

OFFICE OF THE ATTORNEY GENERAL  
STATE OF NEW YORK

In the Matter of  
the Investigation by Andrew M. Cuomo,  
Attorney General of the State of New York, of  
  
ELLIS HOSPITAL

AOD No. 10-047

**ASSURANCE OF DISCONTINUANCE**

This Assurance of Discontinuance ("Assurance") contains the findings of the Office of the Attorney General of the State of New York (the "OAG") of its investigation of Ellis Hospital (the "Hospital") as described herein pursuant to its authority under the Executive Law, the Not-for Profit Corporation Law ("N-PCL") and its common law power as representative of unnamed charitable beneficiaries, as well as the relief agreed to by the OAG and the Hospital (collectively, the "parties").

FINDINGS

Ellis Hospital and Its School of Nursing

1. The Hospital, a New York Type B not-for-profit corporation, is exempt from federal taxation as a charitable organization pursuant to Internal Revenue Code § 501(c)(3). The Hospital operates, among other things, the Ellis Hospital School of Nursing (the "Nursing School"), located in Schenectady.

The Belanger Fund

2. Between 1970 and 1981, the Hospital received \$2,345,013 from bequests under the Last Wills and Testaments (the "Wills") of John W. Belanger and his wife, Anna Nordgren Belanger. John W. Belanger's will, which was substantially similar to his wife's will, directed that the bequests were to be used in:

improving the facilities of the present nurses training school. In the event the circumstances prevent or dictate the termination of such a training school, it is my wish that this devisee be used for such other major project, such as facilities for an extended care unit or nursing home accommodations which will provide adequate minimal medical attention and care.

3. The Belangers' bequests established use-restricted gifts to the Hospital, as provided in the Wills (the "Belanger Fund" or the "Fund"). The OAG has determined that the Hospital's governing board had an obligation to apply the Belanger Fund to the purpose specified in the Wills and to the payment of the reasonable and proper expenses of administration of the Belanger Fund, and that this obligation extended to not only the principal of the bequests, but also the appreciation and income of the Fund.

4. Upon accepting the bequests comprising the Belanger Fund, the Hospital became a trustee with respect to the Belanger Fund as defined in § 8-1.4(a)(2) of the Estate Powers and Trust Law and assumed fiduciary duties to the ultimate beneficiaries of the Belanger Fund.

5. In 1974, the Hospital's then-existing Nursing School on Rosa Road was torn down. At that time, the Nursing School consisted of two buildings: a residence hall for nurses built in 1906; and an annex for classrooms and offices built approximately twenty years later. From that date to the present, classes have been held in four different rented spaces as well as the local community college. Residential space has not been made available.

#### The Hospital's Improper Administration of the Belanger Fund

6. Starting in approximately 1970 and continuing until at least 1998, the Hospital repeatedly appropriated and expended the income and appreciation of the Belanger Fund for general Hospital purposes, unrelated to improving the facilities of the Nursing School. During that time, the Hospital expended only a small portion of the Belanger Fund to improve the facilities of the Nursing School as required by the Wills. The OAG has determined that the

Hospital's actions in this manner failed to honor the use restrictions imposed by the Wills, and accordingly, N-PCL § 513(b).

7. During this period, the Hospital also repeatedly borrowed millions of dollars from the Belanger Fund and used those funds to pay the Hospital's capital and operating expenses and to finance special Hospital projects unrelated to the Nursing School. Although the Hospital purportedly paid interest on its loans from the Fund, none of that interest was retained in the Belanger Fund or used to improve the facilities of the Nursing School, as required by the Wills. The OAG has determined that the Hospital's actions in this manner failed to honor the use restrictions imposed by the Wills, and accordingly, N-PCL § 513(b).

8. At no time did the Hospital seek a court order pursuant to either EPTL § 8 1.1(c) or N-PCL § 522(b) for relief from the use restrictions imposed by the Wills, including permission to borrow from the Belanger Fund or to use earnings or appreciation from the Fund for purposes unrelated to improving the facilities of the Nursing School.

9. The Hospital's use of the Belanger Fund, including its income and appreciation, for purposes unrelated to the Nursing School, deprived the Belanger Fund of the opportunity for earnings and growth that it would have had if the Hospital had fully invested and used the Fund, including its income and appreciation, solely for the restricted purpose as set forth in the Wills. The current value of the Fund is millions of dollars less than it would have been had the Hospital done so. The OAG has determined that the Hospital's actions in this manner failed to honor the use restrictions imposed by the Wills, and accordingly, N-PCL § 513(b).

#### The Hospital's Failure to Maintain Records of the Belanger Fund

10. Prior to the mid-1990s, the Hospital failed to keep accurate accounts of its restricted fund assets, separate and apart from the other accounts of the Hospital as required by

N-PCL § 513(b). Accordingly, the Hospital cannot reconstruct the amount of income and appreciation that it spent from the Belanger Fund.

11. In 1996, the Hospital's chief financial officer admitted in a memorandum to the head of the Ellis Hospital Foundation that the Hospital did not have records to reconstruct the amount of interest or appreciation on the Belanger Fund.

