpretation of "local" might require that the transfer hospital be within the same neighborhood as the ASF. In contrast, a region can encompass multiple states or portions of multiple states. Despite this ambiguity, ODH has not issued any regulations, rules,

guidelines, or protocols to advise ambulatory surgical facilities as to its interpretation of the statute. Wymyslo TR. 75. Without any guidance as to the meaning of the word "local", Capital Care owner Terrie Hubbard testified that she was forced to draw her own conclusions as to its meaning. Ms. Hubbard believed that Capital Care would be in compliance with the statute if it had a written transfer agreement with a hospital within 50-75 miles of the facility. Ms. Hubbard consulted with an attorney who also concluded that 50-75 miles was a reasonable range. Hubbard TR. 157.

1. The Department of Health's interpretation of the word "local" in the context of O.R.C. § 3702.303 is not reasonable.

Former Director of Health Dr. Wymyslo ODH testified that he did not consider UMHS to be "local" because patients could not be transferred there in thirty minutes or less. His explanation was based on a credentialing standard he was familiar with when he was on a credentialing committee at a hospital in Dayton, Ohio. Wymyslo TR. 57-58. However Dr. Wymyslo did not explain why a hospital's credentialing standard is relevant to defining whether a hospital is "local" under § 3702.303. This interpretation did not appear in Dr. Wymyslo's February 18 letter to Capital Care. His letter contained no explanation or guidance whatsoever regarding his interpretation of the word "local." State Ex. H. In fact, Dr. Wymyslo's theory did not surface until he was cross examined at the hearing. Dr. Wymyslo's testimony was contradicted by the more relevant testimony of Tamara Malkoff, Chief of the Bureau of Information and Operational Support. Ms. Malkoff testified that when the hospital closest to a facility is 50 minutes away, the hospital is considered local enough.

Q. And if the facility is in a rural area and the hospital is 50 miles away, what would your opinion be?
A. Again, I don't really look at the number of miles. I don't -- You know, I'm not -- In my mind, I don't have a set number of miles. I'm looking to see what is close to that

12 facility, what's local for that facility. And if the closest
13 hospital is 50 miles away, I would consider that local.

Malkoff TR. 30. Her testimony was unrebutted. Given that UMHS is only 52 miles from Capital Care, it is a reasonable interpretation of the statute that the agreement with University of Michigan complies with the statute. Interim Director Himes erroneously adopted the hearing officer's conclusion that Dr. Wymyslo's credentialing standard was reasonable and consistent with § 3702.303. Adjudication Order, p. 2, adopting Report and Recommendation, pp. 9-10

Furthermore, limiting the term "local" to hospitals within 30 minutes of the Capital Care facility is not reasonable because there are no hospitals within the 30 minute transfer window radius that will give Capital Care a written transfer agreement. Capital Care owner Terrie Hubbard contacted every hospital within the Toledo metropolitan area. Hubbard TR. 51. For reasons unrelated to protecting the health and safety of Ohioans, all of these hospitals denied Capital Care a written transfer agreement. *Id.* Many of the hospitals in the area are Catholic hospitals that are morally opposed to abortion. University of Toledo Hospital is prohibited from entering into a written transfer agreement with Capital Care because it is a public hospital. *Id*, O.R.C. § 3727.60(B). The rest of the hospitals are owned by the non-profit ProMedica which simply refused to enter an agreement with an abortion provider without giving a reason. Hubbard TR. 51. No hospitals in the Toledo metropolitan area would enter into a written transfer agreement with Capital Care. Hubbard TR. 51.

Faced with these challenges with Toledo hospitals, it was reasonable for Terrie Hubbard to interpret the term "local" as she did. ODH had issued no regulations, rules, guidelines, or protocols to define the meaning of "local," so Terrie Hubbard had no way of knowing of Dr. Wymyslo's 30 minute limit until he testified at the hearing. Wymyslo TR. 75-76. Since there were no hospitals closer to Toledo than UMHS willing to enter into a transfer agreement,

entering into an agreement with the University of Michigan was reasonable. Ms. Hubbard consulted with an attorney who also concluded that 50-75 miles was a reasonable range. Hubbard TR. 157.

2. Capital Care's interpretation of the word "local" is reasonable.

While the Department of Health's interpretation of O.R.C. §3702.303 is clearly unreasonable and contrary to law, there are a number of reasons why Capital Care's understanding of the law is appropriate. First and foremost, Capital Care's written transfer agreement adequately protects patient safety thus fulfilling the purpose of the requirement. The stated purpose of the written transfer agreement requirement is to establish an "effective procedure for the safe and immediate transfer of patients from the facility to the hospital" when necessary. O.R.C. § 3702.303. Ms. Hubbard has arranged with Air Evac Lifeteam, a helicopter company, to transport patients experiencing non-life threatening complications to UMHS. Capital Care Ex. M; Hubbard TR. 171. The company keeps helicopters at various bases across the state of Ohio. Hubbard TR. 168. The helicopter can transport a patient from Capital Care to UMHS in 15 to 20 minutes. Hubbard TR. 160. Ms. Hubbard testified that the cost does not matter because Capital Care would pay it. Hubbard TR. 160.

In the rare event that a patient experiences a life threatening emergency requiring immediate medical attention, Capital Care will not need to use the transfer agreement. The Capital Care staff will call 911 and the responding EMTs will transfer the patient via ambulance to the nearest hospital of the EMTs' choice. Hubbard TR. 159. There is no risk that the patient will not be treated at the hospital because federal law requires the hospital to accept and treat every emergency patient until they are stabilized before sending the patient to another hospital. 42 U.S.C. § 1395dd (b); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573,

583 (6th Cir. 2009). Hospitals must accept every emergency patient regardless of whether the patient arrives with a transfer agreement from an ASF. 42 U.S.C. § 1395dd (b) (commonly referred to as EMTALA). Thus, because Capital Care's written transfer agreement provides for the safe and efficient transfer of a patient to a hospital in the event that she requires emergency treatment, it satisfies §3702.303.

Furthermore, the Hearing officer erred when he found that Capital Care's written transfer agreement with University of Michigan Health System does not specify an effective procedure for the safe and immediate transfer of patients to a hospital as required by O.R.C. § 3702.303. Report & Recommendation, p. 10, ¶ 10. This finding decision is simply not supported by the evidence. Rather, the overwhelming evidence shows that Capital Care has procedures in place for the safe and immediate transfer of patients using the written transfer agreement. Ms. Hubbard's unrebutted testimony was that she has arranged with Air Evac Lifeteam to transport patients experiencing non-life threatening complications to University of Michigan Hospital. Capital Care Ex. M; Hubbard TR. 171; Finding of Fact #27. The helicopter can transport a patient from Capital Care to UMHS in 15 to 20 minutes. Hubbard TR. 160. In the rare event that a patient experiences a life threatening emergency requiring immediate medical attention, Capital Care's procedure is to call 911 and allow EMTs to transfer the patient via ambulance to the nearest hospital of the EMTs' choice. Hubbard TR. 159; Report & Recommendation, p. 5. There is no risk that the patient will not be treated at the hospital because federal law requires the hospital to accept and treat every emergency patient until they are stabilized before sending the patient to another hospital. 42 U.S.C. § 1395dd (b) (commonly referred to as EMTALA); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573, 583 (6th Cir. 2009). Because Capital Care has demonstrated that it can safely transfer patients in a timely manner using its

written transfer agreement with UMHS, the Department of Health was incorrect to conclude that the agreement does not meet the requirements of O.R.C. § 3702.303.

