



October 2, 2012

Commissioner Ted Nickel
State of Wisconsin
Office of the Commissioner of Insurance
125 South Webster Street
GEF III – 2nd Floor
Madison, WI 53703

Dear Commissioner Nickel,

ABC for Health, Inc. is concerned about stewardship issues and the need to update and clarify an Insurance Commissioner's Order related to the more than \$800 million entrusted to Wisconsin's two medical schools, the University of Wisconsin School of Medicine and Public Health (UWSMPH) and the Medical College of Wisconsin (MCW). These funds resulted from the Blue Cross Blue Shield (BCBS) conversion to a for-profit company in 2001. Advocacy and Benefits Counseling for Health, Inc. (ABC for Health) is a Wisconsin-based nonprofit, public interest law firm that has played a consumer watchdog role over the conversion process and monitored the use of these public funds.

In 2001, then Commissioner of Insurance Connie O'Connell issued an Order that authorized the BCBS conversion plan. This Order appointed UWSMPH and MCW as stewards of the conversion fund. Commissioner O'Connell noted that while the missions of the medical schools "may include or relate to the conversion fund's purpose, [they] do not coincide with it." Despite the medical colleges' stewardship, Commissioner O'Connell made it clear that "the conversion funds are best viewed as public capital charged with a particular purpose."

We are concerned that the "public capital" referred to by Commissioner O'Connell needs closer monitoring and public scrutiny. We respectfully urge the Office of the Commissioner of Insurance (OCI) to work with the Wisconsin United for Health Foundation Board (WUHF) and both medical schools to clarify the concerns outlined below to ensure that these public funds are spent in a manner that is consistent with the intent of the original Order and, at the same time, reflect certain present realities. The original Order provides a framework for the distribution of conversion funds, but lacks any enforcement or investigative authority for the WUHF board or for OCI. We call on OCI to implement a mechanism to revise, update, and enforce the terms of that Order.

The public health landscape has changed dramatically since 2001 with new threats of bio terrorism and possible health pandemics. Research and community funding priorities have changed and evolved during that time frame. Consequently ABC for Health maintains that the initial Order, drafted over a decade ago, requires revision and certain modifications to address identified shortcomings and to better reflect the changes in Wisconsin's public health landscape.



Without action from you, the BCBS funds cannot be of optimum benefit to the people of Wisconsin.

To accomplish this end, a full reconsideration of the original Order is not necessary. In fact, the Commissioner need simply issue a supplemental Order that merely clarifies and enforces the terms of the original Order. OCI has broad authority to issue such Orders under Wis. Stat. § 601.41.¹ Alternatively, and less intrusively, OCI can provide a written letter to the parties, the two schools and the WUHF Board, directing the swift implementation of needed changes including the Legislative Audit Bureau (LAB) recommendations listed below.

The Commissioner's Order established the WUHF to operate as an oversight foundation over UWSMPH's and MCW's use of the BCBS money. One of the shortcomings of the initial Order is that it did not provide WUHF any enforcement authority. WUHF cannot properly oversee the medical schools without explicit authority to investigate and enforce the provisions of the original Order. Without proper regulation, stewards of public money, like the two schools, may pursue activities not contemplated by the original Order. Strong oversight coupled with investigative and enforcement authority will ensure that the public conversion funds benefit the public long into the future. An effective enforcement apparatus must include penalties for noncompliance with Order requirements.

ABC for Health is not alone in raising concerns about the medical schools' stewardship over these public funds. In 2010, LAB investigated the administration of the BCBS conversion fund and identified several areas of significant concern in its May 12, 2010 LAB report, "Medical Education, Research, and Public Health Grants." Specifically, the LAB recommended:

- An amendment to the conflict of interest policies.
- A clarification regarding "allowable uses" of medical education and research funds.
- A redefinition of the supplanting prohibition and a determination of the degree to which medical education and research funds should be competitively allowed.
- A determination of the level of public health funding the schools may directly expend. The original Order requires the distribution of an appropriate percentage of funds for public and community health organizations in a manner that provides for reasonable access. The LAB wanted both words "appropriate," and "reasonable access" defined to justify the existing 35/65 distribution, where 35% of the funds go towards community-based initiatives and 65% go towards medical education and research. Unfortunately, the LAB discovered that both medical schools spend about 1/3 of the public health and community health organization money for medical education and research, in addition to the 65%.

