STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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Via Electronic Mail

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Re: Vaccination of Lifespan and CNE Boards of Directors

Dear Drs. Fanale, Babineau and Alexander-Scott:

On January 15, 2021, it was publicly reported that Lifespan and Care New England ("CNE") had offered their respective board members an opportunity to receive the COVID-19 vaccine. At the time, Lifespan and CNE were participating in the earliest stages of Rhode Island's vaccination campaign, directed by the Rhode Island Department of Health ("RIDOH"). The stated goal of the vaccination campaign at that point was to shore up our health care system and prioritize the State's frontline healthcare workers — those with greatest risk of exposure to the virus. Meanwhile, with the exception of healthcare workers and other limited categories of people not relevant to this inquiry, Rhode Islanders had been told by RIDOH that they would have to wait until February for those 75 and older to even be eligible for vaccination.

The appearance or perception that certain connected or wealthy individuals were, by virtue of their seat on a hospital board of directors, being given an opportunity to "jump the line" months in advance was upsetting to many and fueled anxiety among everyday Rhode Islanders who were dutifully waiting their turn. Perhaps most significantly, it undermined public confidence that the government and health care entities vested with responsibility for carrying out these critical, early phases of the vaccination program were acting in the best interests of all Rhode Islanders and seeded doubts that instead they may have been putting their own interests first.

Accordingly, this Office, pursuant to its statutory authority as the state's Health Care Advocate, undertook a review of: 1) the vaccination priority guidance provided by RIDOH; and 2) Lifespan's and CNE's compliance with that guidance, in letter and in spirit. This review was intended to determine whether or not the actions of Lifespan and/or CNE contravened any guidance or directive promulgated by RIDOH, or state law or regulation.

This Office's analysis, set forth in more detail below, is briefly summarized here. In response to our inquiry, RIDOH has acknowledged that it did not provide Lifespan or CNE with specific guidance regarding prioritization during the initial vaccination phase. The documents provided by the three relevant parties confirm that point; it simply cannot be disputed that RIDOH gave Lifespan and CNE wide discretion in vaccinating their hospital staff, including vaccination prioritization. Furthermore, and critical to this inquiry, RIDOH did not define who, among those connected with Lifespan or CNE, constituted "hospital staff," leaving that vital question for Lifespan and CNE to determine on their own.

This Office strongly believes that Lifespan and CNE should have acted differently, for the reasons set forth later in this report. However, we cannot rationally conclude that Lifespan and/or CNE violated any RIDOH guidance or directive regarding vaccination prioritization, given: 1) the wide discretion RIDOH afforded Lifespan and CNE regarding prioritization; and 2) RIDOH's admission to this Office that it does not believe that Lifespan and CNE did so. Nor is there a basis for a finding that Lifespan or CNE violated any Rhode Island law or regulation. Indeed, like many things related to the COVID-19 pandemic, this issue of "line-jumping" is a novel one, and one which Rhode Island law, based on the facts here, at present does not reach.

An additional and equally important goal of our review was to emphasize the need for transparency, fairness, and equity in Rhode Island's vaccine distribution. It is imperative that people have trust and confidence in the vaccine distribution system and those entrusted to lead and participate in it.

To those ends, this report briefly recites how these vaccinations proceeded, based upon the submissions and records provided by the parties. The report then concludes with a set of recommended guiding principles for those participating in the vaccination effort going forward.

Office of the Health Care Advocate

The Health Care Advocate within the Office of the Attorney General was established by statute in 1999 to protect public health in Rhode Island. Our work in this area is based on the premise that all Rhode Islanders deserve access to quality and affordable health care, the public

deserves an advocate to protect those rights, and the Attorney General has the authority to serve as that advocate. As this Office continues to exercise its role as Health Care Advocate, quality, accessibility, affordability, and equity remain our guiding concerns. Among the powers and duties of the Health Care Advocate is to "[r]eview complaints and conduct any investigations deemed by the attorney general necessary to assure quality health care delivery." R.I. Gen. Laws § 42-9.1-2.