The hearing officer found that the University of Michigan transfer agreement did not "specifically define the actual transfer mechanism." Report & Recommendation, p. 5, ¶25. This finding of fact was erroneously adopted by the Director of Health. Revised Code § 3702.303 does not require ASFs and hospitals to specify the transfer procedures in the written transfer agreement. In addition, of the twenty-two written transfer agreements in the record, none specifically define the actual transfer mechanism in the agreement. Most agreements simply make the ASF responsible for arranging the transport of the patient, including the mode of transportation. For example, in the Children's Hospital agreement the ASF is to transfer using "transport criteria developed by [the ASF]" (Capital Care Ex. G p. 2); the MetroHealth System agreement requires the ASF to arrange "for transport of the patient, including selection of the mode of transportation" (Capital Care Ex. G p. 9); Medina-Summit Ambulatory Surgery Center's agreement requires the transferring physician, in consultation with the receiving physician to arrange transport, including selection of the mode of transportation (Capital Care Ex. G p. 47).

Capital Care's transfer agreement with University of Michigan is consistent with the overwhelming majority of written transfer agreements deemed acceptable by ODH, as shown in Capital Care Ex. G. It states, "Facility [Capital Care] shall be responsible for and make all necessary arrangements for the proper transport of patient from Facility to Hospital, which arrangements shall include but not be limited to stabilizing the patient, selecting the transportation medium, and sending accompanying staff when indicated." Capital Care Ex. C pp. 1-2. This language allows for better patient care than if the mode of transportation were

spelled out, because it allows the facility to make a case by case call based on the necessities of the circumstances.

Finally, the University of Michigan Hospital considered the agreement to be in compliance with § 3702.303. A hospital official told news outlets, "We believe that we are in full compliance with the laws of the state of Ohio. We obviously would not sign an agreement that we felt in any way that was noncompliant." The official also stated, "We are a regional system, and we do consider Toledo to be part of our service area."[2]

Therefore, because the ODH's interpretation of O.R.C. § 3702.303 is unreasonable and Capital Care in fact complies with the statute, this Court should reverse the Director's decision to non-renew and revoke Capital Care's license.

B. <u>ODH's Decision to Not Renew and Revoke Capital Care's License Is Contrary to Law Because the Written Transfer Agreement Requirement is Unconstitutional As Applied to Capital Care.</u>

Courts have consistently held that license holders have a constitutionally protected property interest in their licenses. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that license holders have constitutionally protected due process interests in their licenses); *Foxy Lady, Inc. v. City of Atlanta, Ga.*, 347 F.3d 1232, 1236 (11th Cir. 2003) (recognizing due process protections apply to license revocation) (citing *Burson*, 402 U.S. at 539); *Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n*, 547 F.2d 938, 941 (5th Cir. 1977) (same). Since application of the regulatory scheme at issue operates to deprive Capital Care of protected property in its license and continued ability to do business, it must comport with the mandates of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See, e.g., Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) ("The regular and impartial

[2] Marlene Harris-Taylor, *Opponents of City's Last Abortion Clinic Dispute Deal*, Toledo Blade, Mar. 28, 2014, at http://www.toledoblade.com/Medical/2014/03/28/Opponentsof-city-s-last-abortion-clinic-dispute-deal.html#DBFJY8m9BQxvxqWf.99 (Attachment 3).

administration of public rules . . . as required by due process, prohibits the subtle distortions of prejudice and bias as well as gross governmental violations exemplified by bribery and corruption and the punishment of political and economic enemies through the administrative process.").

1. The written transfer agreement provision violates due process because it is unconstitutionally vague.

Due Process requires that laws must not be excessively vague. This prohibition fulfills two functions. "First, it provides 'fair warning' so as to safeguard the innocent and, second, it avoids arbitrary applications of the law by insisting upon explicit standards regulating conduct." *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983) *citing Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). A law is unconstitutionally vague unless it gives a person "of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. 108. In addition, "[t]he standards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Id.*

The degree of statutory imprecision that due process will tolerate varies with the nature of the enactment and the correlative needs for notice and protection from unequal enforcement. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006)[3], citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, and fn. 7 (1982). Where the statute limits the exercise of individual freedoms affirmatively guaranteed by the United

[3] In determining the constitutionality of a statutory provision alleged to be void for vagueness, the state courts are bound by the standard of vagueness laid down by the United States Supreme Court. *In re Davis*, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (2d Dist. 1966).

States Constitution, the vagueness standard is more stringent. *Colautti v. Franklin*, 439 U.S. 379 (1979).

In *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1392 (6th Cir. 1987), plaintiff challenged as void for vagueness a Cincinnati penal ordinance requiring that aborted fetuses be "interred, deposited in a vault or tomb, cremated, or otherwise disposed of in a manner approved by the Commissioner of Health." No regulations were issued by the city to define what was meant by "otherwise disposed of in a manner approved by the Commissioner of Health." *Id.* at 1393. The penalty for violating the ordinance was a fine of not more than $1,000. The Sixth Circuit granted a preliminary injunction against enforcement of the ordinance, holding that there was a substantial probability that the plaintiff could show that the ordinance was unconstitutionally vague. *Id.* at 1399. The court based this decision on the fact that the city had issued no guidance, and thus enforcement was open to ad hoc changes in policy. *Id.* See also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 451 (1983) (holding that ordinance requiring "humane" disposal of fetal remains was impermissibly vague).

Applying the vagueness doctrine to the written transfer agreement Provision, O.R.C. § 3702.303, the statute is unconstitutional as applied to Capital Care because it did not give notice to Capital Care as to how close the transfer hospital was required to be. ODH has authority to implement regulations interpreting the statute, but ODH has chosen not to do so. O.R.C. § 3702.30 (B). Because the statute interferes with the exercise of a constitutionally protected right, the right to obtain an abortion, the law should be held to a higher standard of clarity than other civil statutes. *Colautti v. Franklin*, 439 U.S. 379 (1979).

Capital Care owner Terrie Hubbard interpreted the word "local" to mean within 50-75 miles of the clinic. Hubbard TR, p. 156. She contracted with a hospital that was 52 miles away.

