HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

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RE: AN ACT to amend the public authorities law, in relation to authorizing the Westchester health care corporation to enter into agreements for the creation and operation of a health care delivery system network

A.7719-B (Abinanti)
S.5880-B (Murphy)

Assembly Calendar 545

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The New York State Conference of Blue Cross and Blue Shields Plans strongly oppose enactment of this Bill, which is merely an attempt to circumvent the Department of Health's existing regulatory process that allows health care entities to obtain protection from federal and state antitrust laws in favor of an easier approach with less consumer protections and inappropriately replaces professional antitrust analysis by state and federal agencies with antitrust experience with the judgement of the legislature. Further, this Bill blatantly ignores the public opinions of both the Federal and State agencies charged with oversight of antitrust laws. The Federal Trade Commission (FTC) and New York Attorney General each have noted that New York's "antitrust laws are not a barrier to the formation of efficient health care collaborations that benefit health care consumers."[1]

In fact, in 2015, the New York Attorney General specifically opined that this Bill is "overbroad", "unnecessary because collaborations among health care providers that truly benefit patients are already lawful and need no exemption" and "not in the interest of New Yorkers because they grant the Corporations virtually unlimited discretion to work together with their competitors to raise the prices of health care services that they provide to patients in New York." In seeking to

[1] Office of Policy Planning, Federal Trade Commission, *Certificate of Public Advantage Applications Filed Pursuant to New York Public Health Law, 10 NYCRR, Subpart 83-1* (April 22, 2015), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf

provide immunity from federal and state antitrust laws to the Westchester Health Care Corporation ("WHCC") and all entities in which they collaborate, the bill authorizes potentially unlimited anticompetitive behavior, whether or not such behavior is in the best interests of the patients being served, and without consideration for the existing Department of Health process that already affords such protection when consumer protections are met.

Indeed, New York already has a process for health care facilities like WHCC to obtain regulatory protection from antitrust laws that was meticulously created by the Legislature just four years ago. In 2011, the Legislature enacted New York's "Improved Integration of Health Care and Financing" law, which authorized the state to encourage appropriate collaborative arrangements among healthcare providers.[2] Importantly, Article 29-F provides for State action immunity under state and federal antitrust laws with respect to arrangements where the benefits of collaboration resulting from activities undertaken by healthcare providers (and others) outweigh the disadvantages resulting from a reduction in competition. Under regulations adopted by the Department of Health, collaborating parties may apply to obtain a Certificate of Public Advantage ("COPA"), which grants the same antitrust protections proposed by this Bill, upon a demonstration that the benefits of the proposed collaboration outweigh the disadvantages.

Unfortunately, this Bill simply ignores the existing process for health care providers to obtain antitrust protection, in the event antitrust protection is even necessary to further the collaborative relationship, and predetermines that that the benefits of collaboration between WHCC and other providers outweigh any adverse impacts on competition. Essentially, this Bill removes WHCC from the existing application and review process and ignores the Attorney General's strong advice to the Legislature to oppose this bill, noting that antitrust enforcement should not be predetermined through legislation.

More importantly, this Bill ignores the recent opinion of the FTC, which casts doubt on the legality of the State's COPA process. It would stand to reason then that this Bill, which is a water downed version of the COPA, would similarly raise issue. Both the FTC and New York State Attorney General, the two agencies that are tasked with enforcing federal (FTC) and state (NYS Attorney General) antitrust laws, have conclusively stated that health care collaborations that benefit patients do not need exemption from existing antitrust laws. In fact, the FTC recently stated that the main effects of the State's COPA regulations, which would grant the same protections provided under this bill, are "to immunize conduct that would not generate efficiencies and therefore would not pass muster under the antitrust laws. Therefore, COPAs are likely to lead to increased health care costs and decreased access to health care services for New York consumers."[3] The FTC concluded New York's COPA regulations are "unnecessary to promote the goals of health care reform" and expressed concern that the scheme is likely to foster anticompetitive conduct to the detriment of New York health care consumers."[4] Similarly, the NY Attorney General concluded this Bill does not benefit New York patients, is not necessary to promote collaboration, and is so overly broad that it has the potential to harm patients.

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[2] N.Y. Pub. Health Law §§ 2999aa–2999bb (McKinney 2015).
[3] *Id.*
[4] *Id.*

Further, while this Bill proposes to provide immunity under federal antitrust laws, it is unlikely to satisfy the legal precedent known the State Action Doctrine, which allows States to shield certain business activity from Federal antitrust law that the State may want to encourage, but could be deemed anticompetitive. Due to the strong Federal policy against allowing anticompetitive behavior in the market, the State Action Doctrine is subject to heightened scrutiny, and may only be applied when the underlying conduct sought to be immunized is: (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state." Under the proposed legislation, even if you assume that this Bill furthers a clearly articulated State policy initiative, it does not afford any active State supervision. The Bill contains no oversight function other than requiring the submission of annual reports. There is no requirement that WHCC or any of its partners even inform the State when and if they have entered into a collaborative agreement. To withstand scrutiny, the supervision on the part of the State must be rigorous and ongoing, and include specific and enforceable action and oversight. Clearly, the standard is far greater than anything required by the Bill. This hardly represents a scheme that provides ongoing, specific and enforceable "active supervision", which is a necessary component to the State Action Doctrine. As a result, it is questionable whether this bill would provide protection from federal antitrust enforcement.

This Bill represents a growing trend in New York to provide antitrust protections to certain health care providers under the guise of promoting collaboration to benefit patients. However, both the FTC and New York Attorney General have unequivocally stated that collaboration among health care providers that benefit patients are lawful and do not need protection from state and federal antitrust laws. In reality, this Bill is an attempt to promote anticompetitive market activity and circumvent a more rigorous, existing State process—created no more than four years ago and implemented just last year – that has already been called into question by both the FTC and the Attorney General. Thus, this bill would only result in promoting anticompetitive action between WHCC and unknown providers, actions that have already been determined to be detrimental to patients, such as collective bargaining with third party payors, unfettered exercise of pricing power, and market manipulation.

For the foregoing reasons, the Blue Cross and Blue Shield Plans urge that this bill not be enacted.

Respectfully submitted,

HINMAN STRAUB ADVISORS, LLC.
Legislative Counsel for the Blue Cross and Blue Shield Plans of New York