300-00

514977 APR 15

Health Care Facility Renewal Application

As defined in rule 3701-83-04 of the Ohio Administrative Code

Facility ID # 0763AS

Please print legibly in ink or type

1. Facility Name (DBA) Capital Care Network		
2. Address 1243 E Broad St		Suite
3. City Columbus	4. Zip 43205	5. County Franklin
6. Phone Number 614 251 1800	7. Fax Number 614 251 1126	
8. E-mail Address terriehubbard@gmail.com		

Mailing address, if different from above

9. Name		
10. Address		Suite
11. City	12. State	13. Zip

14. **Renewal application type**

☑ Ambulatory surgical facility

Is ASF a provider-based entity of hospital? ☐ No ☐ Yes

If yes, hospital name:

☐ Freestanding dialysis center

☐ Freestanding inpatient rehabilitation facility

☐ Freestanding birthing center

15. Has there been a change in this facility's capacity?	☑ No ☐ Yes
If yes, has an amended license been requested?	☐ No ☐ Yes
16. a) Is your facility accredited by an national accrediting body approved by CMS?	☑ No ☐ Yes
If yes, and there has been a change or update to this facility's most recent accreditation status report or findings, explain and provide a copy of the most recent accreditation inspection report and findings, unless the department has been previously notified.	
Explanation:	
16. b) Is your facility deemed to meet or exceed the approved Medicare program requirements through accreditation?	☑ No ☐ Yes

Ohio Department of Health – Licensure Program –Revenue Processing #3212 P.O. Box 15278, Columbus, Ohio 43215

3500

17. Has there been a change in ownership? If yes, has a change of ownership application been submitted?	☑ No ☐ Yes ☐ No ☐ Yes
18. Has there been a change of onsite administrator? A) If yes, provide name of new administrator: B) Has the new administrator been affiliated through ownership or employment with any of the facilities listed in rule 3701-83-04 (A)(1)(c) of the OAC within five years prior to the date of this application? C) Has the new administrator been convicted of any criminal activity or been involved in a civil judgment or administrative adjudication for an offense related to the provision of care or bearing a direct or substantial relationship to the job responsibilities?	☑ No ☐ Yes ☐ No ☐ Yes ☐ No ☐ Yes
19. Has there been a change of medical director or individual responsible for the provision of health care services? A) If yes, provide name of new medical director/individual: B) License/certification # C) Has the new medical director been affiliated through ownership or employment with any of the facilities in rule 3701-83-04 (A)(1)(c) of the OAC within five years prior to the date of this application? D) Has the new medical director/individual been convicted of any criminal activity or been involved in a civil judgment or administrative adjudication for an offense related to the provision of care or bearing a direct or substantial relationship to the job responsibilities?	☑ No ☐ Yes ☐ No ☐ Yes ☐ No ☐ Yes

20. If you answered yes to question 18 (C) or 19 (D) provide a full explanation stating charge(s), date(s) and disposition on a separate page.	☑ NA

I affirm that to the best of my knowledge and belief, the answers provided herein and all accompanying materials are true and correct. I understand that section 3702.30 of the Ohio Revised Code and paragraph (E) of rule 3701-83-04 of the Ohio Administrative Code require the owner to inform the Director, in writing, of any changes in the information contained in the statement of ownership set forth in the initial application and any change in accreditation status, no later than 30 days after the change occurs.

I certify that I am an owner of the facility or the authorized representative of the owner.

Print/type owner's or representative's name	Title
Terrie Hubbard	owner
Signature	**Date**
	4/6/15

OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

John R. Kasich / Governor

Theodore E. Wymyslo, M.D. / Director of Health

AUG 0 2 2013

Terrie Hubbard, RN, Owner
Capital Care Network of Toledo
1243 E. Broad Street
Columbus, OH 43205

Re: Proposed License Revocation and Refusal to Renew
ID # 0763AS

Dear Ms. Hubbard:

I propose to issue an Order revoking and refusing to renew Capital Care Network of Toledo's health care facility license (ambulatory surgical facility) in accordance with Revised Code (R.C.) Chapter 119 and R.C. 3702.32(D)(2) due to a violation of Ohio Administrative Code (O.A.C.) 3701-83-19(E). O.A.C. 3701-83-19(E) requires an ambulatory surgical facility have a 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. Capital Care Network of Toledo does not have a transfer agreement with a hospital, as required in O.A.C. 3701-83-19(E).

On July 30, 2013, the Ohio Department of Health (ODH) faxed and emailed you a letter reminding you that the transfer agreement between Capital Care Network of Toledo and the University of Toledo Medical Center was set to expire on July 31, 2013 based on the April 4, 2013 letter from University of Toledo Medical Center that you provided to the department. Our letter also stated that O.A.C. 3701-83-19(E) requires an Ambulatory Surgical Facility have a written transfer agreement with a hospital for the "transfer of patients in the event of medical complaints, emergency situations, and for other needs as they arise." You were further notified that you must notify ODH of the status of the transfer agreement by submitting a copy of another transfer agreement or your facility's plan for how it will comply with O.A.C. 3701-83-19(E), no later than 5:00 pm on July 31, 2013. The department has not received any response to the July 30, 2013 letter.

On August 1, 2013, ODH surveyors were present at your facility and were not provided with a current transfer agreement. While you indicated that you were finalizing a written transfer agreement, to date, ODH has not received a copy of a transfer agreement or a plan from Capital Care Network of Toledo setting forth how it plans to comply with O.A.C. 3701-83-19(E).

You may request a hearing before me or my duly authorized representative concerning my proposal to revoke and refuse to renew Capital Care Network of Toledo's health care facility license. Such request must be made in writing and received within thirty (30) days of receipt of this letter and should be directed to Kaye Norton, Ohio Department of Health, 246 N. High Street, Office of the General Counsel, Columbus, Ohio, 43215. A request is considered timely if it is received by ODH via FAX, hand delivery,

or ordinary United States mail, within thirty days of the date of receipt of this letter.

At a hearing, you may appear in person or be represented by an attorney. You may present evidence and you may examine witnesses for and against you. You also may present your position, contentions, or arguments in writing, rather than appear in person for a hearing. If you are a corporation, you must be represented by an attorney licensed to practice in Ohio. Please be advised that if you do not request a hearing within thirty days of receipt of this letter, I may revoke and/or refuse to renew Capital Care Network of Toledo's health care facility license.

Please contact Rachel Belenker, Assistant Counsel, at (614) 466-4882, if you have questions about this matter.

Sincerely,

Theodore E. Wymyslo, M.D.
Director of Health

CMRRR: 7011 3500 0001 9186 5434

c: Drema Phelps, Bureau of Regulatory Compliance

7011 3500 0001 9186 5434

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OHIO DEPT. OF HEALTH
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Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $

Postmark Here
COLUMBUS OHIO 43216 AUG 2013 U.S.P.S.
#07638

Sent To Terrie Hubbard
Capital Care Network of Toledo
Street, Apt. No.; or PO Box No. 1243 E Broad St
City, State, ZIP+4 Columbus, OH 43205

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
#07638
Capital Care Network of Toledo
1243 E Broad St.
Columbus, OH 43205
Terrie Hubbard

COMPLETE THIS SECTION ON DELIVERY

A. Signature
Judith Nola ☐ Agent ☐ Addressee

B. Received by (Printed Name) Judith Nola C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

OHIO DEPT OF HEALTH BIOS/LICENSURE AUG 12 2013 USPS 43216

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7011 3500 0001 9186 5434

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

John R. Kasich / Governor

Theodore E. Wymyslo, M.D. / Director of Health

FEB 18 2014

Terrie Hubbard, RN, Owner
T&S Management of Columbus, LLC
1243 E. Broad Street
Columbus, OH 43205

dba Capital Care Network
1160 West Sylvania Avenue
Toledo, Ohio 43612

Re: Proposed License Revocation and Refusal to Renew
ID # 0763AS

Dear Ms. Hubbard:

I propose to issue an Order revoking and refusing to renew Capital Care Network of Toledo's health care facility license (ambulatory surgical facility) in accordance with Revised Code (R.C.) Chapter 119 and R.C. 3702.32(D)(2) due to violations of R. C. 3702.303 and Ohio Admin. Code 3701-83-19(E). R.C. 3702.303 and Ohio.Admin.Code. 3701-83-19(E) require an ambulatory surgical facility have 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. R.C. 3702.303(A) requires the written transfer agreement to be with a local hospital.