It is with these powers and authorities that we undertake this review.

Guidance from the Rhode Island Department of Health

While not obtained in response to this inquiry, RIDOH's public guidance and communications regarding who was eligible to be vaccinated and when provide valuable context for this Office's analysis. As of early January, when Board members were offered the vaccine, RIDOH was communicating to the public that only very limited groups were eligible to receive it. RIDOH shared with the public a Phase 1 timeline, updated as of January 8, 2021, as well as "Who is Getting Vaccinated?" charts for both weeks of January 4 and January 11. All these communications consistently indicated that only limited health care, public safety, and other frontline workers were eligible, along with nursing home staff and residents, and residents of Central Falls. The general population, starting with adults over 75 years of age, was not slated to be eligible until February/March of 2021.

As outlined above, while not entirely dispositive, the appropriateness of the conduct of Lifespan and CNE must be evaluated against the backdrop of the guidance and direction provided by RIDOH regarding vaccination of non-frontline workers and volunteers, including board members. All conduct, or allegations of misconduct, in any circumstance (criminal, civil, or regulatory) must be held to a standard, and here, in the absence of any applicable law or regulation, that standard is set by RIDOH as the party entrusted with vaccination oversight.

In that regard, RIDOH has acknowledged to this Office that they did not issue formal guidance or expectations regarding vaccine distribution within the hospital systems, relying instead "on a belief that . . . the Hospital Systems would make choices that protected those who were most dedicated and those who were most vulnerable." Presumably, it is because of this failure to provide specific direction that RIDOH has advised this Office that "[t]he Hospital Systems' decisions to vaccinate the members of the Boards when they were vaccinated were neither in conformity with, nor in violation of, RIDOH's directives and guidance." (Emphasis added.)

For obvious reasons, this admission effectively ends this matter, in terms of potential significant legal consequence. Nevertheless, for completeness, this Office further notes that RIDOH, in answer to questions from this Office, stated that it "understands the thought processes expressed by the Hospital Systems." RIDOH further advised this Office, however, that neither Lifespan nor CNE ever proactively sought their approval or consent to include board members in their tiered vaccine plans, and that it "does not believe that the decisions to vaccinate the members of the Boards, when they were vaccinated, were appropriate." RIDOH also stated to this Office that had it known of the plan to vaccinate board members beforehand,

> "the agency would have expressed agreement that making this offering to individuals whose authority forms the basis of their healing work was not unreasonable. The agency would ultimately have pointed out, though, that its own public health physicians had publicly announced that they would not accept vaccinations until their lot was drawn from the public till— because the current climate is one in which the privileged are being surveilled, their choices are being closely appraised, and optics merge with fairness. Therefore, RIDOH would have opined that avoiding any appearance of impropriety would require Board members to be vaccinated at a later time."

In sum, RIDOH's position regarding the conduct of Lifespan and CNE, as expressed to this Office, comes down to this: given the lack of specificity of the guidance and direction it provided to Lifespan or CNE, RIDOH acknowledges that it cannot now credibly contend that Lifespan or CNE contravened that guidance and direction in vaccinating their board members. That said, RIDOH now, after the fact, does not ratify the decisions of Lifespan and CNE to do so.

Care New England

Care New England understood the direction from RIDOH to be to vaccinate its "healthcare workers," and that, based on the size of the allocation they were given, their "only reasonable interpretation was that RIDOH was using a broad definition of 'healthcare workers' that included both clinical and non-clinical workers, i.e., both workers that provide and workers that support patient care." It is CNE's view that their vaccine response plan was designed to ensure that "all of the individuals vaccinated are essential to continuing operations." In CNE's judgment, "[t]o attempt to stratify relative value/risk of the work of each of these individual roles would have slowed vaccination significantly, and . . . would not have been in alignment with the guidelines we were working from."