However the Department of Health could have interpreted the word "local" to mean anything from as broad as the same region of the country to as narrow as the same neighborhood of the city. In fact ODH Bureau Chief Malkoff interpreted the law to allow a contract with a hospital 50 miles away; but Dr. Wymyslo interpreted the law, privately, to allow a contract with a hospital only 30 minutes away. Ms. Hubbard had no way of knowing that Director Wymyslo would define "local" as meaning within 30 minutes of the clinic.

Thus, the statute did not give Ms. Hubbard "fair warning" what "local" meant and ODH's interpretation of the statute is arbitrary given that the Bureau Chief testified 50 miles was local and the Director testified 30 miles was local. Therefore, the statute is vague and unconstitutional as applied to Capital Care's agreement with the University of Michigan hospital. As such, the prior regulation that was in effect before the enactment of O.R.C. § 3702.30 (B), O.A.C. § 3701-83-19 (E) (State Ex. L) applies. The regulation only requires a WTA with a hospital – it does not require the hospital to be "local." Therefore, since Capital Care has a WTA, it complies with the regulation and its license should not be revoked.

2. The written transfer agreement requirement violates due process as applied to Capital Care because it constitutes an unconstitutional delegation of licensing authority to private entities despite the Director's ability to grant a variance.

Due process requires that all licensing decisions be made based upon established standards, rather than upon the whim or caprice of a licensor. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886). States are prohibited from evading due process protections by delegating their licensing authority to a private, non-state actor. *See e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding Due Process clause prohibits standardless delegation of legislative authority to private individuals); *Wash. ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (same); *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (same); *see also Tucson Woman's*

Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004) ("When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process."). In the abortion context, the Supreme Court has held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

A number of state's licensing schemes, requiring written transfer agreements or requiring doctors performing abortions to have admitting privileges, have been held to violate the Due Process Clause as unconstitutional delegations of state power. *Hallmark Clinic v. North Carolina Department of Human Resources*, 380 F.Supp. 1153 (E.D.N.C. 1974); *Birth Control Centers, Inc. v. Reizen*, 508 F.Supp. 1366 (E.D.Mich.1981), aff'd in part on other grounds, 743 F.2d 352 (6th Cir.1984). In *Hallmark Clinic*, a federal district court struck down a statute that required abortion clinics to either secure a written transfer agreement with a hospital or have the physician operating the clinic be an active member of a licensed hospital medical staff. 380 F.Supp. 1153 (E.D.N.C.1974). The court held that both the written transfer agreement requirement and the admitting privileges requirement were unconstitutional delegations of authority to private hospitals. *Id. at* 1158. "By conditioning the license on a transfer agreement, the state has given hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all. The state cannot grant hospitals power it does not have itself." *Id.* 1158-59. The court also recognized that "[s]taff privileges, like transfer agreements, depend on the whim or good will of a hospital . . . and the Department has not undertaken to superimpose its own criteria or even guidelines to control admission to staff privileges." *Id.* at 1159.

Similarly, in *Birth Control Centers, Inc. v. Reizen*, a federal district court in Michigan considered a law requiring abortion clinics to obtain a written transfer agreement with a hospital. 508 F. Supp. 1366, 1374 (E.D. Mich. 1981), *aff'd other grounds*, 743 F.2d 352 (6th Cir. 1984). The law had been interpreted to allow clinics to use backup doctors with admitting privileges instead of a written transfer agreement. *Id.* The district court threw out the regulation in its entirety, stating that it acted as an "impermissible delegation of state power, since it conferred upon hospitals the ability to arbitrarily veto the operation of abortion clinics by withholding transfer agreements . . ." *Id.* The court explained:

> The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor. Similar delegations of licensing functions have met with judicial disapproval . . . The power to prohibit licensure may not constitutionally be placed in the hands of hospitals. Such an impermissible delegation without standards or safeguards to protect against unfairness, arbitrariness or favoritism is void for lack of due process.

Id. at 1375 (internal citations omitted).

When a state delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process. *Wash. ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22 (1928). Where a state has delegated licensing authority for abortion providers to hospitals, the state must ensure that hospital decision-making comports with due process by imposing standards or criteria to guide the private party's discretion. In *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555–56 (9th Cir. 2004) the Ninth Circuit held that a law requiring that a doctor with admitting privileges be present while abortions are performed was not an unconstitutional delegation because state law prohibited hospitals from making arbitrary admitting privileges determinations and required notice, hearing, and judicial review. *See also Women's Health Ctr. of W. Cnty., Inc. v. Webste*r, 681 F. Supp. 1385, 1386 (E.D. Mo. 1988)

aff'd, 871 F.2d 1377 (8th Cir. 1989) (holding delegation constitutional because doctors could obtain admitting privileges from public hospitals required by Missouri law to follow neutral criteria in determining whether to grant surgical privileges).

States can avoid unconstitutional delegations by retaining some final decision-making authority over the licensing decision. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir. 2006). In 2006, the Sixth Circuit considered whether Ohio's regulation requiring abortion providers to obtain written transfer agreements with hospitals constituted an unconstitutional delegation. *Id.* The Court concluded that there was no unconstitutional delegation of licensing authority because the Ohio Director of Health had the ability to grant a waiver from the transfer agreement requirement, preventing the hospitals from having an unconstitutional third-party veto. *Id.* at 610. The Ohio regulation was saved because the state retained the ability to make the final licensing decision.

In the case at bar, Capital Care has not requested a variance, nor can it. As part of H.B. 59 enacted last year, the Ohio legislature enacted O.R.C. § 3702.304, which only allows the Director of Health to grant a variance if the ASF has a signed agreement with one or more physicians with admitting privileges at a local hospital to provide back-up coverage. The current variance requirements as set out in O.R.C. § 3702.304 allow third parties, such as the backup doctor and his credentialing hospital, to make the final licensing decision and therefore constitute an unconstitutional delegation. Just as in *Hallmark Clinic* and *Reizer*, ASFs may obtain a license if they have either a transfer agreement or a backup doctor with admitting privileges, but there is no option for obtaining a license that does not require the final approval of a private entity. In this case, all hospitals within the vicinity designated by ODH have refused to enter into a written transfer agreement with Capital Care for various reasons completely unrelated to women's

health. Hubbard TR. 163. Furthermore, Terrie Hubbard has contacted many doctors, none of whom have agreed to serve as backup doctors. Hubbard TR. 163; Hubbard Affidavit (Attachment 4).[4] Some of these doctors have been told that the hospital would revoke their admitting privileges if they chose to enter into such an agreement. *Id.* Under O.R.C. § 3702.304, the Director has no discretion to renew Capital Care's license without the approval of a private entity. Thus, the written transfer agreement requirement as applied to Capital Care is an unconstitutional delegation of the licensing authority.