On July 30, 2013, the Ohio Department of Health (ODH) faxed and emailed to you a letter regarding the written transfer agreement between Capital Care Network of Toledo and the University of Toledo Medical Center, stating the written transfer agreement was set to expire on July 31, 2013.. Our letter also stated that O.A.C. 3701-83-19(E) requires an Ambulatory Surgical Facility have a written transfer agreement with a hospital for the "transfer of patients in the event of medical

complaints, emergency situations, and for other needs as they arise." You were further instructed to provide ODH with a copy of another written transfer agreement, to take effect August 1, 2013, which would comply with O.A.C. 3701-83-19(E), no later than 5:00 pm on July 31, 2013. The department received no response to the July 30, 2013 letter before the deadline.

On August 1, 2013, ODH surveyors were present at your facility and were provided with a draft written transfer agreement, which designated no Hospital and contained no signatures. While you indicated that you were finalizing this written transfer agreement, ODH did not receive a copy of a written transfer agreement or a plan from Capital Care Network of Toledo setting forth how it planned to comply with O.A.C. 3701-83-19(E) until about January 16, 2014.

You provided to ODH a written transfer agreement with The Regents of the University of Michigan on behalf of the University of Michigan Health System, in Ann Arbor, Michigan, effective on January 20, 2014. The written transfer agreement violates the R.C. 3702.303 (A) requirement that the written transfer agreement be with a local hospital.

You may request a hearing before me or my duly authorized representative concerning my proposal to revoke and refuse to renew Capital Care Network of Toledo's health care facility license. Such request must be made in writing and received within thirty (30) days of receipt of this letter and should be directed to Kaye Norton, Ohio Department of Health, 246 N. High Street, Office of the General Counsel, Columbus, Ohio, 43215. A request is considered timely if it is received by ODH

via FAX, hand delivery, or ordinary United States mail, within thirty days of the date of receipt of this letter.

At a hearing, you may appear in person or be represented by an attorney. You may present evidence and you may examine witnesses for and against you. You also may present your position, contentions, or arguments in writing, rather than appear in person for a hearing. If you are a corporation or limited liability corporation, you must be represented by an attorney licensed to practice in Ohio. Please be advised that if you do not request a hearing within thirty days of receipt of this letter, I may revoke and/or refuse to renew Capital Care Network of Toledo's health care facility license.

Please contact Heather Coglianese, Assistant Counsel, at (614) 466-4882, if you have questions about this matter.

Sincerely,

Theodore E. Wymyslo, M.D.
Director of Health

CMRRR: 7011 2970 0001 8004 2271

c: Brian Dean, Bureau of Regulatory Compliance
Tamara Malkoff, Chief, Bureau of Information & Operational Support
Drema Phelps, Chief, Bureau of Community Health Care Facilities & Services
Heather Coglianese, Office of General Counsel

PetersonConners

PETERSON, CONNERS, FERGUS & PEER LLP

Attorneys and Counselors at Law
Two Miranova Place, Suite 330
Columbus, OH 43215
614-365-7000
fax 614-220-0197
ZSWISHER@PETERSONCONNERS.COM

August 29, 2013

Kaye Norton
Ohio Department of Health
246 N. High Street
Office of the General Counsel
Columbus, Ohio 43215

Re: Proposed License Revocation ID # 0763AS

Dear Ms. Norton:

I am counsel for Ms. Terrie Hubbard. Ms. Hubbard and I received the Notice of Opportunity for Hearing dated August 2, 2013. In accordance with the Notice as well as the Ohio Administrative Code, Ms. Hubbard through undersigned counsel now requests a hearing on this matter.

Best Regards,

Zachary Swisher

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:	:	
	:	
CAPITAL CARE NETWORK, TOLEDO	:	**HEARING EXAMINER**
LICENSE # 0763AS	:	
	:	**WILLIAM J. KEPKO**

MOTION TO WITHDRAW AS COUNSEL AND REQUEST FOR CONTINUANCE OF HEARING

Now comes Zachary Swisher, attorney for Capital Care Network, and moves to withdraw as counsel in this matter. Recently, a significant legal conflict has arisen that counsel believes is not one his client can waive and one which prohibits him from further representing Capital Care Network in this matter.

This conflict is one counsel believes requires his immediate withdraw from his representation and in no way is this motion and request intended to delay the proceedings and is made in absolute good faith and transparency.

Given the recent nature of this motion to withdraw, counsel believes it is his obligation to also request that the hearing in this matter be continued to a later date certain in order to allow Capital Care Network sufficient time to engage new counsel for purposes of representation at any necessary hearing on this matter.

[SIGNATURE PAGE CONTINUED ON NEXT PAGE]

Respectfully Submitted,

Zachary Swisher (0076288)
Peterson Conners Fergus and Peer LLP
Two Miranova Place Suite 330
Columbus, Ohio 43215
614-365-7000 (o)
614-220-0197 (f)
zswisher@petersonconners.com

CERTIFICATE OF SERVICE

Undersigned counsel certifies tat a copy of the foregoing Motion was sent to the Melissa Wilburn, Assistant Attorney General via email this 5th day of February 2014.

Zachary Swisher (0076288)

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

JOURNAL ENTRY VACATING HEARING DATE AND SCHEDULING STATUS CONFERENCE

As a result of the withdrawal of Zachary Swisher as counsel of record for Capital Care Network of Toledo (the "Facility"), the hearing in this matter, scheduled for February 18, 2014, February 19, 2014 and February 20, 2014 is hereby vacated. A telephone conference for scheduling purposes is scheduled for Tuesday, February 18, 2014 at 10:00AM. Assistant Attorney General Melissa Wilburn is to initiate the conference call. All parties are required to attend.

Date: February 8, 2014

William J. Kepko (0033613)
Hearing Examiner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing JOURNAL ENTRY VACATING HEARING DATE AND SCHEDULING STATUS CONFERENCE was served by regular U.S. mail, postage prepaid to the Ohio Department of Health, c/o Kaye Norton, 246 North High Street, Columbus, Ohio 43215 on February 8, 2014 and was served by regular U.S. mail, postage prepaid, to the following parties, on the 8th day of February, 2014:

William J. Kepko (0033613)

Zachary Swisher
Peterson, Conners, Fergus & Peer, LLP
Two Miranova Place, Suite 330
Columbus, Ohio 43215

Melissa Wilburn
Senior Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

JOURNAL ENTRY
SCHEDULING STATUS CONFERENCE

By agreement of the parties a telephone conference for scheduling purposes is scheduled for Monday, March 03, 2014 at 10:00AM. Assistant Attorney General Melissa Wilburn is to initiate the conference call. All parties are required to attend.

Date: February 18, 2014

William J. Kepko (0033613)
Hearing Examiner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing JOURNAL ENTRY SCHEDULING STATUS CONFERENCE was served by regular U.S. mail, postage prepaid to the Ohio Department of Health, c/o Kaye Norton, 246 North High Street, Columbus, Ohio 43215 on February 18, 2014 and was served by regular U.S. mail, postage prepaid, to the following parties, on the 18th day of February, 2014:

William J. Kepko (0033613)

Zachary Swisher
Peterson, Conners, Fergus & Peer, LLP
Two Miranova Place, Suite 330
Columbus, Ohio 43215

Melissa Wilburn
Senior Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400

STATE OF OHIO
OHIO DEPARTMENT OF HEALTH

IN RE:

CAPITAL CARE NETWORK OF TOLEDO	:	Facility Number: 0763AS

NOTICE OF APPEARANCE OF COUNSEL

Please take notice that Lyndsay Nash, Assistant Attorney General, hereby enters her appearance in the record on behalf of the Ohio Department of Health. Please direct all future notices, pleadings and filings to the undersigned at the address listed below.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

LYNDSAY NASH (0082969)
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400
Telephone (614) 387-6149
Facsimile (866) 818-6923
Lyndsay.nash@ohioattorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appearance was sent via regular U.S. Mail on March 4, 2014, to Terri Hubbard, Capital Care Network of Toledo, 1160 W. Sylvania Ave., Toledo, OH 43612.