CNE provided a document showing the three "waves" of vaccination. Wave One comprised "[e]mployees whose duties require them to be part of a direct care team of hospitalized and homecare patients with known COVID-19 infections." Wave Two included "[a]ny one of our employees who were not included in the first wave who have direct contact with patients/clients as part of their day-to-day work in any setting across Care New England." Wave Three captured "[a]ll other CNE employees whose job duties support the clinical operations of the organization."

CNE felt that board members "serve a critical and essential function in overseeing the quality and financial integrity of the health care system," and were, therefore, included in the broad definition of individuals included in CNE's third wave. Within the third wave, vaccine distribution was tiered such that volunteers were offered vaccination after employed workers and after it was determined that there would be enough vaccine remaining. When CNE began to offer vaccine to volunteers, RIDOH had not yet begun routine offering of vaccines to patient or community practices, so CNE concluded that the focus remained on those who supported the clinical operations of CNE, which in its view appropriately included board members. CNE does not represent, nor do they provide any documentation to support, that they sought or obtained permission from RIDOH to begin vaccinating their third wave. CNE does, however, indicate

that there were numerous telephone calls with RIDOH officials in which they "confirmed they had a similar overall perspective . . . on how the allotment of vaccine to our health system was to be used."

CNE reports that seventeen (17) of the volunteer members of the CNE Board of Directors and its affiliate boards opted for vaccination.

Lifespan

Lifespan contends that all of its decisions regarding vaccination distribution and prioritization followed from guidance they received from RIDOH, which indicated that "hospital staff" was the highest priority. However, as noted, RIDOH did not define who was or was not included within that term, nor any order of priority within it. In the absence of more specific guidance from RIDOH, Lifespan's internal prioritization subcommittee interpreted the reference to mean all personnel with a hospital badge, which included board members. Volunteers, which in Lifespan's view included board members, were placed in the third or lowest tier of those who were Lower Risk. In Lifespan's "COVID-19 Vaccine Prioritization" documentation, the Lower Risk tier is described in full as follows: "Non-patient facing staff (all hospitals; dietary; diagnostic radiology; volunteers; off-site employees; students (e.g., medical, nursing, pharmacy) non-patient facing." Board members are not expressly referenced in this tier.

Lifespan sought approval from RIDOH to begin vaccinating its lowest tier on January 4, 2021, and approval was provided on January 6, 2021. Lifespan contends that there were a number of reasons that moving to its lowest tier was appropriate. Lifespan contends that when the decision was made to move to the lowest tier, infrastructure was not yet in place to move outside of the hospital system to community partners or beyond. According to Lifespan, in light of that lack of readiness, storing vaccines in freezers while the state created that infrastructure would have been inefficient, and it was operating with the understanding that its ability to promptly administer vaccine would better enable the state to secure more vaccine in the future.

When Lifespan sought approval from RIDOH to move to its lowest tier, it did not communicate to RIDOH that this tier included board members. In fact, Lifespan's communication to RIDOH about this tier via email stated only the following: "we would like to start expanding to our employees who are in the lower tier, including remote workers who are very much essential to the safe and effective operations of the hospital." Lifespan confirms that this was the extent of the communication between Lifespan and RIDOH regarding Lifespan's plans to move to the lowest tier.

On January 8, 2021, Lifespan communicated internally that it was moving ahead to offer the vaccine to anyone with a Lifespan badge, which expressly included board members. Again, that board members were to be included in this group was not shared with RIDOH. On January 18, 2021, after board member vaccinations had been reported publicly, RIDOH sent Lifespan a letter, asking it to direct its remaining vaccine to community providers and suspend vaccinating its own workforce in its lowest tier.

Lifespan advises this Office it is unable to report on how many doses were administered to the different categories of individuals in the different tiers. However, it disclosed that the vaccine was offered to approximately 110 volunteer board members. Lifespan contends that this number includes board members who would have been eligible to be vaccinated in the first or second tier as clinicians or physicians, as well as others who may have been vaccinated in their professional capacities outside of Lifespan. In light of Lifespan's inability to provide a specific number of board members actually vaccinated, in contrast to CNE, we weigh their conduct in the context of the number of vaccines offered, as opposed to given.