12. Upon information and belief, the Hospital did not begin tracking the interest generated by the Belanger Fund in a separate account until approximately 1996.

The Attorney General's Investigation

13. The OAG began an investigation into the Hospital's use of the Belanger Fund after receiving a complaint by John Belanger's niece concerning the Fund.

14. The Hospital agreed with the OAG's office that the Hospital would not use the income and appreciation of the Belanger Fund for purposes unrelated to the Nursing School during the pendency of the investigation.

PROSPECTIVE RELIEF

WHEREAS the Hospital neither admits nor denies the OAG's Findings;

WHEREAS the OAG is willing to accept the terms of this Assurance of Discontinuance pursuant to New York Executive Law § 63(15) and to discontinue its Investigation; and

WHEREAS, the parties each believe that the obligations imposed by this Assurance are prudent and appropriate:

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties that:

1. The Hospital represents that it has fully allocated and paid into the Belanger Fund the income and appreciation attributable to the Fund during the pendency of this investigation. As of February 28, 2010, the market value of the Belanger Fund was \$2,991,507. The Hospital represents that it has not withdrawn any amounts from the Belanger Fund since that date.

2. The Hospital agrees to acquire a new facility for the Nursing School on the Hospital's McClellan Campus, to be named "The Belanger School of Nursing." In connection therewith, the Hospital's Board of Trustees has duly adopted the Belanger School of Nursing Relocation Plan, dated August 2009 (the "Relocation Plan"). A copy of the Relocation Plan is annexed hereto as Exhibit A and made a part of this Assurance, as though fully set forth herein. As set forth in detail in the Relocation Plan, the Hospital currently leases the Health Services Building ("HSB"), located on the Hospital's McClellan Campus. Pursuant to the Relocation Plan, the Hospital agrees to purchase the HSB for use by the Nursing School and other activities of the Hospital. The Hospital expects that the Nursing School will occupy approximately 42% of the HSB and, accordingly, the Relocation Plan states that 42% of the purchase price of the HSB will be borne by the Nursing School.

3. The Relocation Plan is a binding commitment of the Hospital and may not be modified in any material respect or rescinded without prior written notice and approval of the OAG. Failure to complete the Relocation Plan in all material respects by February 2013, or a later date agreed to in writing by the OAG, shall constitute a breach of this Assurance.

4. The Hospital represents to the OAG that the total cost of the Relocation Plan is expected to be \$3,100,000 (the "Relocation Cost"). The Relocation Cost includes the Nursing School's share of the purchase price of the HSB and any other cost actually incurred and shared by the Nursing School pursuant to the Relocation Plan. The Relocation Cost shall be covered as follows, subject to the provisions of Paragraph 5 below:

- a. Consistent with the use restrictions imposed by the Wills, the Hospital shall pay the Relocation Cost out of the Belanger Fund, up to and including all then-current assets in the Fund;

- b. Any Relocation Cost in excess of that borne by the Belanger Fund shall be paid by the Hospital, up to an additional \$500,000; and
- c. Should the actual cost of the Relocation Plan be less than the Relocation Cost, then the Hospital shall contribute the savings difference to the new restricted fund described in Paragraphs 7 and 8 below, up to an additional \$500,000, after obtaining court approval on notice to the OAG.

5. Any increase in the Relocation Cost above \$3,100,000 shall not (a) excuse the Hospital from relocating the Nursing School in accordance with the Relocation Plan and this Assurance, (b) result in any reduction of any operating cost subsidy that the Hospital has provided or will provide to the Nursing School in the normal course consistent with past practice, or (c) reduce or eliminate the Hospital's obligations to establish, contribute to and manage the new restricted fund described in Paragraphs 7 and 8, below.

6. Amounts remaining in the Belanger Fund after relocation of the Nursing School, if any, will (a) be transferred to the new restricted fund described in Paragraphs 7 and 8, below, thereby extinguishing the Fund, or (b) in the discretion of the Hospital's governing board, remain in the Belanger Fund to be used solely in accordance with the restrictions set forth in the Wills.

7. The Hospital agrees to contribute a total of \$2,500,000 to establish a new fund for the benefit of the Nursing School, to be known as the School of Nursing New Fund ("the New Fund"), with restrictions on spending and use as set forth in Paragraph 8, below. The Hospital's obligation to contribute \$2,500,000 to the New Fund is exclusive of (a) any amounts transferred from the Belanger Fund in accordance with Paragraph 4 above, (b) any operating cost subsidy that the Hospital has provided or will provide to the Nursing School in the normal course consistent with past practice, and (c) any income or appreciation on any installment paid into the

New Fund pursuant to the next sentence of this paragraph. The total of \$2,500,000 shall be paid to the New Fund in five (5) annual installments of \$500,000, payable on or before June 1 of each year starting in 2010. No later than July 15 of each such year, the Hospital shall submit to the OAG written proof that the installment due in such year has been paid in full or, if the Hospital failed to make full and timely payment, a written explanation of the reasons for such failure. Interest at five percent (5%) per annum will accrue from the due date on any installment or portion thereof that remains unpaid.