LYNDSAY NASH (0082969)
Assistant Attorney General

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

AMENDED SCHEDULING ORDER

By agreement of the parties, the following shall be the case schedule in this matter:

Wednesday, March 19, 2014: Witness list and documents to be exchanged.

Wednesday, March 26, 2014: Hearing.

Thursday, March 27, 2014: Hearing.

Friday, March 28, 2014: Hearing.

The hearing will commence on Wednesday, March 26, 2014 at 10:00AM. **Please note a change in the room locations for the hearing.** The hearing on March 26, 2014 and Thursday, March 27, 2014 will be held at the Ohio Department of Health, 246 North High Street, Columbus, Ohio 43215, **8th Floor large conference room**. The hearing on Friday, March 28, 2014 will be held at the Ohio Department of Health, 35 East Chestnut Street, Columbus, Ohio 43215, **Basement Training Room A.** Any modifications to the case schedule shall be by agreement of the parties with the concurrence of the Hearing Examiner and/or by motion.

William J. Kepko (0033613)
Hearing Examiner
Date: 03-07-14

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing AMENDED SCHEDULING ORDER was served by regular U.S. mail, postage prepaid, to the Ohio

Department of Health, c/o Kaye Norton, Office of Legal Services, 246 North High Street, Columbus, Ohio 43215 on March 07, 2014 and was served by regular U.S. mail, postage prepaid, to the following parties, on the 7th day of March 2014:

William J. Kepko (0033613)

Terrie Hubbard
Capital Care Network of Toledo
1160 West Sylvania Avenue
Toledo, Ohio 43612

Zachary Swisher
Peterson, Conners, Fergus & Peer, LLP
Two Miranova Place, Suite 330
Columbus, Ohio 43215

Lyndsay Nash
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400

GERHARDSTEIN & BRANCH

A LEGAL PROFESSIONAL ASSOCIATION

432 WALNUT STREET, SUITE 400
CINCINNATI, OHIO 45202

TELEPHONE: (513) 621-9100
FACSIMILE: (513) 345-5543

*ALPHONSE A. GERHARDSTEIN
JENNIFER L. BRANCH
**JACKLYN GONZALES MARTIN

Of Counsel
ROBERT F. LAUFMAN

**Also admitted in Minnesota*

***Also Admitted in Kentucky and West Virginia*

March 14, 2014

Via U.S. Mail and Fax
Kaye Norton
ODH Office of the General Counsel
246 North High Street, 7th Floor
Columbus, OH 43216-0018
Fax: 614-728-7813

Re: Capital Care Network of Toledo ASF License Number 0763AS

Dear Ms. Norton:

Pursuant to the Director of the Ohio Department of Health's letter to Terrie Hubbard dated February 18, 2014 proposing to revoke and not renew the license for the Capital Care Network of Toledo's health care facility license, Ms. Hubbard and Capital Care Network of Toledo now request a hearing before the Director of the Department of Health regarding Dr. Wymyslo's proposal to revoke and not renew the license.

Please contact me with the date of the hearing.

Sincerely,

Jennifer L. Branch
jbranch@gbfirm.com

C: Heather Coglianese, Senior Legal Counsel to ODH

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

JOURNAL ENTRY GRANTING MOTION OF COUNSEL FOR CAPITAL CARE NETWORK OF TOLEDO TO WITHDRAW

Upon motion of Counsel for Capital Care Network of Toledo (the "Facility") for good cause shown and without objection, Zachary Swisher, Esq. is hereby permitted to withdraw as attorney of record for the Facility in the above referenced matter.

William J. Kepko (0033613)
Hearing Examiner
Date: February 8, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing JOURNAL ENTRY GRANTING MOTION OF COUNSEL FOR CAPITAL CARE NETWORK OF TOLEDO TO WITHDRAW was served by regular U.S. mail, postage prepaid to the Ohio Department of Health, c/o Kaye Norton, 246 North High Street, Columbus, Ohio 43215 on February 8, 2014 and was served by regular U.S. mail, postage prepaid, to the following parties, on the 8th day of February, 2014:

William J. Kepko (0033613)

Zachary Swisher
Peterson, Conners, Fergus & Peer, LLP
Two Miranova Place, Suite 330
Columbus, Ohio 43215

Melissa Wilburn
Senior Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3400

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

IN THE MATTER OF:	:	**Case No.**
	:	
CAPITAL CARE NETWORK OF TOLEDO	:	
1160 WEST SYLVANIA AVE.	:	**NOTICE OF APPEAL**
TOLEDO, OH 43612,	:	
	:	
Appellant,	:	**Appeal from State of Ohio,**
	:	**Department of Health**
vs.	:	**Adjudication Order Proposing to**
	:	**Revoke And Not Renew**
STATE OF OHIO	:	**Appellant's Ambulatory Surgical**
DEPARTMENT OF HEALTH	:	**Facility License**
246 North High Street	:	
Columbus, OH 43215,	:	
	:	
Appellee.	:	
	:	

NOTICE OF APPEAL

Appellant Capital Care Network of Toledo, hereby gives notice that it appeals to the Court of Common Pleas, Lucas County, Ohio, from the Ohio Department of Health Adjudication Order dated July 29, 2014 proposing to revoke and not renew Appellant's ambulatory surgical facility license for failing to have a written transfer agreement with a local hospital. A copy of the Adjudication Order is attached hereto as Exhibit A.

The grounds for this appeal include, but are not limited to:

1. Improper revocation and non-renewal of an ambulatory surgical facility license pursuant to law.

2. Appellant's license should not be revoked and not-renewed because Appellant has complied with the laws of Ohio including R. C. § 3702.30 and the Ohio Administrative Code, including O.A.C. § 3701-83 by having a written transfer agreement with a hospital.

3. Appellant is adversely affected by the Ohio Department of Health's decisions and order, that the decisions and order are contrary to law and that the decisions and order are not supported by reliable, probative, and substantial evidence.

Respectfully submitted,

Jennifer L. Branch (0038893)
Alphonse A. Gerhardstein (0032053)
Attorneys for Appellant
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut St. #400
Cincinnati, Ohio 45202
(513) 621-9100
(513) 345-5543 Fax
agerhardstein@gbfirm.com
jbranch@gbfirm.com

Terry Lodge (0029271)
Attorney for Appellant
316 North Michigan Street Suite 520
Toledo, OH 43604-5627
(419) 255-7552
tjlodge50@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was faxed and mailed by U.S. Mail first class on August 4, 2014 to:

Heather Coglianese
Senior Counsel
Ohio Department of Health
Office of General Counsel
246 North High Street
Columbus, OH 43215
Fax: 614-564-2509

Lyndsay Nash
Assistant Attorney General
Health and Human Services Section
30 E. Broad Street, 26th Floor
Columbus, OH 43215-3400
Fax: 614-466-6090

Terry Lodge

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

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

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.

7/31/14
Date

Custodian of the Director's Journals
Ohio Department of Health

BEFORE THE OHIO DEPARTMENT OF HEALTH

IN RE:	:	
CAPITAL CARE NETWORK OF TOLEDO LICENSE NO. 0763AS	:	HEARING EXAMINER WILLIAM KEPKO

POST HEARING BRIEF OF THE OHIO DEPARTMENT OF HEALTH

INTRODUCTION

Capital Care Network of Toledo (CCN) is an ambulatory surgical facility (ASF). In 2013, CCN applied to renew its ambulatory surgical facility (ASF) license. Every ASF in the state is required to have a transfer agreement with a local hospital or receive a variance waiving the transfer-agreement requirement. CCN has neither, so it is not entitled to renew its license.

