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LUCAS COUNTY
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COMMON PLEAS COURT
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CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

IN THE MATTER OF:	:	Case No. CI 2014-03405
CAPITAL CARE NETWORK OF TOLEDO	:	Judge Duhart
Appellant,	:	
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	**EMERGENCY MOTION TO SUSPEND AND STAY THE ORDER OF THE OHIO DEPARTMENT OF HEALTH FROM WHICH APPELLANT APPEALS AND MEMORANDUM IN SUPPORT**
Appellee.	:	

MOTION

Pursuant to R.C. § 119.12 Appellant hereby moves for an order staying the Adjudication Order issued by the Ohio Department of Health which is the basis of this appeal, on the grounds that if the order is executed, appellant would suffer an unusual hardship. A stay would merely preserve the status quo. Without the stay Appellant would be forced to close its medical business. The effective date of the Adjudication Order is August 12, 2014. Unless this Court grants a stay, Appellant will have to close its business on August 12, 2014. If this Court denies the stay, it would effectively close the last abortion clinic in the Toledo area, making Toledo the largest city in the state without a provider.[1] Appellant therefore requests that the revocation order be suspended until there is a final resolution of this appeal.

[1] *See* CCNT Ex. H, p. 10, *City's Last Abortion Clinic May Close*, The Blade.

MEMORANDUM

I. INTRODUCTION

This is an administrative appeal of the revocation of an Ambulatory Surgical Facility ("ASF") license. 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] As an ASF, Capital Care is required by O.R.C. § 3702.303 to maintain a written transfer agreement (WTA) with a local hospital to establish a procedure for the safe and immediate transfer of patients from the facility to a hospital. To fulfill this requirement, Capital Care owner Terrie Hubbard entered into a WTA with University of Michigan Hospital in Ann Arbor, Michigan on January 20, 2014. Hubbard TR. 46; CCNT Ex. C.

A. Administrative Procedures

In August 2012, Terrie Hubbard, on behalf of Capital Care entered into a written transfer agreement with University of Toledo Hospital as required by OAC § 3701-83-19(E). Hubbard TR. 146; CCNT Ex. A. University of Toledo Hospital notified Capital Care and ODH in April 2013 that it did not intend to renew the written transfer agreement when it expired on July 31, 2013. CCNT Ex. B; Hubbard TR. 147. 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.

When the University of Toledo WTA expired on July 31, Ms. Hubbard was in negotiations with OhioHealth to secure a WTA, but had not yet reached an agreement. Hubbard TR. 153. ODH issued a letter to Ms. Hubbard proposing to revoke and refuse to renew Capital

[2] All references are to the transcript and exhibits contained in the administrative record below.

Care's ASF license for failure to comply with O.A.C. § 3701-83-19(E). State Ex. D. Ms. Hubbard's attorney immediately requested a hearing before ODH on the matter. State Ex. E. A hearing was scheduled but immediately continued by motion of the Director of Health. State Ex. F.

In September 2013, O.R.C. § 3702.303 codifying the written transfer agreement regulation went into effect, adding a requirement that the transfer hospital be "local" and prohibiting all public hospitals from entering into written transfer agreements with abortion providers. When Ms. Hubbard learned of the new requirement that the transfer hospital be "local," she narrowed her search to hospitals within 50-75 miles of the Capital Care facility. Hubbard TR. 156. 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.

On February 18, 2014, the Director of Health issued a second proposed order revoking and refusing to renew Capital Care's ASF license, alleging that Capital Care's WTA does not meet the requirements of O.R.C. § 3702.303 because University of Michigan Hospital is not "local". State Ex. H. A hearing on the matter was held before a hearing examiner on March 26, 2014, wherein Capital Care presented reliable, substantial, and probative evidence that its WTA meets the requirements of the statute, and that the statute is unconstitutional as applied to Capital Care. On June 12, 2014, the hearing examiner issued a report and recommendation upholding the director's decision to revoke Capital Care's license. Capital Care filed objections. On July 29, 2014, the Director of Health issued a final adjudication order approving the hearing examiner's decision to refuse to renew and to revoke Capital Care's license. The order is set to become effective on August 12, 2014.

B. Grounds for Revocation of the License

ODH has proposed to revoke Capital Care's ASF license because it alleges that the WTA with the University of Michigan Hospital does not meet the requirements of O.R.C. § 3702.303. However, no hospitals in the Toledo area will agree to enter into a WTA with Capital Care because abortions are performed at the facility.