In addition, the state of Ohio has set no standards or guidelines for the granting of written transfer agreements or admitting privileges that would satisfy the requirements of due process. *See Baird*, 438 F.3d 609 ("Director Baird admitted that Ohio has no power over hospitals to direct them as to how to respond to requests for written transfer agreements and that hospitals could deny such a request for business, religious, personal, or political reasons."). Private hospitals are not required by law to provide notice and a hearing before terminating a written transfer agreement or revoking admitting privileges or prohibiting its doctors from being backup doctors. Just as in *Hallmark Clinic*, "[b]y conditioning the license on a transfer agreement, the state has given hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all." 380 F. Supp. at 1159. While federal law prohibits hospitals from discriminating against doctors in the extension of admitting privileges on the basis that the physician performs abortions, this law is not an adequate safeguard against arbitrary denials of written transfer agreements and admitting privileges.[5] The federal law does not prohibit

[4] This affidavit is submitted to support this constitutional claim and to address the Court's questions during oral argument on the motion for a stay.

[5] 42 U.S.C. § 300a-7(c) prohibits any entity that receives a "grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act" or a "grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services" from discriminating "in the extension of staff or other

hospitals from citing any number of arbitrary reasons for denying admitting privileges that are unrelated to patient health and safety. Such unfettered discretion is unconstitutional in the hands of a state decision maker or a private third party. *Id.* at 1158; *Yick Wo*, 118 U.S. 370.

Therefore, the written transfer agreement and variance provisions as applied to Capital Care are an unconstitutional delegation of the state's licensing authority to hospitals and doctors. Since the Director denied Capital Care's license because a Toledo area hospital would not enter into a transfer agreement, and because Capital Care does not have a variance because no doctor would agree to be a backup doctor, these laws operate to deny Capital Care a license for unlawful reasons. Thus, the Director's decision is unconstitutional and Capital Care's license cannot be revoked or not renewed.

C. ODH's Decision to Not Renew and Revoke Capital Care's License Was Contrary to Law Because H.B. 59's Written Transfer Agreement Requirement Violates the One-Subject Provision of the Ohio Constitution.[6]

Ohio Constitution, Article II, Section 15(D) expressly provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." This provision, known as the One-Subject Rule, unambiguously requires every piece of legislation to address only a single subject and serve a single purpose. Its purpose is to promote an "orderly and fair legislative process" by prohibiting "logrolling"—"the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately." *See In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335 at ¶ 31 (citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 495-96, 1999-Ohio-123, 715 N.E.2d 1062). A blatant violation of the One-Subject

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privileges to any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion."

[6] The constitutional validity of H.B. 59 under the one-subject rule is also being litigated in *Preterm-Cleveland, Inc. v. Kasich, et al.*, CV-13-815214 (Cuyahoga Ct. Com. Pl.).

Rule will cause an enactment to be invalidated. *Id.* at ¶¶ 38, 46, 52-54. Courts find such violations where there is "'an absence of common purpose or relationship between specific topics in an act.'" *Id.* ¶ 44 (quoting *State ex rel. Dix v. Celeste* 11 Ohio St.3d 141, 145, 464 N.E.2d 153 (1984)). An act may involve multiple topics, so long as they share a common purpose or relationship. However, where there is a "disunity of subject matter such that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act," *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 28 ("*OCSEA v. SERB*") (internal quotation marks omitted), the Court must invalidate the law "'in order to effectuate the purpose of the rule.'" *In re Nowak* at ¶ 44 (quoting *Dix* at 145); *see also Sheward*, 86 Ohio St.3d at 497, 1999-Ohio-123, 715 N.E.2d 1062; *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991).

Appropriations bills "present[] a special temptation" to attach unrelated provisions, but the One-Subject Rule still applies. *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 16, 1999-Ohio-77, 711 N.E.2d 203 (citation omitted). Such bills appropriate funds for an array of programs touching on many topics, but the different provisions must nevertheless be "all bound by the thread of appropriations." *OCSEA v. SERB*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 30 (quoting *Simmons-Harris* at 16). It is not enough for provisions in an appropriations bill to simply have an impact on the state expenditures: they must be directly related to the state budget and appropriations. *Id.* at ¶ 33 (citing *Simmons-Harris* at 16); *Riverside v. State*, 190 Ohio App. 3d 765, 2010-Ohio-5868, 944 N.E.2d 281, at ¶ 44 (10th Dist.); *cf. Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, at ¶ 52 (8th Dist.).

Ohio Revised Code § 3702.303, the written transfer agreement requirement, was enacted by the Ohio legislature as part of H.B. 59, the 2013 budget bill. H.B. 59 flagrantly violates the One-Subject Rule. The stated purpose of the bill is "[t]o amend sections . . .; to enact new sections . . . and to repeal sections of the Revised Code; . . . to make operating appropriations for the biennium beginning July 1, 2013, and ending June 30, 2015; [and] to provide authorization and conditions for the operation of state programs . . ." 2013 Am.Sub.H.B. No. 59. Simply put, the Budget Bill's primary subject is appropriations. However, H.B. 59 addresses at least four distinct topics: (1) budget and appropriations; (2) regulation of abortion and abortion providers; (3) regulation of health care facilities; and (4) creation of a new parenting and pregnancy support program. These topics bear no rational relationship to each other. H.B. 59 clearly violates the One-Subject Rule as there is "no discernible practical, rational or legitimate reason for combining the provisions in one Act." *SERB*, 2004-Ohio-6363, 104 Ohio St. 3d 122, 130, 818 N.E.2d 688, 697.

Furthermore, the written transfer agreement provisions are wholly unrelated to H.B. 59's primary subject – appropriations. The written transfer agreement provisions do not authorize the expenditure of state dollars or stipulate the amount, manner, or purpose of an expenditure. *See Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, at ¶ 28. Neither the obligations they create nor the mechanisms for their enforcement bear any tangible relationship to the appropriation of state funds. They do not, for example, attempt to prevent the misappropriation of state funds, *see* O.R.C. 117.103, or proscribe the illegal use of public benefits, *see* R.C. 2913.46. Nor do their enforcement mechanisms involve state budgeting. The written transfer agreement provisions are enforced through existing rules. *See* O.R.C. 3702.30.

Indeed, in a case similar to the one before the Court, the Eighth District Court of Appeals struck down provisions relating to local governments' authority to regulate food nutrition information and consumer incentive items at food service operations that were "tucked away" inside a "massive" omnibus budget bill. *Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, at ¶¶ 42-44. Although the court "accepted, in theory," that the challenged provisions "could *potentially* impact the budgets of municipalities," it rejected the State's argument that "such a tenuous, tangential link" between the provisions and the remainder of the appropriations bill was sufficient to save it. *Id.* at ¶ 52 (Emphasis sic.). Accordingly, any alleged impact of the written transfer agreement provisions on the state budget would fail to bring the provisions within the Act's overall purpose. In short, there is no common purpose or relationship among the Budget Bill's various topics; its provisions are not all bound by the thread of appropriations. Thus, the Budget Bill violates the One-Subject Rule.

