HANYS Healthcare Association of New York State

Proud to serve New York State's Not-For-Profit Hospitals, Health Systems, and Continuing Care Providers

Dennis Whalen, President

September 29, 2014

Katherine Ceroalo
Bureau of House Counsel, Regulatory Affairs Unit
New York State Department of Health
Corning Tower, Room 2438
Empire State Plaza
Albany, New York 12237

Re: Certificate of Public Advantage, I.D. # HLT-38-13-00007-RP

Dear Ms. Ceroalo:

The Healthcare Association of New York State (HANYS) welcomes this opportunity to comment on the above-referenced revised proposed rulemaking issued by the Department of Health (DOH) on August 27, 2014. HANYS represents 500 non-profit and public hospitals, nursing homes, home health agencies, and other healthcare providers throughout New York State, many of which are considering or entering into collaborative arrangements with other providers, some of which may be competitors.

DOH first proposed Certificate of Public Advantage (COPA) regulations on September 13, 2013. In our November 4, 2013 comment letter to DOH (attached), HANYS pointed out serious member concerns.

Unfortunately, the August 27 revised proposed rulemaking does not respond to any of our concerns. Therefore, we are again highlighting the serious drawbacks that have been brought forward in the revised proposal.

Although Section 2999-A of the Public Health Law (PHL) states that "the intent of the state is to *supplant competition* . . . under the active supervision of the Commissioner . . . to provide state action immunity under the state and federal antitrust laws," the revised proposed rulemaking fails to implement the statute.

Proposed Section 83-1.2 clearly contradicts the law by providing that the Attorney General (AG) "may seek relief under state antitrust laws . . . if the AG determines if the anticompetitive effects . . . outweigh the benefits."

Section 2999-B of PHL, providing DOH with regulatory authority to implement the companion statute, includes a provision stating that "This article [the COPA laws] is not intended to limit the authority of the AG."

However, this provision does not grant the AG authority to ignore the plain language of a statute. The AG is charged with enforcing the laws of the state, not acting contrary to their provisions.

The law clearly articulates the state's policy: to supplant competition. "Supplant" means that the policy is superseded and subordinated to another. The interests of competition are made inferior to those of state-supervised collaboration. Neither the AG nor DOH has the authority to change what the law states.

Despite that, proposed Section 83-1.2 would allow the AG to bring an antitrust action as if the interests of competition are not supplanted: the proposed rule would expand the AG's authority to use a weighing of competitive factors to determine if a collaborative arrangement is proper. This is exactly what PHL forbids. Further, neither PHL section gives the AG authority to retroactively "unwind" a collaboration. That authority is granted solely to DOH.

In contrast, proposed Sections 83-1.10 and 83-1.12 (regarding review and revocation of a COPA) do not call for weighing competitive factors. Both sections require DOH to weigh the benefits of the collaboration against the disadvantages of the collaboration. Under the statute and the revised proposed rule, DOH is not allowed to use, or proposing to use, competitive factors.

However, with regard to proposed Sections 83-1.10 and 83-1.12, HANYS must again express our concern that DOH's ability to revoke a COPA introduces the prospect of uncertainty into a healthcare system transformation process that is intended to provide lasting results.

We recommend that the regulatory language include specific criteria as the basis for any DOH intervention and that ample due process be built into any course of action that may result in significant damage to participants. We further suggest that the language be clarified to mean that when DOH weighs the benefits versus the disadvantages, it does so only on the basis of the collaboration's effect on healthcare.

HANYS must again reiterate strong concerns, shared by a wide cross-section of our members, that the COPA regulations as proposed would provide little meaningful protection as the healthcare system transforms. Health policy and provider collaboration is articulated and encouraged by the state and federal governments but is implemented by healthcare providers. We are concerned that failing to alleviate antitrust obstacles may jeopardize the realization of several policy initiatives, including the Delivery System Reform Incentive Payment program, that the state is vigorously pursuing.

