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fol. 2 (8)

Limitations on day-to-day operations do not negate the fact that [redacted] will consolidate with [redacted] + control it. State approval & operations as separate entities does not affect NSR [redacted] rules & need to file.

[redacted]

[redacted]

[redacted]

February 19, 1993

Victor L. Cohen
Premerger Notification Office
6th & Pennsylvania Avenue
Federal Trade Commission
Washington, D.C. 20580

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PREMERGER NOTIFICATION OFFICE

Dear Victor:

The purpose of this letter is to describe the transaction which we discussed orally last week in order to determine whether Hart-Scott-Rodino clearance is required.

The transaction involves two non-competing, not-for-profit [redacted] in a major metropolitan area. The smaller [redacted] (the [redacted]) is a primary and secondary [redacted] without any [redacted]. It is financially impaired, which has restricted the [redacted] it can provide to its community. The larger [redacted] (the [redacted]) is a well established [redacted] which provides a substantial amount of [redacted] as well as primary and secondary [redacted]. It is affiliated with a [redacted].

The leadership of the [redacted] has approached the [redacted] and has asked it to become what under state law can be described as the "sponsor" of the [redacted]. As sponsor, the [redacted] would be expected to provide [redacted] and administrative support to the [redacted] and to assist the [redacted] in obtaining funds to maintain and develop its [redacted] and facilities.

Another primary purpose of the sponsoring arrangement will be to facilitate [redacted] education. Thus, the [redacted] on the

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[REDACTED] could become members of the faculty of the affiliated [REDACTED] school. This is expected to attract higher quality [REDACTED] to become members of the [REDACTED], with a corresponding improvement in [REDACTED] for the community served by the [REDACTED]

The sponsorship arrangement contemplated by the arrangement at issue would be effected by amendments to the [REDACTED] By-laws, which would give the sponsor the right to appoint or remove natural persons (individuals) as the "members" of the [REDACTED] (with or without cause). The "members" would have the authority under the By-laws to select the Board of Trustees of the [REDACTED]

Applicable [REDACTED] regulations requiring state approvals for certain changes of control expressly recognize the distinction between natural persons and corporations becoming members. Under these regulations, control is "presumed to exist if any person . . . is a member of a not-for-profit corporation which member is other than a natural person." (Emphasis added.) Thus, state approval would be required if the [REDACTED] itself became the sole member, but by definition the appointment of natural persons as members with authority to appoint trustees is not an appointment of a controlling person which will require this approval.

The recognized distinction between individuals and corporations as members seems appropriate. The individual members selected by the sponsor, and the members of the Board of Trustees selected by these members, would be selected in their individual capacity, rather than as representatives of the "sponsoring" [REDACTED]. The [REDACTED] Board of Trustees, not the [REDACTED] nor the members it selects, would be responsible for operating the [REDACTED]. Indeed, under general provisions of fiduciary law and state regulatory requirements, the Board of Trustees has a fiduciary responsibility to the [REDACTED]. The majority of the trustees initially selected under the proposed sponsorship is likely to consist of current [REDACTED] Board members. In the future additional persons from the community who are dedicated to serving the [REDACTED] will also be selected to the [REDACTED] Board of Trustees.

The proposed changes to the By-laws would not change the [REDACTED]. It would continue as a separate [REDACTED] for the community it serves and its business and operations would not be merged, consolidated or combined with those of the [REDACTED] although the [REDACTED] would be

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expected to provide administrative support when such arrangements would result in efficiencies.

In the future, transactions between the [redacted] and the [redacted] would be conducted on an "arms-length" basis. As an example, as part of the sponsorship arrangement, the [redacted] intends to loan funds to the [redacted] to permit it to improve its facilities and programs. This loan, which would not otherwise be available to the [redacted] from normal banking sources, would be pursuant to a normal arms-length loan agreement.

To underscore the arms-length nature of the proposed sponsorship relationship and to prevent either the sponsor or the members it selects from exercising control over the [redacted] amendments to the By-laws which create the sponsorship arrangement will also restrict and limit sponsor and member influence over [redacted] operations.

These amendments to the By-laws will specifically prohibit either the sponsor or the member from exercising authority over: (1) the appointment or dismissal of [redacted] management-level employees and [redacted] staff; (2) approval of [redacted] operating and capital budgets; (3) adoption or approval or [redacted] operating policies or procedures; (4) approval of certificate of need applications filed by or on behalf of the [redacted]; (5) approval of [redacted] debt necessary to finance the cost of compliance with operational or physical plant standards required by law; (6) approval of [redacted] contracts for management or for clinical services; and (7) approval of settlements of administrative proceedings or litigation to which the [redacted] is a party, except that members may have the authority to approve settlements of litigation that exceed insurance coverage or any applicable self-insurance fund.

Because the proposed "sponsoring arrangement" involves the appointment of natural persons as members, coupled with the imposition of the restrictions on the sponsor's and members' authority described above, and because there will be no merger, consolidation or combination of the business and operations of the two [redacted] the state has advised the proposed sponsoring organization that the arrangement will not result in a new "controlling" person under state law amounting to a change in the "operator" of the [redacted]. As a consequence, a state certificate of need would not be required for the transaction.

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Of course, both the [redacted] and the state recognize that if the [redacted] itself were to become the sole member of the [redacted] or if the nature of the arrangement between the [redacted] should change in the future so that their business and operations were to become combined, and/or if the [redacted] were to obtain control over the operations of the [redacted] then the state would expect the [redacted] to obtain a certificate of need or other required approvals before making any such change. The [redacted] would, of course, comply. If that were to occur we would expect to file for Hart-Scott clearance at the same time.

Please let me know your reaction to this description. If you have any other questions, I will be happy to try and answer them.

Sincerely,

[redacted signature]

3/9/93 The decision on the top of page 1 is based on the major factors that ① the sponsor can both appoint and remove the natural person members of [redacted] ② as a result the sponsor has the power to select the trustees it wants and ③ while the sponsor and members have limits on their power over [redacted], the trustees do not. As in the past, the PNN Office deems such a change in control of non-profits as an asset acquisition.

PJSmith