The Ohio Department of Health (ODH) has issued two notices, each of which proposed to issue an order revoking and refusing to renew CCN's ASF license. The Hearing Examiner should uphold both of ODH's proposed orders because the record supports each notice.

The first notice proposed to issue an order refusing to renew and revoking CCN's license because CCN did not have a written transfer agreement with a hospital. Undisputed evidence shows that CCN did not have a transfer agreement or a variance when ODH issued its first notice proposing to revoke and refuse to renew CCN's license.

Even after CCN received the first notice, CCN continued to operate without a transfer agreement for nearly six months. In late January 2014, CCN entered into a purported "transfer agreement" with the University of Michigan Health System in Ann Arbor, Michigan, approximately 53 miles away. This putative arrangement does not satisfy the requirement that

an ASF have a transfer agreement with a "local" hospital, and ODH therefore issued a second notice refusing to renew and revoking CCN's license.

At the hearing, CCN's operator testified that it would take CCN's transportation provider approximately an hour to show up at CCN even to begin to transport a patient to this far removed hospital and that the actual transport itself would take another fifteen to twenty minutes, if possible, to effect by helicopter. Such a lengthy delay would frustrate the purposes of having a transfer agreement with a local hospital, which is to provide immediate care to an ASF patient in the case of emergencies and medical complications that require treatment beyond what the ASF can provide. CCN's continued operation with such a transfer agreement does not comply with the law, poses a risk to the health and safety of CCN's patients, and should not be permitted.

STANDARD OF REVIEW

Administrative hearings under R.C. 119 are held to a preponderance of the evidence standard. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81, 697 N.E.2d 655, 658 (1998); see also, *Buckeye Bar, Inc. v. Liquor Control Comm.*, 32 Ohio App.2d 89, 91, 288 N.E.2d 318, 320 (10th Dist. 1972). ODH's determination that Capital Care Network does not meet the criteria for licensure need only be supported by a preponderance of the evidence. If the hearing examiner finds the ODH's determination meets this standard, he should affirm ODH's determination.

This agency is without jurisdiction to determine the constitutional validity of a statute. *See, e.g., Herrick v. Kosydar*, 44 Ohio St.2d 128, 130, 339 N.E.2d 626, 628 (1975) *citing S. S. Kresge Co. v. Bowers* 170 Ohio St. 405, 166 N.E.2d 139 (1960). This is true whether the challenge is a facial challenge to the statute, *S.S. Kresge Co.*, 170 Ohio St. at 406-07, 166 N.E.2d at 141, or whether the allegation is that the statute is unconstitutional as applied, *MCI*

Telecommunications Corp. v. Limbach, 68 Ohio St.3d 195, 197-99, 625 N.E.2d 597, 598-99 (1994). Jurisdiction to determine constitutional issues is exclusively vested in the courts. *Herrick*, 44 Ohio St.2d at 130, 339 N.E.2d at 628.

Neither the hearing examiner's report and recommendation nor the agency's final adjudication order can determine the statute's constitutionality. Therefore, to the extent CCN seeks this relief from the hearing examiner, the request must be denied. CCN can request this relief from the common pleas courts, which have jurisdiction to rule on constitutional issues. *Cleveland v. Posner*, 193 Ohio App.3d 211, 2011-Ohio-1370, 951 N.E.2d 476 at ¶¶ 16-17. (8th Dist. 2011), citing *FRC of Kamms Corner, Inc. v. Cleveland Bd. of Zoning Appeals,* 14 Ohio App.3d 372, 373, 471 N.E.2d 845, 846 (8th Dist. 1984).

STATEMENT OF THE FACTS AND CASE

CCN is an ASF located in Toledo, Ohio, in Lucas County. (TR. 41). Terri Hubbard, R.N., is the ASF's owner and administrator. (TR. 140-141). An ASF is a freestanding facility where outpatient surgeries are routinely performed. R.C. 3702.30(A)(1). As an ASF, CCN is required to have either a written transfer agreement with a local hospital or a variance of that requirement, allowing it to operate without a transfer agreement. R.C. 3702.303(A)(1) and O.A.C. 3701-83-19. CCN has never submitted a request for a variance of the transfer agreement requirement. (TR. 162-163).

On or around July 30, 2013, ODH learned that CCN's then-existing transfer agreement with The University of Toledo Hospital, a hospital approximately seven miles away, was going to expire on July 31, 2013. (State's Ex. A; TR. 20 and TR 47). ODH instructed CCN to immediately submit a new written transfer agreement by July 31, 2013, to comply with ASF licensure requirements. (State's Ex A; TR. 20). CCN did not submit a transfer agreement as

requested by ODH. (TR. 21-22; TR. 46). Therefore, ODH proposed to revoke and refuse to renew CCN's ASF license. (State's Ex. D).

CCN continued to operate without a transfer agreement of any kind from August 1, 2013, to January 15, 2014. CCN does not dispute that during that time, CCN was out of compliance with ASF licensing requirements. (TR 46).

On January 16, 2014, CCN entered into a transfer agreement with the University of Michigan Health System in Ann Arbor, MI, in Washtenaw County, Michigan. (State's Ex. G, TR. 46). CCN submitted this proposed transfer agreement to ODH on January 16, 2014. (State's Exhibit H). The Director reviewed it and determined that the transfer agreement did not comply with the statute, which required a written transfer agreement be with a "local" hospital. R.C. 3702.303(A). Therefore, the Director issued a second notice proposing to revoke CCN's license to operate an ASF. (State's Ex. H).

LAW AND ARGUMENT

A. All ambulatory surgical facilities must have transfer agreements with local hospitals.

Every ASF in the state "*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," unless the ASF applies for and receives a variance waiving this requirement. *See* R.C. 3702.303(A) & (C) (emphasis added).[1] Transfer agreements protect the

[1] An ASF may also operate without a transfer agreement if it is a based in a hospital. R.C. 3702.303(C)(1). That exception is not relevant here because CCN is an independent, freestanding entity.

health, safety and welfare of ASF patients. R.C. 3702.30. ODH must revoke the license of any ASF that fails to comply with ASF-licensing requirements. R.C. 3702.303(A) and R.C. 3702.32.

Statutes and rules do not define the term "local hospital." Therefore, one should first look to the plain language of the statute and apply the statute according to the plain meaning of the words used. *State ex rel. Burrows v. Industrial Commission of Ohio*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519, 521 (1997). "Words used in a statute must be taken in their usual, normal or customary meaning." *State v. Taylor,* 114 Ohio App.3d 416, 422, 683 N.E.2d 367, 371 (2d Dist. 1996).

The meaning of the term "hospital" is not disputed and the meaning of the word "local" is easily ascertained. Black's Law Dictionary defines "locality" as, "a definite region; vicinity; neighborhood; community." *Black's Law Dictionary* 957 (8th ed. 2004). American Heritage dictionary offers a similar definition: "of or relating to a city, town or district rather than a larger area." *American Heritage Dictionary* 795 (3d. ed. 2000). As discussed above, CCN is located in Toledo, Ohio, and the hospital with which CCN has a purported transfer agreement is located *fifty-three miles away* in Ann Arbor, Michigan. A transfer agreement between entities in non-neighboring cities and where the cities are separated by such significant distance does not satisfy either the legal or common definition of "local." Therefore, CCN's transfer agreement with a Michigan hospital does not comply with the plain language of the statute stating that all ASFs "*shall have a written transfer agreement with a local hospital* . . . ." *See* R.C. 3702.303(A) (emphasis added).