Finally, the written transfer agreement provisions were not passed on their own merits, but rather were added as riders to the State's biennial budget bill. Ohio legislators buried controversial anti-abortion provisions in the pages of a budget bill that was sure to pass. The written transfer agreement provisions were initially added to H.B. 59 in the House Committee during its final hearing, despite numerous previous hearings on the bill. No opportunity for public testimony was given. The provisions were later amended to target abortion providers in the final hearing of the Senate Committee, again despite numerous prior hearings on the bill and again without an opportunity for public testimony. *See* 2013 Am.Sub.H.B. 59 (codified at R.C. 3727.60). The written transfer agreement provisions, which are inherently controversial and of significant constitutional import, were not debated and approved during a fair and open legislative process. *Cf. Cleveland v. State* at ¶¶ 44-45 (noting that the lack of testimony and

hearings on nutrition- and food-service-related provisions in a budget bill "create[d] a strong suggestion" of impermissible logrolling). H.B. 59 frustrates the One-Subject Rule's purpose of preventing logrolling and ensuring "a more orderly and fair legislative process." *Dix*, 11 Ohio St. 3d at 142-43; *In re Nowak* at ¶ 31.

Director Wymyslo proposed to revoke Capital care's license because it allegedly violated O.R.C. § 3702.303 (A)'s requirement that it maintain a written transfer agreement with a "local" hospital. Ex. H p. 2; Wymyslo TR. 65. Because there is no common purpose or relationship between the provisions of H.B. 59, H.B. 59 and the written transfer agreement provision are void and unenforceable. If H.B. 59 is held to be void, then the requirement that Capital Care's transfer agreement be local is also void. Since Capital Care has a written transfer agreement with the University of Michigan, the director's proposed revocation is contrary to law and should be disapproved.

V. CONCLUSION

The decision of the Director of Health to not renew and to revoke Capital Care's ASF license is not supported by reliable, probative, and substantial evidence because Capital Care in fact has a written transfer agreement with the University of Michigan Hospital that complies with the requirements of O.R.C. § 3702.303. Furthermore, the Director's decision is not in accordance with law because O.R.C. §3702.303 is unconstitutionally vague, is an unconstitutional delegation of authority to a third party, and it violates the One-Subject Rule of the Ohio Constitution. Therefore, Appellant Capital Care respectfully requests that the decisions be reversed and the Ohio Department of Health be ordered to not revoke or rescind Capital Care's ASF license.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served September 23, 2014 by U.S. Mail first class, postage prepaid on:

Lindsay Nash
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, OH 43215

/s/ Jennifer Branch
Jennifer Branch

OHIO DEPARTMENT OF HEALTH
246 North High Street
Columbus, Ohio 43215
614/466-3543
www.odh.ohio.gov
John R. Kasich / Governor

July 30, 2014

Via facsimile (513.345.5543) and regular U.S. Mail

Jennifer Branch
Gerhardstein & Branch
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202

Re: In the Matter of Capital Care Network
License No.: 0763 AS

Dear Ms. Branch:

Enclosed please find the Adjudication Order issued by the Interim Director of the Ohio Department of Health in the above referenced matter. Please contact me if you have any questions.

Sincerely-

Heather Coglianese
Senior Legal Counsel

Cc: Tamara Malkoff, Chief, Bureau of Informational & Operational Support
Lyndsay Nash, Assistant Attorney General

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Adjudication Order

By letter dated August 2, 2013, Capital Care Network was notified that the Director of Health ("Director") proposed to issue an order revoking and refusing to renew Capital Care Network's ("CCN") health care facility license (ambulatory surgical facility) in accordance with Chapter 119 of the Revised Code, section 3702.32(D)(2) of the Revised Code ("R.C."), and Ohio Administrative Code ("OAC") rule 3701-83-05.1(C)(2) due to a violation of paragraph (E) of OAC rule 3701-83-19, which requires ambulatory surgical facilities to obtain a written transfer agreement with a hospital for the transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise.

By letter dated February 18, 2014, CCN was notified that the Director proposed to issue an order revoking and refusing to renew CCN's health care facility license (ambulatory surgical facility) in accordance with Chapter 119 of the Revised Code, R.C. 3702.32(D)(2), R.C. 3702.303 and OAC rule 3701-83-05.1(C)(2) for not having a transfer agreement with a local hospital. Specifically the director found that the transfer agreement submitted by CCN with the University of Michigan Health System in Ann Arbor, Michigan, violated the requirements of R.C. 3702.303(A).

Both letters notified CCN that it was entitled to a hearing regarding the proposals to refuse to renew and/or revoke the health care facility license if a hearing was requested within thirty (30) days of receipt of the notice. CCN requested a hearing by letters dated August 29, 2013 and March 14, 2014.

The administrative hearing was originally scheduled for February 18, 19 and 20, 2014. It was continued upon motion of CCN until March 26, 27, and 28, 2014. The hearing was held by Hearing Examiner, William J. Kepko, on March 26, 2014. Appearing on behalf of CCN was Terrie Hubbard, RN. CCN was represented by attorney Jennifer L. Branch of Gerhardstein & Branch. Appearing on behalf of the department was Rachel Belenker. The department was represented by Lyndsay Nash, Office of the Ohio Attorney General.

The department, through its attorney, filed its Post Hearing Brief on April 30, 2014. CCN, through its attorney, filed its Post Hearing Brief and Proposed Findings of Fact and Conclusions or Law on May 22, 2014. The department, through its attorney, filed its Reply Brief on May 28, 2014.

The Hearing Examiner's June 10, 2014 Report and Recommendation was received by the Department on June 12, 2014. By letter sent via email and certified U.S. mail dated June 13, 2014, the department transmitted the Report and Recommendation to attorney Jennifer L. Branch and informed CCN that it may file written objections to the Report and Recommendation within ten days of date of receipt of the letter. In addition, the letter provided that the Objections shall be considered by the Director before approving, modifying, or disapproving the Report and

Recommendation. CCN, through its attorney, submitted objections to the Report and Recommendation via email on June 20, 2014.

Upon consideration of the file, exhibits admitted in the administrative hearing, post-hearing briefs, hearing examiner's Report and Recommendation, and CCN's Objections to the Report and Recommendation, I hereby approve the hearing examiner's Report and Recommendation. Specifically, I approve and adopt Findings of Fact Nos. 1-33 and Conclusions of Law Nos. 1- 13.