Analysis

It should come as no surprise that the health of, and care received by, our fellow Rhode Islanders has often been determined by their socio-economic background. The COVID-19 pandemic has, sadly, been no exception to this rule. The initial scarcity of FDA-approved COVID-19 vaccines, forcing a rationing of critical health care resources, presented a true test of our collective commitment to equity, fairness, and public health.

This Office's ability to hold anyone to account here is constrained by the lack of guidance or direction provided by RIDOH to Lifespan and CNE during the initial vaccination rollout. There is nothing that this inquiry has unearthed to suggest that Lifespan or CNE, by vaccinating board members, violated or acted contrary to any specific guidance or directive issued by RIDOH. The three entities are all in agreement with respect to that, and we have found no evidence that suggests otherwise. Also, as stated earlier, there are no laws or regulations that govern this conduct, or perhaps more appropriately put, these choices.

This Office agrees with RIDOH's after-the-fact observation that there is a distinction between board members on the one hand and, on the other, rank-and-file hospital employees and volunteers, some of whom are admittedly not on the frontlines. The distinction is one of privilege, access and connections, and, in some circumstances, wealth. Lifespan and CNE, even absent better direction from RIDOH, should have realized that offering vaccinations to this small, yet privileged subset undermined public confidence in the system writ large, particularly when, at the same time, the public was receiving communications from RIDOH indicating how very constrained and limited the eligibility was. This erosion of public confidence in the fairness of the process undermines broader willingness to follow the rules. We see this borne out with increasing reports of younger or otherwise ineligible people signing up for vaccines, simply because the system seems to allow them to do so. This Office recognizes that speed, and a need to avoid waste and spoliation of vaccines were competing interests here, but we are not persuaded, based on the evidence that we have reviewed, that these competing concerns justified the decision to vaccinate board members.

This unfortunate episode highlighted the consequences of straying too far from those public health principles that have guided vaccine distribution in Rhode Island: vaccinating those who are at greatest risk of spreading, contracting, and dying from COVID-19. By offering vaccinations to all of their board members, irrespective of any individualized criteria applicable to Rhode Islanders generally, at a time when Rhode Islanders were gravely concerned about their health and that of their loved ones, Lifespan and CNE erred, and significantly so.

Going forward, we must work to restore and maintain trust in the system. To those ends, we offer the following guiding principles:

- **Rhode Island Department of Health:**
  - For the public, RIDOH must continue its emphasis on transparency, with regular clear and robust communications to the public as to what it is doing and why.
  - For vaccination partners, such as health care providers, municipalities, etc., the guidance from RIDOH must be as clear as possible so that those entrusted with aspects of the vaccine distribution mission know exactly what is expected of them, and so that public health, equity, and fairness can truly guide the system.

- **Vaccine Partners:**
  - Given the vast and complex responsibilities of vaccine distribution, we know partners will have to exercise discretion.
  - It is, therefore, incumbent upon vaccine partners to hold themselves to the highest standards when operating and exercising discretion in this work.
  - They should endeavor to:
    - Adhere as best and as closely as possible to the relevant categories and/or guidance from RIDOH and the CDC;
    - When in doubt, ask for clearer guidance;
    - Be transparent about vaccination priorities, and apply these priorities consistently and equitably; and
    - Avoid at all costs any waste of vaccines.
  - Avoiding even the appearance of personal or corporate self-interest may be the most important of these principles when it comes to restoring public trust.

We would be remiss if we did not conclude this report by acknowledging the extraordinary work, dedication, and sacrifice of both Lifespan and CNE and their thousands of employees and frontline health care workers over the past year, as well as the dedicated public servants at RIDOH. We are grateful for their hard work and leadership throughout this pandemic, and we look forward to our continued work together.

The COVID-19 pandemic has taught us all about the importance of strategies that require individual sacrifice for the benefit of others and the broader community. The vaccination strategy is no different, and our collective ability to follow the rules will help keep Rhode Islanders safe.

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