

June 7, 2024

Oregon Health & Science University
Attn: Board of Directors
3225 SW Pavilion Loop MC: L101
Portland, OR 9723
ohsuboard@ohsu.edu

Re: OHSU-Legacy Health Merger

Dear OHSU Board Members:

As a regular, grateful visitor to the Casey Eye Institute and retired Oregon government lawyer, I read with interest the OHSU-Legacy “Definitive Agreement Summary of Terms” that the parties recently disclosed. As explained further below, I have three significant concerns about this agreement and the process leading to it:

1. OHSU’s statutory mission does not extend to the operation of a hospital and associated clinics in the State of Washington such as Legacy Salmon Creek.
2. Contrary to the Definitive Agreement’s assumptions, OHSU’s new Legacy Health employees probably will be eligible for Oregon PERS¹ membership as soon as the deal closes.
3. Inking a binding agreement without seeking public comment on a near-final draft or disclosing a viable business plan violates OHSU’s commitment to its proclaimed “value” of transparency.

1. OHSU’s statutory health care mission is limited to Oregon.

As a creature of statute, OHSU only has “such power and authority as has been conferred upon it by its organic legislation.” *Ochoco Const. v. LCDC*, 295 Or. 422, 426 (1983) (stating general principle). In OHSU’s case, its statutory missions (and related powers) are found in Oregon Revised Statutes (ORS) chapter 353. Under those laws, OHSU’s missions do not extend to the operation of a hospital and associated clinics in the State of Washington.

¹ As used in this letter, “Oregon PERS” or “PERS” refers generally to the state’s Public Employee Retirement System and Oregon Public Service Retirement Plan under ORS chapters 238 and 238A.

Several statutes make clear that OHSU's missions are limited to the State of Oregon. Indeed, the statute that created OHSU, ORS 353.020, states in part that OHSU "shall be an independent public corporation with statewide purposes and missions."

And under ORS 353.030(3), OHSU "is designated to carry out" certain "public purposes and missions on behalf of the State of Oregon." Insofar as health care is concerned, these are:

- Providing "inpatient and outpatient clinical care and health care delivery systems throughout the state," and
- Continuing "a commitment to provide health care to the underserved patient population of Oregon."

In short, OHSU is supposed to provide health care in Oregon for Oregonians – not in Washington for Washingtonians.

While ORS 353.050 provides that the OHSU Board may "either within or outside the state" establish and participate in business structures for health care, it may do so only if the university or the board determines that such a business "is necessary or appropriate to carry out the university's missions and goals." I do not believe that the OHSU Board can reasonably make that determination with respect to Legacy Salmon Creek. Operating a hospital and associated clinics in Washington is neither necessary nor appropriate for OHSU's mission to provide medical care in Oregon.

2. Contrary to the Definitive Agreement's assumptions, under applicable Oregon case law, Legacy Health employees probably will be eligible for Oregon PERS membership as soon as the deal closes.

The Definitive Agreement Summary states that, upon closing, all Legacy Health employees "will become public employees of the State of Oregon." Summary at 7(a). This status will exist even though those employees nominally will continue to work for a Legacy Health 501(c)(3) corporation. The Definitive Agreement Summary further provides that the OHSU Board will evaluate, apparently at its own pace, "a single compensation system and employee benefits across all combined system entities." Summary at 7(b)(iv). This implies an assumption by OHSU that its new "State of Oregon employees" will not be eligible for participation in Oregon PERS unless and until OHSU decides to make them eligible. Unfortunately, that assumption likely is baseless.

ORS 353.250 gives OHSU the authority to “offer to its employees, in addition to the Public Employees Retirement System, alternative retirement programs.” Under that statute, an OHSU employee – not OHSU – gets to choose the retirement program for that individual employee.

Nevertheless, OHSU apparently believes that its new Legacy Health employees will not be able to choose PERS as their retirement plan. Instead, OHSU seems to think that nominal employment by a Legacy Health 501(c)(3) corporation precludes any PERS eligibility. Due to a 40-year-old Oregon appellate court decision, however, that assessment likely is incorrect.