Sincerely,

Dennis P. Whalen
President

DPW: mt
Enclosure

HANYS Healthcare Association of New York State

Proud to serve New York State's Not-For-Profit Hospitals, Health Systems, and Continuing Care Providers

Dennis Whalen, President

November 5, 2013

Katherine Ceroalo
Bureau of House Counsel, Regulatory Affairs Unit
New York State Department of Health
Corning Tower, Room 2438
Empire State Plaza
Albany, New York 12237

RE: Certificate of Public Advantage; State Register September 18, 2013, Page 7, ID HLT-38-13-00007-P

Dear Ms. Ceroalo:

The Healthcare Association of New York State (HANYS) appreciates the opportunity to comment on the above-referenced proposed rulemaking issued by the Department of Health (DOH). HANYS represents more than 500 non-profit and public hospitals, nursing homes, home health agencies, and other health care providers throughout New York State, many of which are considering or entering into collaborative arrangements with other providers—some of whom may be competitors.

National and state health system reform policies envision payment restructuring, care delivery system reconfiguration and growth, improved efficiencies, and higher quality care. These same policies openly encourage providers, many of which are competitors, to enter into vertical and horizontal collaborations as an essential means to achieve these reform goals. The enactment of Public Health Law §§2999-aa and 2999-bb is a significant step toward removing barriers to establishment of these collaborative undertakings.

In 2011, the Governor's Medicaid Redesign Team (MRT) recommended the enactment of legislation to provide protection from antitrust enforcement to collaborative arrangements deemed necessary and beneficial to a community's health care by DOH.

The MRT recommendation was carried forward by the Governor with the submission of amendments to his original 2011-2012 budget. The amendments,

which contained the current PHL §§2999-aa and 2999-bb, were embraced and adopted by the Legislature.

Significantly, §2999-aa states that:

> ". . . it shall be the policy of the state to encourage, where appropriate, cooperative, collaborative and integrative arrangements . . . among providers or among others who might otherwise be competitors under the active supervision of the commissioner [of health]. To the extent such arrangements . . . might be anticompetitive . . . the intent of the state is to *supplant competition with such arrangements* . . . under the active supervision of the commissioner . . . as necessary . . . ." (emphasis added)

At the request of the Governor, the Legislature made a clear policy decision: competition would be supplanted, i.e., superseded, replaced, displaced, overridden, usurped, etc., by collaborative arrangements that are so approved by the Commissioner of Health. In other words, if the Commissioner deems a collaborative arrangement sufficiently beneficial, antitrust concerns are subordinated to that determination.

HANYS provides this background to put into context our significant concern with a provision in the proposed rulemaking. Proposed §83-1.2 states in part, "The Attorney General may seek relief under state antitrust laws . . . if the Attorney General determines that the anticompetitive effects of the parties' business conduct or arrangement outweigh the benefits of the arrangement."

HANYS strongly believes that this provision clearly and directly contradicts the language and purpose of the law. The proposed regulation introduces an antitrust analysis, to be conducted by the Attorney General, into a circumstance where by law it has been displaced by the cooperative arrangement as approved by the Commissioner. An antitrust analysis conducted by the Attorney General analyzes whether an arrangement damages competition, not whether it impacts individual competitors.

The balancing determination allowed by §2999-aa is to be made by the Commissioner. The Commissioner's criteria are whether the arrangement is more beneficial, from the Commissioner's perspective, than detrimental. This interpretation is supported by proposed §83-1.12 regarding revocations. Under the proposed regulations, a Certificate of Public Advantage may be revoked by DOH when, among other things, DOH, after consultation with the Attorney General, determines that the benefits or likely benefits of the arrangement and the unavoidable costs of terminating the agreement do not continue to outweigh the disadvantages or likely disadvantages resulting from the agreement.

HANYS believes that the provision in §83-1.12 is consistent with the statute. It is in contrast with the provision in §83-1.2, which not only contradicts the statute but would also vest authority in the Attorney General despite the vesting of authority in the Commissioner of Health.

HANYS respectfully submits that the provision in proposed §83-1.2, allowing the Attorney General to unwind an established and approved arrangement solely on the basis of an antitrust analysis, eviscerates a key feature of the law: protection from antitrust scrutiny for highly desirable health care arrangements. We believe that this proposed provision will likely discourage would-be applicants since there is no assurance that an arrangement may someday be deconstructed solely on antitrust, rather than health system, grounds.

The enactment of §2999-aa is a significant step that provides an important tool to move the health system forward. We strongly urge DOH to remove the provision in question to allow the statute to be utilized as intended.

Thank you for your consideration.

Sincerely,

Dennis P. Whalen
President

DW:mt