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CITY BAR

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Stephen Berger
Chairman
Commission on Health Care Facilities in the 21st Century
90 Church Street, 13th Floor
New York, NY 10007

David Sandman, Ph.D.
Executive Director
Commission on Health Care Facilities in the 21st Century
90 Church Street, 13th Floor
New York, NY 10007

Re: Legal Concerns Regarding the Commission on Health Care Facilities in the 21st Century

Dear Mr. Berger and Mr. Sandman:

The Committee on Health Law of the New York City Bar Association ("the City Bar") has reviewed the enabling legislation and mission of the Commission on Health Care Facilities in the 21st Century ("the Commission"). The City Bar is concerned that the forthcoming Commission recommendations may have dramatic and disproportionate effects on communities of color in New York City.

According to materials published on the Commission's website and discussed at public meetings, the December recommendations will include possible closure, merger, consolidation, conversion, and restructuring of hospitals, and reallocation of local and statewide resources. The Governor will transmit the recommendations to the legislature by December 5, 2006, and if the recommendations are not rejected in their entirety by both houses of the legislature by December 31, 2006, they become law, and must be implemented by the Commissioner of the Department of Health (DOH) in the next administration.

We are concerned about the procedures established by the Commission, because they do not evidence an attempt to comply with Title VI of federal civil rights laws and are likely to have disproportionate impact on communities of color and poverty, the very communities that already encounter barriers to access to health services. Pursuant to Title VI of the Civil Rights Act of 1964, the state must analyze mechanisms that have disproportionate impact on people of color,

and address them.[1] 42 U.S.C. 2000d; 45 C.F.R. 80.1 et. seq. The legislative history of Title VI makes clear that both intentional and unintentional discrimination in health care systems was a prominent concern for the drafters of the law.[2]

For example, federal regulations explain that in determining the site or location of facilities, the state or any other recipient of federal funds may not make choices "*with the effect of* excluding individuals from, denying them the benefits of, or subjecting them to discrimination...." 45 C.F.R. 80.3(b)(3). The regulations further prohibit recipients of federal funds from utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination, whether directly or through contractual or other arrangements. Therefore, the disproportionate impact that the closure or "right-sizing" of facilities may have on people of color -- particularly absent significant investment in alternative sources of care – must be considered and addressed by the Commission's recommendations.

Racial disparities in access to health care already exist in New York City, and may be exacerbated by the right-sizing envisioned by the Commission. Communities of color experience the effects of disparities in the spatial distribution of services, with hospitals and other care often clustered in high-income neighborhoods, and a dearth of providers in low-income communities of color, such as Central Brooklyn, an area that has recently sustained serious losses in hospitals. A stark illustration of the effects of this spatial distribution is the difference in infant mortality rates –3.7 per thousand in the Upper East Side of Manhattan versus 12.2 in the Brownsville section of Brooklyn.[3]

The Commission's structure raises serious concerns about adverse impact on New York City communities of color and poverty. New York State is split into six regions by the Commission, and despite having 42% of the state's population, New York City is considered only one region. Each region is entitled to representation in the Commission by six regional members, but because all the boroughs are considered a single region, the entire city can be represented by only one-sixth of the regional members.[4] Additionally, because ratings are given to each facility relative to other facilities within the same region, and all of New York City is one region despite the great disparities in wealth and access even within the boroughs, New York City hospitals in minority communities may receive a rating that is artificially low.

The Commission's methodology is similarly problematic, and may result in unfair results for communities of color within New York City. The Commission has created a right-sizing framework by assigning a rating of -1, 0, or +1 to each hospital for six different criteria: (i) service to vulnerable populations; (ii) availability of services; (iii) quality of care; (iv) utilization;

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[1] DOH is a "recipient of federal funds" and thus must comply with Title VI.

[2] David Barton Smith, Health Care Divided: Race and Healing a Nation, pages 96 – 142 (1999).

[3] The October 2005 monograph "Separate and Unequal: Medical Apartheid in New York City" by Bronx Health Reach further examines the disparities in health outcomes in certain neighborhoods in New York City, and explored the link between race and health insurance status, and access to care. In this city of both tremendous wealth and tremendous poverty, Bronx Health Reach found that in Brownsville the infant mortality rate was 12.2 deaths per 1,000 live births, while in Yorkville, the infant mortality rate was only 1.9 per 1,000 live births.

[4] In fact, we are represented by only 4 people, as two of our regional seats have never been appointed.

(v) viability; and (vi) economic impact. Racial disparities in access to care that already affect many underserved communities are not sufficiently addressed in this framework, because the -1, 0, or +1 system allows issues such as financial health of an institution to trump community needs.

Despite federal regulations under Title VI that prohibit "disproportionate adverse impact" discrimination, or conduct that may be facially neutral but will affect minorities more severely, the Commission's methodology disregards the impact that closure of financially distressed hospitals will have on minority communities in New York City. It is easy to imagine hospitals in communities of color that serve vulnerable populations, but score poorly on the "viability" or "utilization," or even "quality of care" factors being slated for closure or down-sizing, despite the fact that these communities face huge disparities in the availability of health care services and facilities.

The City Bar requests that the Berger Commission articulate (1) how it has analyzed barriers to access to care that currently have disproportionate impact on people of color, and (2) how it plans to address racial inequities in spatial distribution, to assure that the December 1, 2006 recommendations will not exacerbate the losses of care that poor communities of color have already suffered. Absent such planning and analysis of Title VI obligations, we strongly suggest that the recommendations should be delayed rather than rushed to effect in the final days of the current state administration.

Very truly yours,

Joyce Tichy