



January 21, 2022

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Directors Allen and Vandehey,

This letter provides comments to the Technical Advisory Group (“TAG”) guidance materials dated January 12, 2022 (the “Guidance”). To summarize, the Guidance addresses, among other issues, (a) the concept of “essential services” and (b) how a health care entity will determine if a transaction will significantly reduce essential services. For how a health care entity will determine if a transaction will significantly reduce essential services, the Guidance draws from considerations set forth in OAR 409-070-0010(3) and incorporates a variety of measurement principles for assessing whether a reduction is “significant.” The Guidance also provides that (a) a health care entity must evaluate whether a significant reduction or elimination of essential services will occur 12 months after the effective date of the transaction and (b) changes in essential services that occur within the 12 months after the transaction effective date are presumed to result from the transaction.

PeaceHealth has the following concerns with the approach outlined in the Guidance.

1. Attributing Causation to Transactions.

The Guidance attributes far too much causation to a transaction for changes in essential services. A transaction could be one factor for a change, perhaps even an important factor, but rarely the sole cause to the extent the Guidance seems to suggest. The following are just some examples:

- a. Providers might retire without available replacements.
- b. Particularly for non-clinical services, community partners (such as for school-based programs highlighted in the Guidance) may decide to reprioritize projects.
- c. Local governments may adjust public transportation in a way that increases travel times.

All of the above are largely outside of the control of the health care entity and not the product of the transaction itself. The Guidance overlooks that important consideration. We ask that the Guidance be

revised so that the test relates to whether the transaction directly causes a significant reduction or elimination of essential services.

2. 12-Month Measurement Period.

The Guidance's description of the 12-month measurement period is ambiguous and too difficult for a health care entity to apply when assessing whether an Oregon Health Authority ("OHA") filing is appropriate. As an example, it is not clear what the OHA intends for a circumstance in which a health care entity (i) makes a good faith estimate at the time of closing that the transaction will not significantly reduce or eliminate essential services during the 12-month post-closing period, but (ii) due to provider retirements there is a significant reduction say in month 10. The Guidance does not address what the health care entity is expected to do at that point.

The above ambiguity makes it almost impossible for health care entities to effectively evaluate whether filing is appropriate. We ask that the Guidance be revised to state that a health care entity should make a good faith determination regarding a transaction's effects on essential services as of the date of closing. The Oregon Health Authority would then respect that determination short of evidence that the health care entity acted in bad faith.

Thank you for the opportunity to participate in the TAG and to provide comments on the draft Guidance.

Respectfully,

/s/

Tom Karnes
Assistant General Counsel