



DEPARTMENT OF JUSTICE
Antitrust Division

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Richard J. Webb, Esquire
McCarter & English
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652

Dear Mr. Webb:

This letter responds to your request on behalf of the Hospice Network of New Jersey, Inc. (hereafter "Hospice Network") for a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, concerning Hospice Network's proposal to form a network of Medicare certified hospice care providers in the state of New Jersey. For the reasons set forth below, the Department has no present intention to challenge the proposal.

You report that the Hospice Network is a not-for-profit corporation within the meaning of Section 501(c)(3) of the Internal Revenue Code. The member hospices coordinate the delivery of care to persons who are terminally ill. Services are usually provided at the home of the patient and occasionally at a local acute care facility. Hospice Network members must be Medicare certified. That is, their services and facilities must meet requirements for Medicare certification as specified in the federal Social Security Act. The Network's by-laws provide that any Medicare certified hospice provider is eligible for membership, so long as it has demonstrated a leadership role in hospice care. Members are not restricted from affiliating with other organizations or contracting individually with third party payers.

There are seven initial members of the Hospice Network. They are Cumberland County Hospice, Inc., Vineland, New Jersey (serving Cumberland County); Samaritan Hospice, Inc., Moorestown, New Jersey (serving Burlington and Camden Counties); Hunterdon Hospice, Inc., Flemington, New Jersey (serving Hunterdon County); Center for Hope Hospice, Inc., Linden, New Jersey (serving Union County); Hospice of Morris County, Inc., Morristown, New Jersey (serving Morris County); Valley Home Care, Inc. (d/b/a/ Valley Hospice), Ridgewood, New Jersey (serving Bergen County); and The Hospice, Inc., Glen Ridge, New Jersey (serving Essex and Hudson County). You state that the service area of each initial Hospice Network member is local; the boundaries of local geographic markets are roughly defined by New Jersey county boundaries. Each member is in a different county, so that the initial members of the Hospice Network are not direct competitors. Although you state that the Hospice Network will not add new members in markets where existing members already operate, competition among members may develop in the future should initial or subsequent members expand the geographic scope of their services.

The largest potential customers of the Hospice Network are third party payers active in the New Jersey health care market. It is planned that each member of the Hospice Network will provide to a representative of the Hospice Network a list of prices at which the member would be willing to provide the various levels of hospice care. The Hospice Network representative with access to this information will be an independent agent, not employed by any Hospice Network member, and no Hospice Network member will have access to the pricing information provided by any other member. The Hospice Network representative will then provide this information to and solicit contracts from third party payers. If a contract offer is received from a third party payer, the representative will communicate the offer to Hospice Network members. Each member will then elect whether to participate in the contract. This decision is to be made independently by each member, without influence from any other member. Member participation in the Hospice Network is non-exclusive, and members will be free to negotiate and contract individually with third party payers who have offered contracts through the Hospice Network, or who have chosen not to do so.

With regard to non-price terms, such as utilization review, quality improvement plans, peer review criteria, grievance procedures, and referral protocols, the Hospice Network will be responsible for negotiation. Third party payers unable to reach agreement with the Hospice Network on any non-price terms will be free to negotiate directly with individual Hospice Network members.

The Hospice Network has rejected, at least for the time being, development of a fully integrated joint venture. The Hospice Network nevertheless plans to immediately pursue operational integration to the extent feasible, e.g., common marketing, quality improvement, in-service training.

Although Statement 9 of Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, issued by the U.S. Department of Justice and the Federal Trade Commission on September 27, 1994, specifically relates to multiprovider networks, the analytical framework described in the statement is useful for analyzing the single-provider Hospice Network. Under Statement 9, a threshold question is whether the network is comprised of member entities that are competitors. Where members are not competitors because each is in a geographically distinct local market, joint marketing and other cooperative arrangements among the members are unlikely to have an anticompetitive effect in any local market. Whether members are competitors may be determined by the product and geographic market definition analysis described in Statement 9.

If the network includes direct competitors, they must either avoid joint pricing or joint agreements on other significant terms of competition, or they must assure that such joint decisions are necessarily related to significant economic integration among them. Substantial financial risk-sharing among competitors demonstrates such integration, and under those circumstances we would analyze the competitive effects of the network under the rule of reason as described in Statement 9.

You have represented that members of the Hospice Network operate in distinct geographic areas and are not direct competitors, because hospice services are provided in local markets. This is confirmed by interviews we conducted with payers. Given these market facts, joint activities of the Hospice Network members are not likely to cause competitive harm and do not present antitrust problems.

In the future, should Hospice Network members expand their areas of operation and become competitors in local markets, decisions about prices and other significant terms of competition will have to be made unilaterally (without explicit or tacit agreements among the members and without use of a common negotiating agent), or such decisions will have to be related to significant economic integration among the members. According to the Hospice Network's proposal, its members intend to make all pricing decisions independently, and precautions have been taken to ensure that pricing information will not be shared between or among the members. However, the Hospice Network's proposal also contemplates using an agent to negotiate jointly contract provisions concerning utilization review and other matters that may have significant competitive implications. Consequently, if Hospice Network members become competitors, such negotiation by the Network's agent might require the members to undertake economic integration or to take other precautions to avoid anticompetitive problems.^{1/}

For the reasons explained above, the Department has no intention of challenging the proposed Hospice Network. In accordance with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if the Hospice Network, once formed, proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made publicly available immediately. In addition, any supporting data that you have not identified as confidential business information under Paragraph 10(c) of the Business Review Procedure also will be made publicly available 30 days from the date of this letter.

Sincerely,

/S/

Anne K. Bingaman

¹ See business review letter issued November 3, 1995, to Georgia Preferred Podiatric Medical Association.