The hearing examiner's Report and Recommendation found that, as of the date of the hearing, CCN did not have a written transfer agreement as required by 3701-83-19(E) prior to January 20, 2014 when CCN submitted a transfer agreement with the University of Michigan Health System in Ann Arbor, Michigan. The hearing examiner's Report and Recommendation found that the transfer agreement submitted by CCN on January 20, 2014 did not comply with the requirements of R.C. 3702.303(A). The hearing examiner concluded that because CCN does not have an acceptable written transfer agreement with a local hospital or a variance, it does not meet the licensing requirements. The hearing examiner further concluded that because CCN does not meet the licensing requirements of R.C. Section 3702.30, the Director's decision not to renew, or to revoke the license of CCN, is valid. Based upon these findings, and in accordance with R.C. 3702.32, R.C. 3702.303(A), R.C. Chapter 119, and OAC 3701-83-19(E), I hereby issue this Adjudication Order refusing to renew and revoking CCN's health care facility license.

Any party desiring to appeal this final adjudication order shall file a notice of appeal with the Ohio Department of Health, Office of General Counsel, 246 North High Street, Seventh Floor, Columbus, Ohio 43215, setting forth the order appealed from and stating that the Department's order is not supported by reliable, probative, and substantial evidence and not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the Department's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court of common pleas of the county in which the place of business of the licensee is located or the county court of common pleas where the licensee resides. In filing a notice of appeal with the Department or court, the notice that is filed may be either the original notice or a copy of the original notice. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the department's order as provided in R.C. section 119.12.

To ensure that this order does not affect patient health and safety, this order shall become effective on August 12, 2014. Please note, the August 12, 2014, effective date of this order does not extend the fifteen (15) day deadline noted above for filing a notice of appeal. Finally, CCN may, in conjunction with filing an appeal, request that the court of common pleas stay this order pending appeal.

Lance D. Himes
Interim Director of Health

7-29-14
Date

I hereby certify this to be a true and correct copy of the Adjudication Order of the Director of the Ohio Department of Health.

7/30/14
Date

Custodian of the Director's Journals
Ohio Department of Health

STATE OF OHIO
STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

HEARING DATE: MARCH 26, 2014

REPORT AND RECOMMENDATION

This matter came on for an administrative hearing on March 26, 2014 as a result of a request for a hearing filed on August 29, 2013 and March 14, 2014 on behalf of Capital Care Network of Toledo ("Capital Care"). The timely requests for a hearing were filed in response to the Ohio Department of Health's two proposed refusals to renew and to revoke Capital Care's health care facility license to operate as an ambulatory surgical facility ("ASF"). Appearing on behalf of Capital Care was Terrie Hubbard, the owner of Capital Care. Capital Care was represented by Jennifer L. Branch, Gerhardstein & Branch. Appearing on behalf of The Ohio Department of Health was Rachel Belenker. The Ohio Department of Health was represented by Lyndsay Nash, Office of the Ohio Attorney General. (Hereinafter the Director of the Ohio Department of Health and the Ohio Department of Health are referred to as the "Director" and "ODH").

I. STATEMENT OF THE CASE

Capital Care operates an abortion clinic in Toledo, Ohio. Pursuant to Ohio Revised Code ("R.C") §3702.30(E), Capital Care is required to be licensed by ODH. In order to be licensed, Capital Care must meet certain quality standards and, pursuant to Ohio Administrative Code ("OAC") §3701-83-19(E), must have a written transfer agreement. A transfer agreement is a written agreement between the facility and a

hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise.

R.C. §3702.303 became effective on September 29, 2013. R.C. §3702.303(A) requires Capital Care to have a written transfer agreement with a local hospital.

On August 02, 2013 ODH notified Capital Care that it intended to revoke and not renew Capital Care's ASF license because Capital Care did not have a written transfer agreement. (State's Exhibit D). On February 18, 2014, ODH notified Capital Care that it intended to revoke and not renew Capital Care's ambulatory surgical facility's license because the written transfer agreement that Capital Care had obtained with a Michigan hospital was not with a "local" hospital, in violation of R.C. §3702.303(A). (State's Exhibit H).

Testifying on behalf of ODH was Tamara Malkoff, Terrie Hubbard on cross-examination and Theodore E. Wymyslo, MD. Tamara Malkoff is employed by ODH and is Chief of the Bureau of Information and Operational Support ("BIOS") and the Division of Quality Assurance. Theodore E. Wymyslo, MD is the former Director of the Ohio Department of Health. State's Exhibits A, D, E, F, G, H, I J, K, L and M were also admitted into evidence. Testifying on behalf of Capital Care were Harvey Blank, MD and Terrie Hubbard. Dr. Blank has been a licensed physician in Ohio for approximately 50 years. Exhibits A, B, C, D, E, G and M were admitted into evidence on behalf of Capital Care. Capital Care also proffered Exhibit I.

At the conclusion of the hearing, the parties, in lieu of closing arguments, agreed to a briefing schedule. ODH filed its brief on April 30, 2014. Capital Care filed its brief on May 21, 2014. ODH filed a reply brief on May 28, 2014.

From the testimony, the exhibits that were admitted into the record and the arguments of counsel, and after a thorough review of all of the evidence, this Report and Recommendation constitutes the Hearing Examiner's Findings of Fact and Conclusions of Law as required by Chapter 119 of the Ohio Revised Code.

II. FINDINGS OF FACT

1. Capital Care operates an abortion clinic in Toledo, Ohio.
2. Capital Care is owned by TNS management which is owned by Terrie Hubbard and her husband. (Transcript page 42). (Hereinafter citations to the transcript are cited as Tr. _).
3. Capital Care is licensed by ODH. (Tr. 19).
4. Prior to September 29, 2013, in order to be licensed and to maintain its license, Capital Care had to have a written transfer agreement with a hospital.
5. A transfer agreement is a written agreement between the facility and a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise. (Tr. 18, 61).
6. In June 2013, the Ohio Legislature enacted House Bill ("HB") 59 that included R.C. §3702.303, which became effective September 29, 2013. (State's Exhibit K).
7. R.C. § 3702.303(A) requires Capital Care to have a written transfer agreement with a "local" hospital. (State's Exhibit K, Tr. 24).
8. "Local" is not defined in the statute, nor is it defined by ODH regulation. (Tr. 24, 67).
9. In April, 2013 Capital Care submitted an application to renew its license as an ambulatory surgical center. (Tr. 19).
10. At the time of Capital Care's application for renewal, Capital Care had a transfer

agreement with the University of Toledo Medical Center ("UTMC"). (Tr. 19, Capital Care Exhibit A, hereinafter CC Exhibit _).

11. Capital Care's transfer agreement with UTMC was effective from August 01, 2012 through July 31, 2013. (Tr. 19, CC Exhibit A).

12. UTMC is a public hospital and is located approximately seven miles from Capital Care. In addition, there are seven to eight hospitals in the immediate area of Capital Care. (Tr. 32, 47).

13. HB 59 prohibited a public hospital such as UTMC from entering into a transfer agreement with an abortion clinic. (Tr. 32).

14. On or about April 04, 2013 UTMC notified Capital Care that it intended not to renew its transfer agreement with Capital Care. (CC Exhibit B).