¹ See Wis. Stat. § 601.41 (granting the Commissioner of Insurance authority to "issue such prohibitory, mandatory, and other orders as are necessary to secure compliance with the law"); *Homeward Bound Servs. v. Office of the Ins. Comm'r*, 2006 WI App 208, P44 (Wis. Ct. App. 2006) (construing Section 601.41 broadly).



The WUHF, UWSMPH, MCW, and OCI each have a special opportunity to fulfill a leadership role and improve the health status of Wisconsinites. As trustees of public funds, the medical schools must prioritize and direct these scarce public health funds to *directly* benefit the people Wisconsin. As Insurance Commissioner, you must actively monitor this trust relationship between the schools and the people. WUHF must work with the OCI to obtain explicit authority to enforce the Order and investigate suspected violations. WUHF's "watchdog function" must include investigation and enforcement authority, particularly as it relates to the oversight of funding decisions and supplanting of program funds. WUHF must have the authority to refer noncompliant actions to OCI for enforcement actions and penalties. The following recommendations provide for better management and enforcement of the medical schools' stewardship function. ABC recommends the following ten-point plan:

- 1. Require an annual letter audit from the LAB to augment the comprehensive 5 year audits.** Entities, like the two medical schools, charged with handling public funds typically require annual compliance reviews and audits. Such an audit allows for an annual review of procedures, supplanting, distribution of funds, and conflict of interest issues. Unlike the Annual Reports from the UWSMPH Oversight and Advisory Committee (OAC), the LAB is an independent organization and is better suited to review the schools' granting programs. In addition, the LAB gained tremendous expertise in this area while preparing the 5 year audit.
- 2. Require that WUHF has explicit authority to conduct independent investigations regarding funding and stewardship issues.** ABC for Health and the LAB identified a series of medical school projects and programs that appeared to supplant funds from a wide variety of other sources. The original Order defines and strictly prohibits supplanting of grant funds. The LAB report demanded further investigation in regards to certain conflicts of interests between the schools and the administration of the BCBS funds. No substantial investigations ensued and regrettably, the Order fails to articulate an effective means to investigate or enforce violations by the partnership programs.
- 3. Include an audit reporting function that requires an evaluation of the progress made following any LAB's recommendations.** The LAB report included a list of recommendations that enable the medical schools to better serve the needs of the people of Wisconsin. UWSMPH's most recent Annual Report fails to report any significant steps taken to fully address these recommendations. A progress report is also mandatory for an accurate analysis of the medical colleges' compliance with the LAB report.
- 4. Clarify the original order that explicitly limits conflicts of interest and promotes better grant-making decisions at both schools.** After the LAB audit, neither the UWSMPH nor MCW could document compliance with their existing conflict of interest policies. In addition to preventing actual malfeasance, conflict of interest policies strive to prevent the appearance of impropriety. Failing to document the enforcement of the policies thwarts this purpose just as



completely as not following the policy at all. The public cannot view the endowments as neutral grant makers when they cannot be certain that the endowments are following proper procedures. As far as the endowments' records show, they may have inappropriately awarded nearly \$8 million (based on findings in the LAB audit report.)

5. Improve the independent review of grants. The independent review and oversight of the UWSMPH OAC is suspect. ABC takes issue with the process used to independently review grants. ABC for Rural Health, Inc., applied for a 2010 Wisconsin Partnership Program (WPP) Community-Academic Partnership Grant. Mike Rust, Chief Operating Officer of ABC for Rural Health complained in writing to WPP about his concerns that the reviewers did not follow published WPP guidelines and that the reviewers' critique illustrated a lack of professional understanding regarding the conduct of medical-legal advocacy practice. At a later meeting with Rust, WPP staff did not offer a material defense regarding any of ABC for Rural Health's criticisms.