8. The Hospital agrees that the principal, including capital appreciation of the New Fund, will be used solely for the purposes of improving the facilities of the Nursing School, including but not limited to ordinary capital expenses and improvements, medical equipment for use in connection with instruction at the Nursing School, and educational materials including books, computers and software. The Hospital agrees that all interest and other income generated by the New Fund, as defined by N-PCL § 513(c) as may be subsequently amended, will be segregated and used solely to pay for products or services that improve the quality of education at the Nursing School, including but not limited to the funding of a chair in nursing instruction and providing financial or other assistance to students with special needs. No part of the New Fund shall be used to pay for any portion of the Relocation Cost, including, without limitation, any cost overruns if the cost of the Relocation Plan exceeds the budget approved for the Relocation Plan.

9. The Hospital agrees that it will not deviate from uses of the New Fund prescribed in this Assurance without first obtaining a court order upon notice to the OAG.

10. The Hospital agrees to change the name of the Nursing School to "The Belanger School of Nursing" and to place prominent signage on the HSB displaying the new name. The

Hospital agrees to sponsor an event in connection with such renaming, to which Belanger family members will be invited.

11. The Hospital agrees that it will not use Belanger Fund, or any of the other permanent or temporarily restricted institutional funds of the Hospital, for any purpose other than that specified in the applicable gift instrument. The Hospital agrees not to borrow from or encumber any such restricted fund without first obtaining a court order upon notice to the OAG.

12. The Hospital agrees to comply with all recordkeeping and reporting requirements pertaining to institutional funds as set forth in N-PCL § 513(b).

13. No later than January 15 and July 15, 2011 and on January 15 and July 15 for each of the next five years thereafter, the Hospital agrees to submit written reports to the OAG with respect to the principal (including appreciation or depreciation) and income of the New Fund for the preceding six calendar months. Such reports shall be submitted to the OAG. Such bi-annual reports shall include changes in the total market value and investments, interest and dividends earned, and any income or principal expenditures from the New Fund, indicating the purpose of each expenditure.

14. By January 15 and July 15, 2011 and each year thereafter until the relocation of the Nursing School is complete, the Hospital shall report in writing to the OAG on the status of implementation of the Relocation Plan, including (a) any change in the estimated cost of the project or completion date, (b) any change in proposed or actual expenditure for construction, renovation or equipment, and (c) expenditures made from the Belanger Fund and the Hospital's other funds in connection with the relocation of the Nursing School.



15. The Hospital agrees to provide such further information to the OAG as the OAG may request from time to time, concerning implementation of the Relocation Plan, the New Nursing School Fund or other relevant matters to assure compliance with this Assurance.

16. A breach by the Hospital of any provision of this Assurance shall not relieve the Hospital of its other obligations hereunder.

#### MISCELLANEOUS

17. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Hospital and its counsel and the OAG's own factual investigation, including the Findings set forth above. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

18. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Hospital in agreeing to this Assurance.

19. The Hospital represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. The Hospital shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects the Hospital's (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by The Hospital.

20. The Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

21. The Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

22. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

23. All notices, reports, requests and other communications to any party pursuant to this Assurance shall be in writing, and shall be deemed to have been duly given when delivered in person, by overnight courier, by certified mail return receipt requested or by facsimile to the respective parties as follows:

If to the Hospital, to:

Michael J. Cooney, Esq.  
Nixon Peabody LLP  
437 Madison Avenue  
New York, New York 10022-7001  
Tel: (212) 224-7343  
Fax: (866) 743-0233  
E-mail: mcooney@nixonpeabody.com

If to the OAG, to:

Office of the Attorney General of the State of New York  
Charities Bureau  
The Capitol  
Albany, New York  
Attn: Donald Segal, Assistant Attorney General  
Tel.: (518) 473-4863  
Fax: (518) 473-8153  
E-mail: Donald.Segal@ag.ny.gov

or such other address or facsimile number as such party may hereafter specify for the purpose by written notice to the other parties to this Assurance. Each such notice, request or other communication shall be effective (i) if delivered in person, when such delivery is made; (ii) if delivered by overnight courier, the next business day after such delivery is sent; (iii) if delivered by certified mail return receipt requested, as of the date noted as the date of delivery on the return receipt or (iv) if delivered by facsimile, when such facsimile is transmitted and the appropriate confirmation is received. All notices, requests, or other communication pursuant to this Assurance shall reference AOD number 10-047.

24. Acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of the practices or procedures referenced herein, and the Hospital shall make no representation to the contrary.

25. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

26. If a court of competent jurisdiction determines that the Hospital has breached this Assurance, the Hospital shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

27. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The OAG is willing to accept this Assurance pursuant to Executive Law § 65(15) in lieu of commencing a statutory proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

28. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on April 29,

2010.

ANDREW M. CUOMO  
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By: \_\_\_\_\_

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