15. On July 30, 2013 ODH notified Capital Care that it needed to provide a copy of another written transfer agreement no later than July 31, 2013. (Tr. 20, State's Exhibit A).

16. Between August 01, 2013 and January 20, 2014 Capital Care contacted seven or eight hospitals in the Toledo area in search of a transfer agreement. Capital Care was unable to secure a transfer agreement in the Toledo area either because the hospitals were unwilling to enter into a transfer agreement or were prohibited from doing so by state law. (Tr. 51).

17. Capital Care did not respond to ODH's July 30, 2013 notification, nor did Capital Care provide ODH with a transfer agreement by July 31, 2013. (Tr. 21).

18. On August 1, 2013 ODH conducted an on-site survey at Capital Care. (Tr. 45).

19. At the time of the survey, Capital Care provided ODH an unsigned draft of a transfer

agreement. (Tr. 45).

20. Between August 01, 2013 and January 20, 2014, Capital Care did not have a written transfer agreement with a hospital. (Tr. 46).

21. Because Capital Care did not provide another transfer agreement by July 31, 2013, ODH, on August 02, 2013, notified Capital Care that it intended to revoke and not renew Capital Care's ambulatory surgical facility's license. (State's Exhibit D).

22. On August 29, 2013 Capital Care, through counsel, timely requested a hearing. (State's Exhibit E).

23. On or about January 20, 2014 Capital Care entered into a transfer agreement with the University of Michigan, on behalf of the University of Michigan Health System ("UMHS") and submitted the transfer agreement to ODH. (CC Exhibit C, State's Exhibit G).

24. UMHS is located in the state of Michigan and is 52 miles from Capital Care. (Tr. Pg. 46).

25. The transfer agreement between Capital Care and UMHS does not specifically define the actual transfer mechanism. (Tr. 66).

26. In the event of an emergency, Capital Care intends to use 911 to transport patients to a hospital in the Toledo area. (CC Exhibit M, Tr. 159).

27. Capital Care also intends to transport patients to UMHS via a helicopter service. (CC Exhibit M, Tr. 159).

28. In order to transport patients to UMHS, Capital Care has made arrangements with Air Evac Life Team ("AELT") to provide helicopter service between Capital Care and UMHS. (CC Exhibit M).

29. AELT is based in Licking County, Ohio and it could take as much as an hour to reach Capital Care in Toledo, Ohio. (Tr. 168, 169).

30. The actual flight time between Capital Care and UMHS is fifteen to twenty minutes. (Tr. 160).

31. Capital Care's use of a helicopter service to transport patients to UMHS is inherently unreliable because there is no formal contract between Capital Care and AELT, rendering availability uncertain. In addition, travel time from Capital Care to UMHS is unpredictable, jeopardizing patient health and safety. (Tr. 49, 50, 168 and 169).

32. On February 18, 2014 ODH rejected Capital Care's transfer agreement because UMHS was not a local hospital and the transfer agreement, therefore, violated R.C. 3702.303(A). (State's Exhibit H).

33. On March 14, 2014 Capital Care, through counsel, timely requested a hearing. (State's Exhibit J).

III. LEGAL DISCUSSION

R.C. § 3702.303(A) states that Capital Care, except as provided in division (C) of this section, shall have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise. A copy of the agreement shall be filed with the director of ODH. The exceptions in Division C are not applicable in this case.

The term "local" as used in R.C. §3702.303(A) is not defined either in the statute

or by regulation. When a word is not defined, courts in Ohio use its common, ordinary, and accepted meaning, unless it is contrary to clear legislative intent. *Cincinnati City School District Board of Education v. State Board of Education of Ohio*, 122 Ohio St.3d 557, 2009-Ohio-3628, 2009 Ohio LEXIS 1965, citing *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 51, 2007 Ohio 2877, 868 N.E.2d 246, p. 14. R.C. §1.42 instructs courts to read words and phrases in context, and according to rules of grammar and common usage. American Heritage dictionary defines "local" as "of relating to a city, town or district rather than a larger area". *American Heritage Dictionary* 795 (3rd. Ed. 2000). Random House unabridged dictionary offers a similar definition: "Pertaining to a city, town or small district rather that an entire state or country". *Random House Unabridged Dictionary 1127,* 2nd Ed. 1993.

Tamara Malkoff, Chief of the Bureau of Information and Operation Support, testified that, although she did not review Capital Care's transfer agreement, she would first consider the distance between the ASF and the hospital and whether the ASF is located in a rural area or a metropolitan area. (Tr. 29). The hospital must also be able provide the necessary services. (Tr. 31). Ms. Malkoff would exclude public hospitals, as they are not able to provide the necessary services because of the prohibition in HB 59. (Tr. 33). Ms. Malkoff would not consider whether a hospital was willing or not to enter into a transfer agreement with an ASF. (Tr. 31). Ms. Malkoff also testified that, if an ASF was not able to obtain a transfer agreement, then the ASF could apply for a variance. (Tr. 31).

Dr. Theodore Wymyslo is a licensed physician and former Director of the Ohio Department of Health. (State's Exhibit M). As former Director of Health, Dr. Wymyslo

was responsible for approving or rejecting the transfer agreement in this case. In that regard, Dr. Wymyslo reviewed the transfer agreement in this case and determined that UMHS was not a "local" hospital. Dr. Wymyslo concluded, therefore, that Capital Care's transfer agreement was not consistent with R.C. § 3702.303(A). (Tr. 65).

Dr. Wymyslo utilized his prior medical experience to determine whether Capital Care's transfer agreement with UMHS was consistent with R.C. § 3702.303(A). (Tr. 59-60). More particularly, Dr. Wymyslo utilized a guideline that he required for on-call physicians in his residency programs. Dr. Wymyslo characterized this guideline as the "thirty minute availability" rule. (Tr. 58-59). The thirty minute availability rule, in the context of this case, would require Capital Care or any ASF to transfer to the local hospital with which they have a transfer agreement, within thirty minutes, a patient who is experiencing a complication or an emergency. (Tr.58). Dr. Wymyslo equates the thirty minute availability rule with high quality patient care and safety, and believes that the rule is consistent with R.C. §3702.303(A). (Tr.59).

Applying the thirty minute availability rule to Capital Care's transfer agreement and to R.C. § 3702.303(A), Dr. Wymyslo determined that an out of state hospital 52 miles away from Capital Care would not be consistent with the thirty minute availability rule and would not be considered a "local" hospital for purposes of R.C. § 3702.303(A). (Tr. 65). Dr. Wymyslo was also concerned that, since UMHS was out of state, there could be insurance issues and concerns that would not likely arise if UMHS was an in-state hospital. (Tr. 65- 66). Dr. Wymyslo was also concerned that the actual transfer mechanism between Capital Care and UMHS was not defined. (Tr. 66). Dr. Wymyslo's major concern, however, and the reason he rejected Capital Care's transfer

agreement was due to the distance between Capital Care and UMHS and the amount of time it would take to transport patients to that facility. (Tr. 67-68).