6. Improve the OAC review of grants: Most grant making programs have comprehensive procedures, conflicts review, and strict standards of conduct during a review process. ABC for Health staff member Brynne McBride attended an OAC meeting in December 2011 where, in addition to other committee business, OAC members reviewed the 2011 solicitation responses and reviews for planning and development grants. According to OAC protocol, the first stage in the grant approval process consists of an "independent expert review" (discussed above); hardly any information is provided to the public regarding these "experts." Despite the "expert review," members of the Committee ultimately decide which grants are approved.

During the December 2011 meeting, the OAC demonstrated questionable professionalism, conflicts of interest, and a disorganized grant approval process. OAC members lacked knowledge about process and grant review criteria and many seemed unaware of their role. For example, an OAC member pleaded with the Committee to vote for her respective proposal since she "couldn't vote for it herself." When OAC voted on a proposal affiliated with a specific OAC member, leadership directed the affiliate "into the hall outside by the window" while the Committee deliberated. During the voting process, affiliates observed the counting of the vote through the window, which enabled them to determine who supported their project.

As another example, an OAC member arrived late and discovered that she had "missed the instructions" for how to review proposals and thus did not apply the proper "OAC criteria." This member did nothing to correct her mistake, but rather responded with, "Oh, well, it's too late to go back;" she did not re-score any proposals.

In a third instance, a WPP staff member presented the "findings" from the independent review process. However, she did not present factual statements; rather, she recited the names of the people who applied for funding in addition to their workplace so that Committee members could identify if they knew the person. After the recitation of names, members discussed if they liked



that person and their work; they did not discuss whether the proposed project complied with OAC criteria or whether it was of benefit to the people of Wisconsin.

7. Ensure a competitive process: The 2010 LAB report took issue with how the schools failed to use a competitive process to allocate certain medical education and research funds. For UWSMPH grants awarded within the scope of the LAB report, 57.7% of all grants were reportedly awarded competitively; however, they represented only 17.9% of the total funds awarded. No competitive grants existed in 2004 because “the competitive grant programs had not yet been developed.” The LAB thought the lack of oversight in the realm of non-competitively awarded grants was suspicious. More investigation and action is required to insure a fair and competitive process for all awards of BCBS conversion funds.

8. Eliminate the UW Foundation fees, seek a refund. The WPP continuously pays exorbitant fees to the UW Foundation to administer the conversion fund. WUHF member Sen. Joe Lean raised this issue at a meeting in August 2010. According to a report in the Wisconsin State Journal, Lean detested the more than \$25 million collected by the Foundation since the fund’s creation and urged UWSMPH to demand a refund. UWSMPH’s Dean Golden replied that he planned to meet with the Foundation’s new president and negotiate a fee reduction. A private, closed door meeting with the UW Foundation did not occur until December 20, 2011. No minutes from this meeting are posted to the WPP website or otherwise available to the public.

The management fees charged to the fund by the UW Foundation are still grossly excessive. In the aforementioned December 2011 meeting, the Foundation apparently agreed to lower its fees by 0.3%. The Wisconsin State Journal reports that this reduction generates approximately \$225,000 in extra funds for health related projects. Despite this, the UW Foundation still takes millions of dollars in management fees on an annual basis. Furthermore, the agreed reduction in management fees fails to compensate for any past excesses in Foundation fees. A refund of a substantial portion, if not all, of the past management funds, including interest, is necessary.