B. To the extent that the term "local hospital" requires interpretation, ODH has reasonably interpreted that requirement to exclude this hospital, some fifty-three miles away.

Because the term "local hospital" has an ordinary and customary meaning, no need for interpretation arises. *State v. Taylor,* 114 Ohio App.3d at 422, 683 N.E.2d at 371. But even if the term "local hospital" requires interpretation, ODH would still prevail because it reasonably interpreted that term to exclude this hospital, fifty-three miles away from CCN.

ODH's interpretation of the "local hospital" requirement was explained by its former Director, Dr. Theodore Wymyslo, M.D. Dr. Wymyslo is a family practice physician, board certified in Family Medicine, with over thirty years of experience before he became the Director of the Ohio Department of Health. (State's Ex. M). Dr. Wymyslo served on the Credentials Committee for Miami Valley Hospital. (TR. 57 and State's Exhibit M). The Committee's role was to ensure that on-call physicians were available within thirty minutes in an emergency. (TR. 57-58). Dr. Wymyslo considered this thirty minute requirement to be the standard in the medical community and found it applied here. (TR. 124-125).

> And so we had many conversations, not only with other medical staff members, but also with consultants nationwide. And they recommended to us that we use the thirty-minute availability rule to determine whether or not back up was readily available for the clinicians that were covering call. (TR. 58)

When asked why the hospital had this requirement, Dr. Wymyslo explained:

> Well, because in an emergency situation, we wanted to be sure for patient safety and also for high quality of care, that we had the capability of responding to patients and their needs in a timely manner. And we felt that by phone 15 minutes and in person 30 minutes was the time period that for us would safeguard patients. (TR. 59)

Dr. Wymyslo's determination that a hospital fifty-three miles away is not a "local" hospital is afforded deference. An administrative agency's construction of a statute or rule that the agency is empowered to enforce must be accorded due deference. *See, e.g., Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223, 1226 (1992) (citing *Lorain City Bd. of*

Edn. v. State Emp. Relations Bd., 40 Ohio St.3d 257, 533 N.E.2d 264 (1988)). Unless the construction of a statute or rule is unreasonable or impermissible, reviewing courts should follow the construction given to it by the agency. *See Leon, above; see also Morning View Care Center—Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, at ¶ 43 (10th Dist. 2002). Dr. Wymyslo relied on the plain meaning of the word "local", his experience with transporting patients and arranging for on-call physicians, and a concern for patient safety and continuity of care. (TR. 65-66, 68-69). Dr. Wymyslo's testimony supports the conclusion that his determination was reasonable.

CCN's owner, Terri Hubbard, testified that she was not sure what the statute meant by "local" hospital. Ms. Hubbard conceded that she never tried to contact anyone at ODH to receive any guidance on ODH's interpretation of the word local. (TR. 165). Instead, she determined, without any basis in medical experience or common medical usage, that local means "within 50 to 75 miles." (TR. 165-166). Conveniently, Ann Arbor is about 53 miles from Toledo.

Ms. Hubbard testified if CCN transported patients to Ann Arbor, it would do so by helicopter. (TR. 49). Ms. Hubbard conceded that she did not have a contract or any formal written arrangement with the helicopter company, but "all [she] has to do is call the facility." (TR. 49). However, Ms. Hubbard had no answer when questioned how much a helicopter transfer would cost. (TR. 160). Ms. Hubbard offered no testimony regarding what types of insurance the helicopter service would accept or whether it would transport uninsured patients. Ms. Hubbard did not testify about what would happen if the helicopter service could not fly to Toledo due to weather, mechanical problems, or other commitments.

According to Ms. Hubbard, a helicopter could transport a patient from CCN to Ann Arbor, Michigan, in "fifteen minutes, weather permitting; 20 minutes on a bad day." (TR. 160). On cross-examination, Ms. Hubbard conceded that the helicopter company she plans to use does not have any helicopters in the Toledo area. (TR. 169). The helicopter service's home base is in Licking County, Ohio, *which Hubbard conceded is a 50-60 minute helicopter flight away from Toledo.* (TR. 169). Furthermore, CCN does not have a helicopter landing pad, but rather, was planning to land the helicopter in "an empty lot right beside our clinic." (TR. 160). Ms. Hubbard failed to present any evidence that the helicopter company had permission to land in the vacant lot, or whether obstacles such as buildings, streetlights, telephone wires, or other common obstructions or temporary structures or objects would even permit such a landing. She presented no evidence about whether the helicopter could land "right beside our clinic" in heavy rain or fog. In short, CCN's "plan" to use this helicopter service was so vague as to leave a reasonable individual doubting whether it was an actual plan at all.

Indeed, Ms. Hubbard essentially admitted that the Ann Arbor-by-helicopter plan was illusory, as when questioned about whether CCN would use its transfer agreement, Ms. Hubbard testified that "it depends." (TR. 51, 166). According to Ms. Hubbard, "if they [patients] are in that dire need of a medical emergency, 911 is going to be called and they're going to be taken to the nearest hospital, regardless of a transfer agreement." This testimony suggests that CCN itself realizes that a transfer agreement with a hospital some fifty three miles away would not serve the statute's purpose of ensuring and facilitating "local" transfer for quality care. Ms. Hubbard's testimony indicates that the agreement was submitted to ODH merely to try to satisfy the legal requirement that CCN have a transfer agreement. CCN does not intend to use the agreement, undoubtedly because it realizes that calling a helicopter from Licking County, Ohio,

to pick up a patient in Toledo, Ohio, and transfer her over fifty miles to Ann Arbor, Michigan, is not a reasonable or responsible plan to care for patients needing emergency hospital care.

C. The hearing examiner does not have the authority to rule on CCN's constitutional challenges and they should be rejected.

CCN raised two constitutional challenges at the hearing, but neither helps them at this stage (or ever, eventually). It argued that R.C. 3702.303 is unconstitutionally vague because it does not define "local" and that the transfer requirement creates an undue burden on a woman's right to seek an abortion. (Tr. 13-14, 106, 131-132) The Hearing Examiner lacks jurisdiction to consider these constitutional arguments. *Herrick,* 44 Ohio St.2d at 130, 339 N.E.2d at 628. If CCN wishes to raise these constitutional issues, it must do so before the Common Pleas Courts.

CCN's constitutional challenges would fail even if they could be raised here (and they cannot). CCN's void-for-vagueness challenge fails because CCN cannot satisfy the high burden of showing vagueness in this case. A statute is not void "simply because it could be worded more precisely or with certainty." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶96 (2006) citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992).

Because this is a civil statute, and not a criminal statute, the burden of proof to show that a statute is unconstitutionally vague is stringent. "A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-51, 882 N.E.2d 400, at ¶ 46 (2008).

The ordinary inquiry is "whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do are not void for vagueness." *Norwood,* 110 Ohio St.3d at

380 citing *Grayned v. Rockford*, 408 U.S. 104, 108–109, (1972) (holding that anti-noise ordinance which prohibited noise which would disturb the peace, near a school, was not unconstitutionally vague because the statute gives fair notice to those at whom it is directed).

The statute is not impermissibly vague because the meaning of the word "local" is easily ascertained, especially for medical professionals. If CCN was unclear what the word "local" meant, it could have consulted a dictionary. CCN could have also consulted ODH, the agency charged with enforcing the statute. CCN claims the statute is "vague," but did nothing to ascertain the statute's meaning. (TR. 156-158). Additionally, the statute allows a licensee to easily conform its behavior. CCN can re-submit transfer agreements until it produces one that meets the statutory requirement. CCN and others similarly situated do not face any threat of monetary penalty or imprisonment. CCN's vagueness challenge should be rejected.

CCN's undue-burden challenge fares no better. CCN argues that the transfer agreement requirement has forced several ASFs to close, creating an "undue burden" on a woman's right to seek an abortion. (TR. 106, 131-132). CCN's argument is essentially that, if CCN closes, women in the Toledo area will have to travel to Cleveland or Michigan. The Sixth Circuit has already rejected that argument, holding that no "undue burden" exists just because a woman may have to travel to another clinic in the next city. *Women's Med. Professional Corp. v. Baird*, 438 F.3d 595, 605 (6th Cir. 2006), citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992).