C. The Need for a Stay of the Adjudication Order

If the stay is not granted Appellant will suffer an unusual hardship – that is the facility, which has operated without needing to transfer a patient for more than eight years, will have to close during the appeal process.

I. ARGUMENT

The purpose of a stay order is to maintain the *status quo* until a full hearing on plaintiffs' claims can be heard. *See Yudin v. Knight Industries, Corp.*, 109 Ohio App. 3d 437, 439, 672 N.E.2d 265 (6th Dist.1996). Capital Care is seeking merely to keep the *status quo* as it has been since this litigation began in August 2013 when ODH first proposed to not renew Capital Care's license. The administrative process has taken almost a year[3] during which time the facility has remained opened.

Ohio Revised Code § 119.12 dictates that a court should suspend an agency order that is the subject of an appeal if the appellant demonstrates that an unusual hardship will result if the agency's order is executed. The court is not limited in the factors to be considered in granting or denying suspension of the agency order. Courts have identified four factors that are of particular importance in the decision:

1. The substantial likelihood that the moving party will ultimately prevail on the merits of the appeal;

[3] ODH took over seven months to schedule a hearing and four months to issue a final decision. ODH's unhurried pace supports maintaining the *status quo*.

2. The substantial threat of irreparable harm to the moving party by denial of the stay;

3. Whether the issuance of a stay will cause harm to others; and

4. Whether issuance of the stay would serve the public interest.

Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp., 753 N.E.2d 864, 868, 753 N.E.2d 864 (10th Dist. 2001) citing *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm.*, 337 F.2d 221 (6th Cir. 1964). See also *Lake County Board of MRDD v. SERB*, Franklin C.P. No. 92CVF02-1504, 1992 WL 699882 (Apr. 14, 1992) (stay granted to maintain the status quo); *Hudson Township Trustees v. SERB*, Summit C.P. CV 86 3 0903, 1986 WL 295943 (May 30, 1986) (stay granted because it was in the best interest of the parties).

A. Likelihood of Success on the Merits

The first factor, likelihood of success, is of limited importance in this case. When the law has not been developed, "whether or not the moving party will prevail on the merits is not a particularly helpful factor since a motion for a stay comes at a time when the merits of an appeal have not been fully examined." *Lake County*, 1992 WL 699882 at *69; See also, *Hudson Township*, 1986 WL 295943 at *1.

Nevertheless, Appellant can show likelihood of success on the merits because O.R.C. § 3702.303 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. In addition, Appellant is likely to succeed on the merits because the Director's decision is not supported by reliable, probative, and substantial evidence. O.R.C. § 119.12. "[A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon

improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993).

1. **The Written Transfer Agreement Requirement is Unconstitutional as Applied to Capital Care Network.**

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.").

Due Process requires that laws must not be excessively vague. 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 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 O.R.C. §3702.303, ODH has no authority to renew Capital Care's license without the approval of a private entity. Thus, the written transfer agreement requirement as applied to Capital Care is an unconstitutional delegation of the licensing authority.

Finally, H.B. 59, the bill under which O.R.C. § 3702.303 was passed, 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." [4] 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[5] 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.

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[4] 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.).

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

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

Even if O.R.C. § 3702.303 were not unconstitutional, Capital Care would still be likely to succeed on the merits because it presented reliable and substantial evidence that it has in fact complied with the requirements of the statute. Ohio Revised Code § 3702.303 requires that all ambulatory surgical facilities maintain "a written transfer agreement with a local hospital[.]" The purpose of the written transfer agreement is to specify "an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise." O.R.C. § 3702.303. The Director of Health approved the hearing officer's erroneous conclusion that Capital Care's written transfer agreement with UMHS does not meet the requirements of O.R.C. § 3702.303(A) because he does not consider University of Michigan Hospital to be a "local" hospital with respect to the Capital Care facility.

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 Director erroneously adopted the hearing officer's conclusion that this rule was reasonable and consistent with §3702.303. Adjudication Order, p. 2, adopting 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 Director's decision is clearly in error and should be reversed.