9. Require annual evaluation of the Fund Distribution Rate at a widely noticed public meeting. ABC for Health maintains its longstanding position that the “35/65” split demands restructuring so as to more directly benefit the growing healthcare needs of the people of Wisconsin. The UWSMPH Annual Report indicates that the OAC reviewed and assessed the allocation percentage between public health and medical education and research initiatives and unanimously agreed to maintain the current allocation. Incredibly, despite the passage of over a decade, the 35/65 split remains unchanged. This is despite an increase in the fund’s overall amount and in other available funding sources, and despite evolving threats to the public health of Wisconsin. Furthermore, of the 35% of funds dedicated to public health initiatives, UWSMPH retains a substantial portion by directing money toward student education--a core function of the University, which should come from the school’s operational budget.



In addition, UWSMPH uses some of the 35% to support University programs and staff. Any funded community-academic initiative requires employment of a faculty member, whose salary and benefits constitute a large part of the grant's budget--faculty take an indirect rate of nearly 40%! This "flow back" of community funds contravenes the spirit of the original 35/65 split. Both UWSMPH's Annual Report and the LAB report fail to capture the value of the 35% lost to the University. While the 2010 Annual Report indicates \$2,989,614 went to Oversight and Advisory Committee-funded grants and \$760,366 went to Medical Education and Research Committee-funded grants, the Report lacks the necessary detail that would allow ABC for Health to accurately analyze how much of this funding flowed back to UW via administrative fees, indirect rates, academic partner salaries, and other such expenditures that violate the spirit of the 35/65 split and do not directly benefit the people of Wisconsin.

Finally, as of December 2011, WPP staff admitted that their "administration expenses" continue to be "higher than the MCW." OAC members approved \$375,788 in administrative expenses for 2012 on top of salary/personnel costs of \$1,076,538. The 2012 budget proposal characterizes personnel costs as increasing 9% over 2011. Such a budget is not acceptable.

10. Require oversight committees to have staggered member terms with no terms to last for more than three years. The lack of turnover for certain Board and Committee positions, especially on the UWSMPH OAC, is unfortunate. Certain public and University members of the Committee must resign and make room for new leadership. For example, Phil Farrell, Doug Mormann, and Greg Nycz have long tenures--nearly a decade each--on the Committee and must leave to allow fresh ideas and leadership to emerge. These positions are not lifetime appointments.

WUHF, UWSMPH, MCW, and OCI must prioritize and direct these scarce public health funds to directly benefit the people Wisconsin. As Insurance Commissioner, you must actively monitor this trust relationship between the schools and the people and work with WUHF to obtain explicit authority to enforce the Order and investigate suspected violations. You can give teeth to WUHF's "watchdog function" to ensure it has investigation and enforcement authority, particularly as it relates to the oversight of funding decisions and supplanting of program funds. Finally, you can require WUHF to refer noncompliant actions to OCI for enforcement actions and penalties.

As past and present recipients of some of these scarce public health funds we fully understand and greatly appreciate the importance such funds play in advancing the health of the public in Wisconsin. Therefore, please view our critiques of the Order in context and understand that we respect a great deal of the work conducted by the schools with this "public capital" for the people of Wisconsin. Yet, the record and the evidence remain clear that the schools can do better- much better. As such, we pursue these recommendations in light of the need to continually improve the process and better serve the public health needs of Wisconsinites.



Thank you for your time. We hope you are willing to support this process, to work with the schools, the public health advocacy community, and WUHF. As you know, it is critical that the trustees of these funds focus on the highest and best use of the money for the people of Wisconsin. Having effective enforcement and oversight included in the conversations moving forward with WUHF board members and schools helps support appropriate funding in our communities, and holds everyone accountable to the people of Wisconsin. We hope this letter encourages you to take action to ensure that the BCBS conversion funds adhere to BCBS's founding principles, "to ease the [financial] burden on those seeking hospital and health care services throughout the state."

Regards,

ABC for Health, Inc.

By Bobby Peterson

CC:

Sen. Kathleen Vinehout, Co-Chair Legislative Audit Committee
Rep. Samantha Kerkman, Co-Chair Legislative Audit Committee
Honorable Mark Miller
Honorable Jeff Fitzgerald
Joe Chrisman, State Auditor
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