IV. CONCLUSIONS OF LAW

1. ODH has jurisdiction over this matter.

2. The record indicates that Capital Care received notice of the date, time and place of the hearing, all in accordance with law. (State's Exhibits D, E, F, H, I, and J).

3. Capital Care, pursuant to R.C. §3702.30, is a health care facility operating as an ambulatory surgical facility.

4. Each ambulatory surgical facility must be licensed and meet certain quality standards established by ODH. R.C. §3702.30(E).

5. Pursuant to R.C. §3702.303(A), Capital Care is required to have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise.

6. Capital Care's failure to have a written transfer agreement between August 01, 2013 and January 20, 2014 is a violation of Ohio Administrative Code ("OAC") §3701-83-19(E).

7. Capital Care's written transfer agreement with the University of Michigan on behalf of the University of Michigan Health System, located in the state of Michigan, 52 miles from Capital Care, is not a local hospital as required by R.C. §3702.303(A).

8. The use of the thirty minute availability rule by the Director of the Ohio Department of Health when evaluating Capital Care's transfer agreement with UMHS is

reasonable and consistent with R.C. §1.42 and is also consistent with R.C. §3702.303(A) requiring the transfer agreement to be with a local hospital.

9. The Director's consideration of the distance and the time of travel between Capital Care and UMHS when evaluating Capital Care's transfer agreement with UMHS is reasonable and consistent with R.C. §3702.303(A) and R.C. §1.42.

10. Capital Care's written transfer agreement with the UMHS is not consistent with R.C. §3702.303(A) because it does not specify an effective procedure for the safe and immediate transfer of patients from the facility to a local hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise.

11. Because Capital care did not have a written transfer agreement between August 01, 2013 and January 20, 2014, and because Capital Care does not have a written transfer agreement with a local hospital, Capital Care did not meet the licensing requirements of OAC §3701-83-19(E) and does not meet the requirement in R.C. §3702.303(A) that the transfer agreement be with a "local' hospital.

12. Because Capital Care did not meet the licensing requirements in OAC §3701-83-19(E) and does not meet the requirements in R.C. §3702.303(A), the Director's August 02, 2013 and February 18, 2014 decisions to not renew, or to revoke the license of Capital Care, are valid.

13. Capital Care's constitutional challenges to R.C. §3702.303(A), including Capital Care's allegation that HB 59 violates the single subject rule and that the statute is vague, are beyond the jurisdiction of the Hearing Examiner. *MCI Telecommunications Corp. v. Limbach*, (1994), 68 Ohio St.3d 195, 197-199, 625 N.E. 2d 597, 598-99; *S.S.*

Kresge Co. v. Bowers (1960), 170 Ohio St. 405, 166 N.E.2d 139

V. RECOMMENDATION

Based on the testimony, the exhibits, the briefs submitted by the parties and for the reasons expressed herein, it is the finding of the Hearing Examiner that the Director's proposed revocation of the licensure of Capital Care Network of Toledo is in accordance with the rules adopted under Chapter 3701.83 of the Ohio Administrative Code and R.C. §3702.303(A) and it is **THEREFORE RECOMMENDED** that the Director's August 02, 2013 proposed non-renewal and revocation of Capital Care' s license and the Director's February 18, 2014 proposed non-renewal and revocation of Capital Care's license are valid as a matter of law.

William J. Kepko (0033613)
Hearing Examiner
June 10, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing REPORT AND RECOMMENDATION was served by certified U.S. mail, postage prepaid, return receipt requested, to the Ohio Department of Health, c/o Kaye Norton, Office of Legal Services, 246 North High Street, 7th Floor, Columbus, Ohio 43215 CMRRR# 7009 3410 0000 4139 6357 on June 10, 2014.

William J. Kepko (0033613)

THE BLADE
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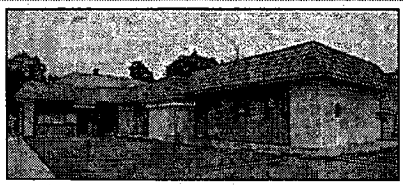
Opponents of city's last abortion clinic dispute deal

UM hospital pact does not meet law, they say

3/28/2014

BY MARLENE HARRIS-TAYLOR
BLADE STAFF WRITER



Exterior photo of the Capital Care Network abortion clinic on Sylvania Avenue in Toledo.

The fate of Toledo's only remaining abortion clinic could hinge on a pact with the University of Michigan Health System to treat any patient who may incur complications during an abortion.

UM hospital officials confirmed Thursday that an emergency-care transfer agreement with Capital Care Clinic was signed Jan. 20.

"We are a regional system, and we do consider Toledo to be part of our service area," said the hospital's chief communications officer, Denise Gray-Felder.

Capital Care's owner Terrie Hubbard approached the Michigan hospital after the abortion clinic's license was revoked by the Ohio Department of Health. The clinic was ordered to shut down unless it could secure an agreement with a hospital.

Ms. Hubbard argued at a state hearing Wednesday the deal with the Ann Arbor hospital meets a state mandate that the clinic have an arrangement with a "local" hospital.

A provision written into Ohio's two-year budget created a law which required a transfer agreement as a condition for a license. Previously, that had been only a department rule.

State lawmakers also enacted a requirement that hospitals partnering with abortion clinics be "local," a term that was not defined in the law.

"We believe that we are in full compliance with the laws of the state of Ohio. We obviously would not sign an agreement that we felt in any way that was noncompliant," the UM hospital spokesman said.

Ohio anti-abortion rights activists, however, question how a hospital 53 miles from Toledo can be considered "local."

Much of the discussion at the state hearing centered on responding to an emergency within 30 minutes. On a good day, it would take at least 53 minutes to transfer a patient from Toledo to Ann Arbor, said Kayla Smith of Ohio Right to Life.

"Ms. Hubbard said she has an agreement with an helicopter service in Licking County and that's just ridiculous. A helicopter would have to travel from two hours away to take a patient to a hospital out of state when there are between seven to 10 hospitals in the Toledo region," she said.

Capital Care had a one-year deal in place with the University of Toledo Medical Center, the former Medical College of Ohio, but the hospital opted not to renew it as of last July 31. No private hospital in the region was willing to take its place.

Ms. Hubbard said she's never had to make such a transfer in the four years she's owned the facility and the eight years before that, when she worked there as a registered nurse.

"This is not an argument about public safety. This is a gotcha game that the Kasich administration has set up to close clinics," said Kellie Copeland of NARAL Pro-Choice.

She said hospitals have a legal obligation not to turn away patients from emergency rooms. "They will call 911 and the patient will be taken to a hospital in Toledo, and they will treat that patient," she said.

The health department is expected to make the final decision on Capital Care clinic sometime in June.

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