The Director also erroneously adopted the hearing examiner's conclusion that Capital Care's written transfer agreement with University of Michigan Health System "does not specify an effective procedure for the safe and immediate transfer of patients" to a hospital as required by O.R.C. § 3702.303. Report & Recommendation, p. 10. The Director'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; Report & Recommendation, p. 5. There is no risk that the patient will not be treated at the hospital because federal law requires the hospital to accept and treat every emergency patient until they are stabilized before sending the patient to another hospital. 42 U.S.C. § 1395dd (b) (commonly referred to as EMTALA); *Moses v. Providence Hospital and Medical Centers, Inc.*, 561 F.3d 573, 583 (6th Cir. 2009). Because Capital Care has demonstrated that it can safely transfer patients in a timely manner using its written transfer agreement with UMHS, the 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." Report & Recommendation, p. 5. This finding of fact was

erroneously adopted by the Director of Health. Revised Code § 3702.303 does not require ASFs and hospitals to specify the transfer procedures in the written transfer agreement. In addition, of the twenty-two written transfer agreements in the record, none specifically define the actual transfer mechanism in the agreement. Most 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.

Therefore, the Department of Health's decision to revoke Capital Care's ASF license should be stayed during the pendency of these proceedings because Capital Care is likely to succeed on the merits.

A. Capital Care Faces a Substantial Threat of Irreparable Harm Unless a Stay is Granted.

In addition to likelihood of success on the merits, Capital Care can also show that it would be irreparably harmed by ODH's decision to revoke its license unless a stay is granted. Irreparable harm is injury where there is no plain, adequate and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete. *City of Cleveland v. Cleveland Electric Illuminating Company* (8th Dist 1996), 115 Ohio App.3d 1, 13. Irreparable harm is best avoided by maintaining the *status quo*. *Lake County*, 1992 WL 699882 at *70. The threshold for demonstrating irreparable harm is relatively low. Even slight harm to appellant weighs in favor of granting a stay when the purpose of the stay is to maintain the *status quo*. *Hudson Township*, 1986 WL 295943 at *1. In *Hudson Township* the employer alleged that it would suffer harm by posting a notice that SERB had determined the employer violated the law. The Court held while this was not irreparable harm, it was "harm nonetheless and weighs slightly in favor of granting the stay." *Id.* In *Lake County* the Court found that a past history of labor unrest, including strikes, was enough to show irreparable harm. 1992 WL 699882 at *70.

Ohio courts have granted stays of ODH orders against abortion clinics to preserve the *status quo* during the pendency of the proceedings on the basis that no potential harm to the public was present after the order was issued that was not present prior to the order. Prior to applying for an ASF license after the ASF laws were passed, two abortion facilities appealed ODH's adjudication order finding they needed to be licensed. The Franklin County common pleas court in those cases granted a stay during the appeals. *See*, *Founder's Women's Health v. Ohio Department of Health* (Franklin Cty. C.P. 2000), Case No. 00CVF05-4276 (copy attached); *Women's Med Centers v. Ohio Department of Health* (Franklin Cty. C.P. 2000), No. 00CVF05-4347 (copy attached). The Montgomery County common pleas court also granted a stay of the

adjudication order appealed by WMC Dayton in 2008 (copy attached).[6] The Hamilton County common pleas court recently granted a stay to Lebanon Road Surgery Center during its appeal of an ODH order revoking its ASF license for lack of a written transfer agreement, holding that closure would cause irreparable harm to the facility and its patients. *Lebanon Road Surgery Center v. Ohio Department of Health* (Hamilton Cty. C.P. 2014), Case No. A1400502 (copy attached).

A physician's loss of his medical practice, his sole means of support, has also been found to constitute irreparable harm sufficient to enjoin a hospital from breaching a non-compete contract. *Robert W. Clark, M.D., Inc. v. Mt. Carmel Health* (Franklin Cty. 1997). 124 Ohio App.3d 308, 317. Irreparable harm may also result when a business is forced to abruptly stop operating. *Matter of Columbus Skyline Securities, Inc.*, 10th Dist. Franklin No. 93AP-790, 1994 WL 198780, *7 (May 19, 1994) (*rev'd on other grounds*); *Pentco v. Moody*, 474 F. Supp. 1001, 1006 (S.D. Ohio 1978); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

Without a stay Capital Care will be forced to close its doors. Leaving the Toledo area with no clinic to perform abortions will cause irreparable harm to Capital Care and its patients. Therefore, a stay is the appropriate solution and should be granted.