In *State ex rel PERB v. City of Portland*, 69 Or. App. 117, rev. den., 298 Or. 68 (1984), the Oregon Court of Appeals concluded that a non-profit corporation subject to the control of a city had an “alter ego relationship” with and was an “instrumentality” of the city. This was the case even though the non-profit was nominally unattached to the city government, and the employees were on the non-profit’s payroll rather than the city’s. Accordingly, the court held that the non-profit’s employees were employees of the city for PERS purposes. Under this holding, OHSU’s Legacy Health employees should be eligible for PERS participation (at their election) as soon as the deal closes.²

3. Inking a binding agreement without seeking public comment on a near-final draft or disclosing a viable business plan violates OHSU’s professed commitment to its “value” of transparency.

OHSU’s website proudly proclaims its “Vision, Mission and Values,” including this value:

Transparency is the foundation on which trust grows and develops, and as such is essential to everything we do — including collaboration, a cornerstone of OHSU strategy. Transparency builds credibility — and, over time, a sense of institutional integrity — by creating clarity around key facts in many areas from clinical outcomes to financial and other performance data. This can be uncomfortable because transparency can also reveal areas of vulnerability, but it

² The effective date of a Legacy Health employee’s PERS membership likely also will depend on any applicable statutory waiting period, hourly service requirements, and any necessary collective bargaining agreement (CBA) amendments. Many, but not all, Legacy Health 501(c)(3) employees are subject to CBAs with retirement clauses. The interaction of those CBAs and OHSU’s obligations as a public employer under ORS chapters 238 and 238A (or other statutes such as the Public Employee Collective Bargaining Act) is beyond the scope of this letter.

is necessary to inspire public trust, to meet the needs of those we serve, and to fulfill our missions. There is no trust without transparency.

<https://www.ohsu.edu/about/ohsu-vision-mission-and-values>.

I am confident that interested stakeholders will have comments about the “Definitive Agreement” that could have improved the final product if only OHSU had decided to practice what it preaches. The fact that the Legacy discussions were delicate, or that many comments likely would have been self-serving, is beside the point. The potential issues I identify above are examples of where public input may have been beneficial. The citizens and political leaders of Oregon should have had a chance to weigh in on a near-final draft of the agreement’s terms before it was finalized.

Moreover, I hope that OHSU has a detailed business plan for this merger. Among other items, such a plan would explain how OHSU (a) expects to cover not only its own operating losses, but also Legacy’s more substantial shortfalls; (b) generate enough additional revenue to pay off \$1 billion (plus interest) in merger-related revenue bonds; and (c) limit increases in patients’ bills due to reduced competition.³ That plan would contain measurable metrics instead of happy talk phrases like “economies of scale” and “energizing healthcare.” OHSU leadership should be publicly accountable in the short term for the quality of their initial analysis and in the longer term as to whether the merged OHSU-Legacy is hitting its financial benchmarks.

The people of Oregon own OHSU. An institution truly committed to its values would let those owners see and comment on its detailed business case for this “bet the farm” merger. As OHSU says, “There is no trust without transparency.”

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³ Today’s Wall Street Journal fortuitously has a timely article, “As Hospitals Grow, So Does Your Bill,” which includes this sobering assessment:

Hospital executives argue mergers lead to improved efficiency and better outcomes. But after years of consolidation between hospitals, most areas are dominated by a few large players. That led to higher prices and no significant improvements in patient outcomes.

WSJ, June 7, 2024, B10.

4. Caveats

The foregoing observations are just idle old guy musings – not legal advice. You should confer with your own lawyers with regard to any legal issue discussed above.

Thank you for your public service.

Sincerely,

A handwritten signature in black ink that reads "Joseph T. McNaught". The signature is written in a cursive, slightly slanted style.

Joseph T. McNaught
5400 SW Wichita Street
Tualatin, Oregon 97062