Further, the Sixth Circuit's decision specifically upheld Ohio's written-transfer-agreement requirement, so that precludes any renewed challenge to the same law. To be sure, the law has changed in minor ways, but none of those changes undercuts the Sixth Circuit's precedent. For example, the requirement now expressly states that an agreement must be with a

"local" hospital, but that understanding was always implicit. After all, the requirement was always aimed at *emergencies,* and surely no medical professional would ever have thought that an agreement with a hospital hours away could qualify. And ODH never approved any agreement involving such a distance, nor did it ever need to disapprove one, to its knowledge—precisely because no one responsible would ever propose such an unsafe arrangement, until now. Thus, the statutory addition of local merely clarifies the obvious. The latest statutory amendments also codified, in statute, requirements that were previously based in administrative rules, but that does not undercut this precedent, either.

In sum, the transfer-agreement requirement does not create an "undue burden," because it does not place a substantial obstacle before women seeking abortions. *Baird,* 438 F.3d at 605. Thus, CCN's constitutional challenges fail, and are, again, not properly part of this agency review anyway.

CONCLUSION

CCN cannot continue to operate as an ASF because it does not meet the minimum criteria for licensure. It must have a transfer agreement with a "local" hospital. This requirement exists to ensure the safe and orderly transfer of patients and to provide continuity of care to patients who have to be transferred out of the ASF for medical treatment. The transfer agreement submitted by CCN jeopardizes patient safety. CCN's proposal to put patients on a helicopter and transfer them over fifty miles is not what the General Assembly intended when they required a hospital to have a transfer agreement with a "local" hospital, and it is not the expectation of the Director of the Department of Health who is charged with enforcing the statute and ensuring patient safety.

For all of the foregoing reasons, ODH respectfully requests that hearing examiner recommend that CCN does not have a transfer agreement with a local hospital, therefore, it does not meet the minimum criteria for licensure and its license should be revoked.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Post-Hearing Brief of the Ohio Department of Health was sent via e-mail and regular U.S. Mail on April 30, 2014, to:

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BEFORE THE OHIO DEPARTMENT OF HEALTH

In the Matter of:	:	License Number 0763AS
	:	
Capital Care Network of Toledo	:	**HEARING EXAMINER WILLIAM KEPKO**
	:	
	:	**CAPITAL CARE NETWORK OF TOLEDO'S POST HEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. INTRODUCTION

Capital Care Network of Toledo appeals the Director of the Ohio Department of Health's proposed revocation and non-renewal of their ASF license. The Director's sole reason for his proposal is that Capital Care's written transfer agreement with the University of Michigan Hospital in Ann Arbor, Michigan violates O.R.C. § 3702.303 because the hospital is not "local" as required by the statute. The statute is unconstitutional as applied to Capital Care because it is vague, it is an unconstitutional delegation of licensing authority, and because the statute violates the Ohio Constitution's log-rolling prohibition. Even if the statute were constitutional, Capital Care's transfer agreement complies with the statute because the distance of 52 is sufficient to qualify the hospital as "local" and because Capital Care's hospital transfer policy complies with the purpose of the statute.

II. PROPOSED FINDINGS OF FACT

A. Capital Care Network of Toledo Has a Written Transfer Agreement with a Hospital

1. 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.
2. Terrie Hubbard has been the owner of Capital Care since 2010, and prior to that worked for Capital Care as a registered nurse for eight years. Hubbard TR. 140.

3. Ms. Hubbard also manages Founder's Women's Health Center, another abortion provider located in Columbus, Ohio. Hubbard TR. 52.
4. 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.
5. Ohio Administrative Code Chapter 3701-83 sets forth numerous requirements governing the operation of health care facilities, which include ASFs. Specifically, OAC § 3701-83-19(E) states: "The ASF shall have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise."
6. Capital Care has never needed to transfer a patient to a hospital since Ms. Hubbard began working there eight years ago. Hubbard TR. 142.
7. Nonetheless, Capital Care maintained a written transfer agreement with the University of Toledo Hospital. (CCNT Ex. A).[1]
8. In August 2012, Terrie Hubbard, on behalf of Capital Care entered into a written transfer agreement with University of Toledo Hospital. Hubbard TR. 146; CCNT Ex. A.
9. In April 2013, University of Toledo Hospital notified Capital Care and ODH that it did not intend to renew the written transfer agreement when it expired on July 31, 2013. CCNT Ex. B; Hubbard TR. 147.
10. Terrie 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.

[1] Both parties marked their exhibits using letters. Exhibits submitted by Capital Care Network of Toledo, will have a prefix of "CCNT."

11. On January 20, 2014, Capital Care entered into a written transfer agreement with University of Michigan Hospital in Ann Arbor, Michigan. 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.

13. 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.

14. Patients experiencing less serious medical complications who do not need immediate treatment will be transferred to University of Michigan Hospital 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.

15. Ms. Hubbard spoke with the owner of a helicopter company who assured her that it would transport her patients from the Capital Care facility to University of Michigan Hospital. Hubbard TR. 168.

16. 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.

B. The University of Michigan Hospital is a Local Hospital.

17. In June 2013 the Ohio legislature enacted House Bill 59, which included O.R.C. § 3702.303 codifying the written transfer agreement regulation. This law became effective on September 29, 2013. State Ex. K.

18. 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.

19. As of the date of the hearing[2] ODH had issued no regulations, rules, guidelines, or protocols to define the meaning of "local." Wymyslo TR. 75-76.

20. 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. Hubbard, TR. 152, 154.

21. Ms. Hubbard believed that 50-75 miles from the facility met the definition of "local." She consulted with her attorney at the time who advised her 50-75 miles would meet the "local" requirement. Hubbard, TR. 157.

22. Ann Arbor is approximately 52 miles from Capital Care in Toledo. Hubbard, TR. 46. The estimated drive (no lights and sirens) is 52 minutes.[3] The estimated helicopter flight time is 15 to 20 minutes. Hubbard TR. 160.

23. Ms. Hubbard, and her legal counsel, believed the University of Michigan was close enough to be considered a "local" hospital. Hubbard TR. 157. ODH offered no interpretation of the word local to Ms. Hubbard before the Director issued his proposed revocation order in February 2014. Hubbard TR. 157; Wymyslo TR. 75.

24. From the date HB 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. *Id.* Dr. Wymyslo, relying solely on the statute, declared the agreement with the

[2] As far as counsel knows, ODH has not issued any rules since the hearing.
[3] 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

University of Michigan violated the statute. He did not explain why he believed this or offer any reasonable explanation for the term "local." Ex. H.

25. At the hearing, 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.

26. It is therefore reasonable to interpret the statute as allowing the University of Michigan to be a local hospital to Capital Care Network of Toledo.

27. Since Capital Care has a transfer agreement with the University of Michigan, Capital Care is in compliance with the statute and its license should not be revoked.

III. ARGUMENT

A. Capital Care Has Complied with the Written Transfer Agreement Requirement.

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.

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).

Here, Capital Care contends that it was reasonable for owner Terrie Hubbard to interpret the word "local" as used in § 3702.303 as including hospitals 50-75 miles away from the Capital Care facility. The term is not defined by statute or by administrative rule. As ODH points out, *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. We do know that ODH has not limited "local" geographically. ODH has approved transfer agreements with hospitals over the Ohio border. Malkoff TR. 85-86; CCNT Ex. G.

Former ODH Director Theodore Wymyslo testified that he concluded that Capital Care's written transfer agreement was not "local" because patients could not be transferred from the Capital Care facility to University of Michigan Hospital in 30 minutes or less. Wymyslo TR. 66. 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. He explained that an on-call physician needed to be available to arrive at the hospital within 30 minutes of being called. *Id.* He did not explain why a hospital's credentialing standard is relevant to defining

whether a hospital is "local" under HB 59. Dr. Wymyslo's interpretation of the statute is not reasonable or helpful in understanding the term in HB 59.

