

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**ALAMEDA COUNTY MEDICAL
CENTER,**

et al.

Plaintiffs,

v.

**THE HONORABLE MICHAEL O.
LEAVITT, in his official capacity as
Secretary, United States Department of
Health and Human Services,**

et al.

Defendants.

Civil Action No.

DECLARATION OF BRUCE SCHROFFEL

I, Bruce Schroffel, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am President and Chief Executive Officer of University of Colorado Hospital Authority ("UCH"). I submit this declaration in support of Plaintiffs' complaint and motion for a preliminary injunction in the above-referenced action against Defendants.

2. I am of legal age and competent to testify. This declaration is made on personal knowledge based on information contained in UCH's files upon which I normally rely, publicly available information, and other factual matters known to me.

3. I have served as President and Chief Executive Officer of UCH since January 17, 2006.

4. In my capacity as President and Chief Executive Officer, I am responsible for all aspects of UCH's operations and finances, including participation in the Colorado Medicaid program and payments received thereunder.

5. UCH, located in Aurora, Colorado, is a "body corporate and political subdivision" of the State of Colorado, pursuant to state law. Colorado Revised Statutes § 23-21-503(1).

6. UCH has served since 1921 as a main teaching hospital for the University of Colorado, a component of the State government, and is one of two academic medical centers in the Rocky Mountain region.

7. By state statute, UCH's mission is "the operation of university hospital as a state of the art teaching and research hospital providing comprehensive medical care, including tertiary care, and patient care of limited availability." State statute also requires that UCH provide space and facilities as necessary for the operation of the clinical programs of the University of Colorado's health sciences schools and that UCH provide medical care to those eligible for payment assistance through any program for the benefit of the medically indigent. Colorado Revised Statutes § 23-21-504(1).

8. UCH is the Rocky Mountain region's leading specialty care and referral center, providing among its services the only comprehensive cancer center in the Rocky Mountain region. The hospital also operates primary care clinics in Denver metro locations.

9. We have long served as one of Colorado's leading providers of care for the State's medically underserved population and are currently Colorado's second largest safety net provider. For the fiscal year ending June 30, 2007, 20% of the care provided at UCH was provided to Medicaid patients and patients in the Colorado Indigent Care Program, based on total charges.

10. During the fiscal year ending June 30, 2007, UCH's operating revenues totaled \$565.5 million and operating expenses totaled \$550.2 million, providing an operating margin of \$15.3 million or 2.7%.

11. UCH was founded in 1921 by the Colorado General Assembly as a component of the State's University of Colorado medical campus governed by the University of Colorado Board of Regents.

12. Our structure changed in 1991 when the Colorado General Assembly passed a statute establishing the University of Colorado Hospital Authority, a "body corporate and political subdivision" of the State of Colorado, to operate UCH. Colorado Revised Statutes § 23-21-503(1). The main reason for this governance change was a concern that UCH was "unable to become and remain economically viable due to constraints imposed by being subject to various kinds of government policy and regulation," and that without economic viability, it would "become ever more dependent upon state subsidies and the quality of medical service and education will inevitably decline." Colorado Revised Statutes § 23-21-501. The State Legislature determined that the "needs of the citizens of the state of Colorado and of the University of Colorado health sciences schools" would be best served by this change in governance. Colorado Revised Statutes § 23-21-501.

13. In addition to being designated a body corporate and political subdivision of the State, UCH has many characteristics that we believe show that it is a unit of government.

- a. UCH continues to be obligated, subject to the Colorado Indigent Care Program statute, to provide uncompensated care for the State's underserved population, and is one of the State's two largest indigent care providers. Colorado Revised Statutes § 23-21-504(1).

- b. The resolutions, proceedings, minutes, monthly financial statements and contracts of the Board of Directors of UCH are “public records” and, like the records of all state and local government units in Colorado, are subject to the State’s Open Records law. Colorado Revised Statutes § 23-21-510.
- c. The meetings of the Board of Directors of UCH are subject to the State’s open meetings law, and UCH is defined as a “local public body” under this law. Colorado Revised Statutes §§ 24-6-401 through 402.
- d. UCH is designated as a “public entity” and granted governmental immunity status by Colorado courts. Colorado Revised Statutes §§ 24-10-102 through 115. The employees of UCH are designated as “public employees” and also granted governmental immunity under the Colorado Government Immunity Act.
- e. UCH has the ability to issue bonds that are exempt from taxation by the State or any agency, political subdivision or instrumentality of the State. Colorado Revised Statutes § 23-21-514.
- f. UCH has the authority to accept any gifts, grants, and loans of funds, property or any other aid in any form from the State and any State agency.
- g. UCH is exempt from property taxes. Colorado Revised Statutes § 23-21-525.
- h. The Colorado Legislature has reserved its plenary legislative authority over the Hospital, including the authority to enact laws related to it. Colorado Revised Statutes § 23-21-527.
- i. The power to terminate UCH’s existence rests with the Colorado Legislature. Colorado Revised Statutes § 23-21-503.

- j. UCH is required to submit to the Governor and the Legislature an annual report which sets forth a complete and detailed operating and financial statement of UCH for the prior fiscal year.
- k. The Board of Regents of the University of Colorado continues to control appointments to UCH's Board of Directors. Colorado Revised Statutes § 23-21-506.