B. There Is No Potential Harm to ODH or the Public Should the Stay Be Granted

In addition, no harm will be caused by granting the stay order. Where a stay is granted for the purpose of maintaining the *status quo*, there is little risk of potential harm to the public. *See Lake County*, 1992 WL 699882 at *70; *Hudson Township*, 1986 WL 295943 at *1. Furthermore, any general concern for public safety is balanced out when a facility has in place procedures to protect patients from harm. In *Lebanon Road Surgery Center v. Ohio Department of Health*, the court stayed an ODH order revoking an abortion provider's ASF license for lack

[6] This case was settled shortly after the stay was granted.

of a written transfer agreement in part because ODH failed to show "an immediate and particularized likelihood of harm." Case No. A1400502, p. 2 (copy attached). In addition, the facility had in place procedures to protect patients in emergency situations. *Id.*

Here, a stay would merely preserve the *status quo* and thus would pose little risk of harm to the public. *See Lake County*, 1992 WL 699882 at *70; *Hudson Township*, 1986 WL 295943 at *1. 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. Capital Care and its physicians have an excellent record for patient care. There is no reason to believe that circumstances would change now merely because the administrative proceedings have ended.

In addition, just as in *Lebanon Road Surgery Center*, the Department of Health cannot show "an immediate and particularized likelihood of harm." ODH can show only a general concern for public safety of the community. This general concern is balanced out by the safety precautions that Capital Care has put in place to assure that a patient can be safely and immediately transferred to a hospital in the event of an emergency. As described above, Capital Care has an agreement in place for the rare instances when a transfer is necessary. This agreement satisfies the purpose of the written transfer agreement requirement. Capital Care has also established procedures for transferring patients to a hospital by ambulance in the event that the patient needed more immediate treatment. The Court need not be concerned that continued operation of Capital Care will endanger the health and safety of any of its patients. As there are no real health or safety concerns raised by granting a stay, ODH will not be harmed and the stay should be granted.

C. Issuance of the Stay Would Serve the Public Interest

Finally, the public interest will be served by granting the stay. Granting the stay would cause no harm to the public because it would merely maintain the *status quo*. *Lake County*, 1992 WL 699882 at *70; *Hudson Township*, 1986 WL 295943 at *1. Furthermore, granting the stay is in the public's best interest because access to abortion services is a necessary and important public service. *Jane Roe v. Simon Leis*, 2001 WL 1842459, (S.D. Ohio 2001) (Order granting injunction to transfer inmate from jail to abortion clinic); *Jane Doe v. John Barron*, 92 F.Supp.2d 694, 697 (S.D. Ohio 1999) (same).

Capital Care is the only facility in the Toledo area to perform abortions for women.[7] Thousands of women depend upon Capital Care for safe pregnancy termination services each year, however if the state forces Capital Care to close its doors, women in the Toledo area will have to cross the border into Michigan or travel hours away to Cleveland or Columbus. Dr. Harley Blank testified at the administrative hearing about the catastrophic consequences to women when they do not have access to safe and legal abortion. Blank TR. 131. During the time when abortion was illegal in Ohio, women who could afford to do so travelled to New York, Mexico, or Great Britain to obtain abortions. *Id.* at 132. However, those that could not afford to travel often resorted to illegal abortions, risking infection, bleeding, perforation of the uterus, and death. *Id.* at 133. As the state continues its relentless efforts to shut down each and every abortion provider in Ohio, the risk to women's health becomes greater. Therefore, it is in the public interest to grant the stay and allow Toledo's last abortion provider to remain open during the pendency of the proceedings.

[7] CCNT Ex. H, p. 10, *City's Last Abortion Clinic May Close*, The Blade.

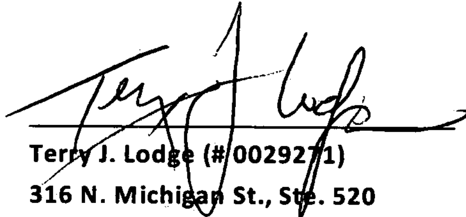
I. CONCLUSION

For the foregoing reasons, appellant Capital Care has shown that a stay is necessary to protect it and its patients while this court fully considers the merits of this case. Maintaining the *status quo* will not harm ODH or the public. Therefore, Capital Care respectfully requests that this stay be granted and the Director's order revoking Capital Care's license to be suspended indefinitely.

II. ORAL ARGUMENT REQUESTED

Appellant requests oral argument given the important issues raised in this Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served August 6, 2014 by U.S. Mail first class, postage prepaid and email to:

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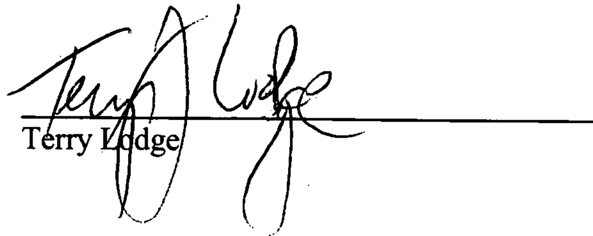

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