More relevant testimony about the meaning of the word "local" in the statute came from Tamara Malkoff, ODH Bureau Chief, who 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 facility, what's local for that facility. And if the closest hospital is 50 miles away, I would consider that local.

Malkoff TR. 30. Given that the University of Michigan is 52 miles[4] from Capital Care, it is a reasonable interpretation of the statute that the agreement with University of Michigan complies with the statute.

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.* 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. *Id.* No hospitals in the Toledo

[4] Ms. Hubbard testified the University of Michigan hospital was 52 miles from Capital Care. Hubbard TR. 173.

metropolitan area would enter into a written transfer agreement with Capital Care. Hubbard TR. 51.

Facing 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 the University of Michigan, 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.

Furthermore, 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."[5]

Additionally, Capital Care's written transfer agreement fulfills the purpose of the requirement because it adequately protects patient safety. 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 University of Michigan Hospital. 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 University

[5] http://www.toledoblade.com/Medical/2014/03/28/Opponentsof-city-s-last-abortion-clinic-dispute-deal.html#DBFJY8m9BQxvxqWf.99.

of Michigan Hospital in 15 to 20 minutes. Hubbard TR. 160. Contrary to the state's claims, Ms. Hubbard did not testify that she did not know the cost of such a transport. Rather, she 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, the Capital Care will not need to use the transfer agreement. It will call 911 and allow EMTs to 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.

B. <u>The Written Transfer Agreement Requirement is Unconstitutional as Applied to Capital Care Network.</u>

Although the state claims that the hearing officer lacks jurisdiction to consider any constitutional arguments, Capital Care is required to raise any as applied challenges to the constitutionality of a law during administrative proceedings to allow for the development of the factual record to be reviewed on appeal. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, 132 Ohio St. 3d 167, 173, 970 N.E.2d 898, 907, citing *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 16. "One who challenges the constitutional application of legislation to particular facts is required to raise that challenge at the first available opportunity

during the proceedings before the administrative agency." *Bd. of Educ. of the South–Western City Sch. v. Kinney,* 494 N.E.2d 1109, 1111 (Ohio 1986); *see also Zieverink v. Ackerman*, 437 N.E.2d 319, 320 (Ohio Ct. App. 1981) (finding that appellant who has not presented evidence concerning the constitutionality of the statute before a state agency is precluded by Ohio Rev. Code § 119.12 from raising as-applied constitutional claim by introducing new evidence before the court of common pleas unless such evidence was "newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.").

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. *See, e.g., Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) ("The regular and impartial 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)[6], 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 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*, 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." 822 F.2d 1390, 1392 (6th Cir. 1987). 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

[6] 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).

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 chose not to. 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. Capital Care owner Terrie Hubbard interpreted the word "local" to mean within 50-75 miles of the clinic. Hubbard, 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 the ODH Bureau Chief 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.

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 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 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*, 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. 379 F.3d 531, 555–56 (9th Cir. 2004). *See also Women's Health Ctr. of W. Cnty., Inc. v. Webster*, 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 may also 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.

However, since the *Baird* decision, the Ohio legislature enacted House Bill 59, which allows the Director of Health to grant variances only 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 the H.B. 59 allow third parties, a 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 ODH's designated vicinity have refused to enter into a written transfer agreement with Capital Care, and despite contacting several doctors, none have agreed to serve as backup doctors. Hubbard TR. 163. Under H.B. 59, ODH may not 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. Just as in *Hallmark Clini*c, "[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. 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.[7] The federal law does not prohibit 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 of HB 59, 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 the state argues in its brief that 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. H.B. 59's Written Transfer Agreement Requirement is Invalid because it Violates the One-Subject Provision of the Ohio Constitution.

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." The purpose of this one-subject provision is to prevent so-called "logrolling"— "'the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.'" *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 2004-Ohio-6363, 104 Ohio St. 3d 122, 129, 818 N.E.2d 688, 696 ("*SERB*"), quoting *State ex rel. Dix v. Celeste*, 11

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

Ohio St. 3d 141, 142-43, 464 N.E.2d 153, 155 (1984) (internal citations omitted). Although courts must give some deference to the legislative process by presuming that a statute is constitutional, a law will be invalidated where there is disunity of subject matter such that there is "no discernible practical, rational or legitimate reason for combining the provisions in one Act." *Id.* at 130, quoting *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506.

Application of the one-subject rule is complicated when the challenged provision is part of an appropriations bill, which by its nature contains many different provisions. In *Simmons-Harris v. Goff*, the Ohio Supreme Court considered whether the Ohio School Voucher Program should be stricken from an appropriations bill as violative of the one-subject rule. 86 Ohio St.3d 1, 14-17, 711 N.E.2d 203 (1999). The court held that there was "a 'blatant disunity between' the School Voucher Program and most other items contained in [the Act]" and that there was "'no rational reason for their combination.'" *Id.*, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St.3d 1, 6, 19 OBR 1, 482 N.E.2d 575. The court considered the provision little more than a "rider"—a provision included in a bill that is "'so certain of adoption that the rider will secure adoption not on its own merits, but on [the merits of] the measure to which it is attached.'" *Id.*, quoting *Dix*, 11 Ohio St.3d at 143, 11 OBR 436, 464 N.E.2d 153. See also *SERB*, 2004-Ohio-6363, 104 Ohio St. 3d 122, 131, 818 N.E.2d 688, 698 (finding a provision added to appropriations bill invalid under one-subject rule because provision did not "clarify or alter the appropriation of state funds").

The stated purpose of H.B. 59 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. 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. The Written Transfer Agreement Provisions of H.B. 59[8] are wholly unrelated to State appropriation, revenue generation, or taxation. Rather, they regulate the activities of abortion providers and other health care providers. 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.

In addition, 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 history surrounding the passage of the abortion related provisions of H.B. 59 also strongly suggests that the provisions were the product of impermissible logrolling. The original version of H.B. 59 did not contain the Written Transfer Agreement or other abortion relation provisions when it was introduced in the Ohio House of Representatives in February 2013. Both the Parenting and Pregnancy Provisions and the Written Transfer Agreement Provisions were not added until April 2013. The public hospital restrictions appeared for the first time in June 2013. The Fetal Heartbeat Provisions were added on June 25, 2013– just five days before H.B. 59 was signed into law, with no opportunity for public testimony. The Heartbeat Provisions borrow heavily from the language of a bill (H.B. 125) introduced in the 129th General assembly which did not pass.

Director Wymyslo proposed to revoke Capital care's license for because it violated R.C. § 3702.303 (A)'s requirement that the hospital be local. 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 its

[8] R.C. 3702.30, 3702.302, 3702.303, 3702.304, 3702.305, 3702.306, 3702.307, 3702.308, and 3727.60.

Written Transfer Agreement Provision that the agreement be with a local hospital are void and unenforceable. If H.B. 59 is held to be void, then the requirement at 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.[9]

IV. CONCLUSION

Capital Care has a written transfer agreement with a hospital and therefore its ASF license should not be revoked nor non-renewed. ODH proposes to revoke and not-renew the license only because it does not comply with O.R.C. § 3702.303, which is an invalid addition to the 2013 Budget Bill, H.B. 59. Furthermore, the statute is void for vagueness. Even if the statute were valid, Capital Care's transfer agreement with the University of Michigan hospital complies because the hospital is close enough to Toledo for the agreement to comply with a reasonable interpretation of the statute's requirement that the hospital be "local."

For these reasons, Capital Care respectfully requests that the hearing officer issue 1) findings of facts and conclusions of law consistent with Capital Care's proposal; 2) a recommendation that the Director's proposed revocation of the license be rescinded; and 3) a recommendation that Capital Care's ASF license be renewed.