14. UCH has participated in financing the State's non-federal share of Medicaid expenditures through certification of public expenditures (CPE's) since 1999 for upper payment limit. UCH has always been treated as a unit of government for these purposes.

15. UCH relies on the supplemental Medicaid payments it receives through Colorado Medicaid's upper payment limit (UPL) and disproportionate share hospital (DSH) programs to provide health care services to the Medicaid and Indigent Care Program patients who rely on UCH as a safety net provider.

16. Based on our analysis of the purported new HHS regulation, *Cost Limit for Providers Operated by Units of Government and Provisions To Ensure the Integrity of Federal-State Financial Partnership*, 72 Fed. Reg. 29748 (May 29, 2007) (the "Rule"), UCH would not meet the new restrictive definition of a unit of government, despite its status as a body corporate and political subdivision of the State of Colorado.

17. Under the Rule, an entity may qualify as a unit of government if it 1) has taxing authority, 2) has direct access to generally applicable tax revenues as an integral part of a unit of government with taxing authority which is legally obligated to fund the health care provider's expenses, liabilities, and deficits, 3) receives appropriated funding as a State university teaching hospital, or 4) is an Indian Tribe or Tribal organization.

18. 1) UCH does not have taxing authority. 2) Because of our public hospital authority governance structure, we are not sufficiently integrated with the State, which is not legally obligated to fund UCH's liabilities (consistent with the goal to ensure economic viability without dependence on state subsidies). *See* Colorado Revised Statutes §§ 23-21-505, 513, 519. 3) While state statute defines UCH's mission to serve as a teaching hospital for the university, UCH does not receive direct appropriations from the State. 4) UCH is also not a Tribal organization.

19. The Colorado State Medicaid agency, in a response to the Rule, has said "there is a significant risk that Denver Health Medical Center, Memorial Hospital, and University Hospital will no longer have the ability to use certification to draw the available federal funds." Colorado Department of Health Care Policy and Financing, Updated Impact of CMS January 18, 2007 Proposed Rules (Mar. 12, 2007).

20. As a result of not meeting this restrictive definition of a unit of government, UCH would no longer be eligible to certify the substantial expenditures it incurs in providing care to Medicaid patients and Colorado Indigent Care Program patients, and would therefore lose the supplemental payments funded by the federal match for these expenditures.

21. We estimate that UCH will lose \$30-35 million annually in DSH and UPL payments due to this Rule, which is twice the operating margin we earned last fiscal year. By excluding UCH from the definition of entities eligible to make certified public expenditures for Medicaid financing purposes, the State will lose the federal matching funding for the expenditures certified by UCH, funding that currently supports these DSH and UPL payments.

22. UCH relies on every incoming dollar of support from federal and state programs to operate our programs and provide care to Medicaid patients and care to the vulnerable

populations of the State. A loss of \$34 million, which would have been 6% of our fiscal year 2007 operating revenues, is too great a financial reduction for UCH to offset.

23. In order to continue operating, UCH would be forced to reexamine our future participation in the Colorado Indigent Care Program and whether we would be able to provide care to those medically indigent patients.

24. We also have attempted to determine whether the State would provide funding to offset this loss. Based on our communications with the Colorado Legislature's Joint Budget Committee, we understand that the State is not going to be able to offset this loss in federal funding from the State General Fund. The "Taxpayer Bill of Rights" amendment to the Colorado constitution, and other State constitutional limitations, restrict the State's ability to provide any additional funding.

25. Based on our discussions with State officials, we are aware that the State of Colorado Medicaid program as a whole will also lose a significant amount of federal support under this Rule. The analysis completed by the State and presented to the Legislature's Joint Budget Committee a year ago estimated that Colorado would lose \$142 million of federal funds. Given the State's difficult financial situation, the loss of this federal funding will mean less funding for payments to the State's safety net providers generally, including UCH, for the services provided to Medicaid and other vulnerable patients. This will be devastating to the ability of UCH and the rest of the State's safety net providers to care for Colorado's medically underserved population.

26. In the event that UCH continued to qualify as a unit of government under this Rule or otherwise, UCH would stand to lose significant federal Medicaid funding due the Rule's cost limit on payments to governmental providers. The change in methodology used to calculate the

cost of care will have an adverse impact on UCH, but the amount of the impact is not known at this time.

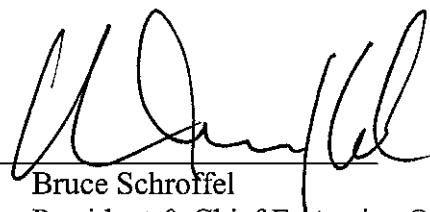
27. When we learned that CMS had proposed this Rule last January, we recognized the impact that this magnitude of loss in funding would have on our facilities. We drafted comment letters to the Centers for Medicare and Medicaid Services (CMS) in the Department of Health and Human Services (HHS) in response to the Proposed Rule, and a supplemental comment letter in response to the purported final version of the Rule, explaining our hospital's circumstances and the devastating impact on our facilities and our community. These letters are attached as Exhibits A and B. CMS went forward with the Rule without addressing our concerns.

28. UCH is a member of the National Association of Public Hospitals, the American Hospital Association, and the Association of American Medical Colleges.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 5, 2008

(Signature):

A handwritten signature in black ink, appearing to read 'B. Schroff', written over a horizontal line.

Bruce Schroff
President & Chief Executive Officer
University of Colorado Hospital