Respectfully submitted,

/s/ Jennifer L. Branch
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[9] 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.)

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served May 21, 2014 by email on:

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John R. Kasich / Governor

July 30, 2014

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

Jennifer Branch
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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

OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

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John R. Kasich / Governor

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

BEFORE THE OHIO DEPARTMENT OF HEALTH

In the Matter of:	:	License Number 0763AS
	:	
Capital Care Network of Toledo	:	**HEARING EXAMINER WILLIAM KEPKO**
	:	
	:	**CAPITAL CARE NETWORK OF TOLEDO'S OBJECTIONS TO REPORT AND RECOMMENDATION**

INTRODUCTION

Respondent, Capital Care Network of Toledo ("Capital Care") objects to the Hearing Examiner's Report and Recommendation because the hearing officer incorrectly concluded that Capital Care's written transfer agreement does not specify an effective procedure for the safe and immediate transfer of patients to a hospital. The Hearing Examiner further erred when he concluded that Capital Care does not have a written transfer agreement with a "local" hospital as required by O.R.C. §3702.303(A). Finally, Capital Care objects to the Hearing Examiner's failure to consider the constitutionality of the written transfer agreement under both federal and Ohio law. Capital Care requests that the Director reject the Hearing Examiner's Report and Recommendation and find that Capital Care's agreement with University of Michigan Health System ("UMHS") satisfies the written transfer agreement requirement of §3702.303(A) and renew Capital Care's ASF license.

A. Capital Care's Written Transfer Agreement Specifies an Effective Procedure for the Safe and Immediate Transfer of Patients to a Hospital.

At the hearing, Capital Care presented reliable and substantial evidence of its procedures for transferring a patient from the facility to a hospital in the event that a patient needs medical care beyond what Capital Care can provide. Nevertheless, the Hearing Examiner erroneously concluded 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 and Recommendation, p. 10.

The Hearing Examiner's 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, a helicopter company 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 University of Michigan Hospital 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; Finding of Fact # 26. 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 Hearing Examiner was incorrect to conclude that the agreement does not meet the requirements of O.R.C. § 3702.303.

The hearing officer found that the UMHS transfer agreement did not "specifically define the actual transfer mechanism." Finding of Fact # 25. However, O.R.C. § 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 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 UMHS is consistent with the overwhelming majority of written transfer agreements deemed acceptable by ODH, as shown in 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.

B. Capital Care's Interpretation of the Word "Local" Is Reasonable.

The Hearing Examiner also found that Capital Care's written transfer agreement with UMHS does not meet the requirements of O.R.C. § 3702.303(A) because University of Michigan Hospital is not a "local" hospital with respect to the Capital Care facility. Report and Recommendation, Conclusion of Law #7. This conclusion is clearly erroneous in light of the Department of Health's failure to issue rules or guidance regarding the definition of "local" and

the unreasonableness of its arbitrary thirty minute transfer rule and the contradictory testimony that 50 miles is reasonable.

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.

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 HB 59. His testimony was contradicted by the more relevant testimony of Tamara Malkoff, Chief of the Bureau of Information and Operational Support. Ms.

Malkoff testified that a hospital 50 miles away would be considered a local hospital in some circumstances. Malkoff TR. 30. Her testimony was unrebutted. The Hearing Examiner erroneously concluded that this rule was reasonable and consistent with §3702.303. Report and Recommendation, pp. 9-10.

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 has contacted many hospitals within the Toledo area, but all of these hospitals denied Capital Care a written transfer agreement for various reasons unrelated to protecting public health and safety. Hubbard TR. 51. Faced with these challenges with Toledo hospitals, it was reasonable for Terrie Hubbard to interpret the term "local" as meaning within 50-75 miles of the facility. Thus the Hearing Examiner's decision is clearly in error and should be reversed.

C. Ohio's New Written Transfer Agreement Requirement Violates Both the Federal and the Ohio Constitutions.

The Hearing Examiner concluded that he did not have jurisdiction to hear Capital Care's constitutional challenges to O.R.C. § 3702.303. Nonetheless Capital Care is required to raise any as applied challenges to the constitutionality of a law during administrative proceedings to allow for the development of the factual record to be reviewed on appeal. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, 132 Ohio St. 3d 167, 173, 970 N.E.2d 898, 907, citing *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 16. Capital Care thus renews its claim that H.B. 59 and O.R.C. § 3702.303 violate both the Federal and Ohio constitutions.

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 v. City of Rockford*, 408 U.S. 104, 108 (1972). O.R.C. § 3702.303 did not give notice to Capital

Care as to how close the transfer hospital was required to be, and is thus unconstitutionally vague as applied to Capital Care. ODH has authority to implement regulations interpreting the statute, but ODH chose not to. Capital Care owner Terrie Hubbard interpreted the word "local" to mean within 50-75 miles of the clinic. Hubbard TR. 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 the ODH Bureau Chief 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.

In addition, 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. 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."). The current variance requirements as set out in H.B. 59 allow third parties, a backup doctor and his credentialing hospital, to make the final licensing

decision and therefore constitute an unconstitutional delegation. 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 ODH's designated vicinity have refused to enter into a written transfer agreement with Capital Care, and despite contacting several doctors, none have agreed to serve as backup doctors. Hubbard TR. 163. Under H.B. 59, ODH may not 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.

Finally, H.B. 59 violates Ohio Constitution, Article II, § 15(D), which expressly provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." Although courts must give some deference to the legislative process by presuming that a statute is constitutional, a law will be invalidated where there is 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. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 2004-Ohio-6363, 104 Ohio St. 3d 122, 130, 818 N.E.2d 688 ("*SERB*"), quoting *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 506. 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. The Written Transfer Agreement Provisions of H.B. 59[1] are wholly unrelated to State appropriation, revenue generation, or taxation. Rather, they regulate the activities of abortion providers and other health care providers. H.B. 59 clearly violates the one-

[1] R.C. 3702.30, 3702.302, 3702.303, 3702.304, 3702.305, 3702.306, 3702.307, 3702.308, and 3727.60.

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.

CONCLUSION

For these reasons, Capital Care Network of Toledo respectfully requests that the Director reject the Hearing Examiner's Report and Recommendation and find that Capital Care has met the requirements of O.R.C. §3702.303.

Respectfully submitted,

/s/ Jennifer L. Branch
Jennifer L. Branch (0038893)
Attorney for Capital Care Network of Toledo
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served June 20, 2014 by fax and email on:

Kay Norton
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/s/ Jennifer L. Branch
Jennifer L. Branch

STATE OF OHIO
DEPARTMENT OF HEALTH

IN THE MATTER OF:

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING EXAMINER
WILLIAM J. KEPKO

SCHEDULING ORDER

This matter came on for a telephone scheduling conference on December 13, 2013 at 11:00AM. Present via telephone was Zachary Swisher, Esq. representing Capital Care Network of Toledo. Present on behalf of the Ohio Department of Health ("ODH") was Melissa Wilburn, Senior Assistant Attorney General. By agreement of the parties, the following shall be the case schedule in this matter:

February 05, 2014: Witness list and documents to be exchanged.

February 18, 2014: Hearing.

February 19, 2014: Hearing.

February 20, 2014: Hearing.

The hearing will commence on February 18, 2014 at 10:00AM and be held at the Ohio Department of Health, 246 North High Street, 7th Floor large conference room. Any modifications to the case schedule shall be by agreement of the parties with the concurrence of the Hearing Examiner and/or by motion.

William J. Kepko (0033613)
Hearing Examiner
Date: 12-13-13

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing SCHEDULING ORDER was served by regular U.S. mail, postage prepaid, to the Ohio Department of Health, c/o Kaye Norton, Office of Legal Services, 246 North High Street, Columbus, Ohio 43215 on December 13, 2013 and was served by regular U.S. mail, postage

prepaid, to the following parties, on the 13th day of December 2013:

William J. Kepko (0033613)

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Melissa Wilburn
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