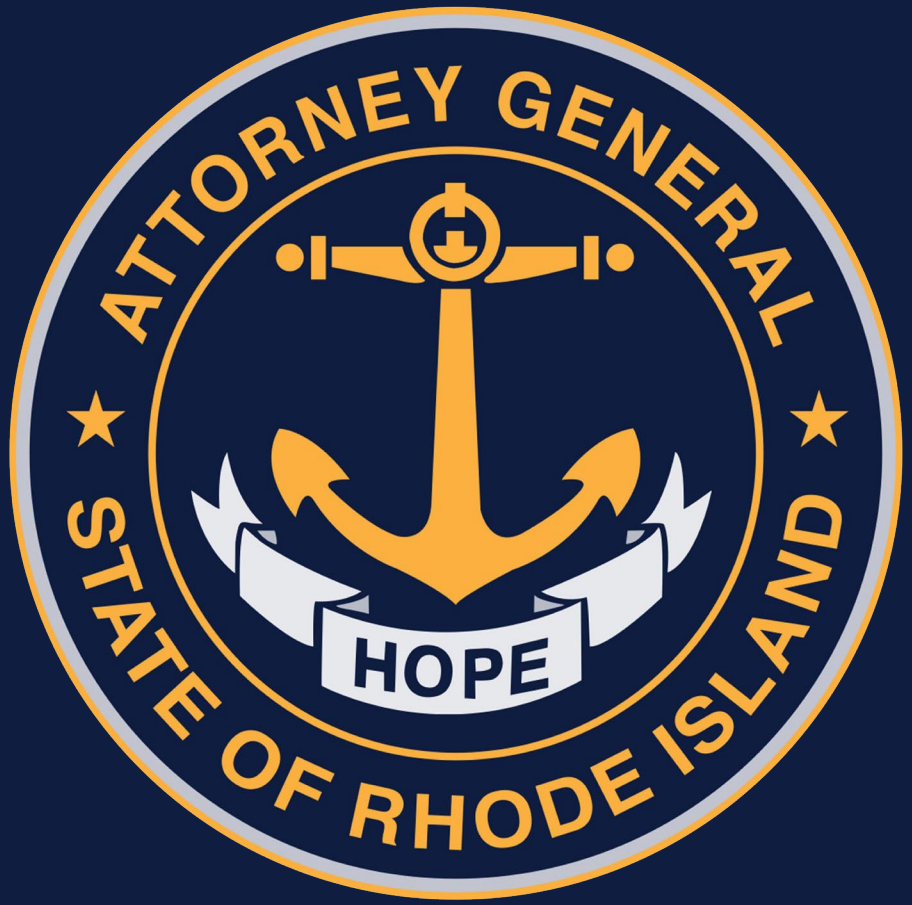

ATTORNEY GENERAL
HOPE
STATE OF RHODE ISLAND

Attorney General Neronha's Review of Proposed Merger Between Lifespan and Care New England:

Why eliminating competition threatens healthcare costs, quality and access

Decision in Proposed Healthcare Merger

Today's HCA Decision denies the application of Lifespan and Care New England to merge.

The Attorney General will also be joining a Federal Trade Commission lawsuit to block the merger.

RIAG Review Team

- Miriam Weizenbaum, Civil Division Chief
- Kathryn Sabatini, Chief of Policy
- Dan Sutton, Deputy Chief of Policy
- Stephen Provazza, Chief, Consumer & Economic Justice Unit
- Jessica Rider, Health Care Advocate
- Maria Lenz, Assistant Attorney General
- Michelle Barbosa, Paralegal

Experts who assisted with review

Dr. Kevin Pflum,
Healthcare economics expert
Principal at Bates White Economic Consulting (Washington, DC)

- Extensive experience analyzing competitive effects of hospital mergers across the U.S. on behalf of merging hospitals and regulators
- Published several journal articles on hospital and provider competition and their effects on prices and quality

  Experience on last two hospital mergers challenged by FTC:
  - Supported Jefferson/Einstein Health (PA) in successful opposition to FTC merger challenge
  - Supported FTC in its successful challenge to Hackensack Meridian Health (NJ) merger.

Experts who assisted with review:

Veralon Partners, healthcare finance experts with over 25 years of experience serving more than 1,300 healthcare clients

Professor Lawton R. Burns, Ph.D, MBA, healthcare management expert; Wharton School of Business at University of Pennsylvania

The Parties

Lifespan	Staffed beds	Care New England	Staffed beds	All other RI hospitals	Staffed beds
Rhode Island Hospital	682	Kent Hospital	306	Landmark Medical Center	140
Hasbro Children's Hospital		Butler Hospital		Our Lady of Fatima Hospital	125
The Miriam Hospital	247	Women & Infants Hospital	247	Roger Williams Medical Center	86
Bradley Hospital				South County Hospital	91
Newport Hospital	104			Westerly Hospital	93

Rhode Island Hospital Conversions Act

The purpose of the HCA "is to assure the viability of a safe, accessible and affordable healthcare system that is available to all…"

R.I. Gen. Laws § 23-17.14-3

The Critical Questions

- Is the proposed merger proper under Rhode Island's antitrust law?
- Are the promised benefits from the merger adequately defined in the Application such that this Office can weigh them against any anticompetitive harms?
- Is the proposed merger financially feasible?

The Attorney General's Review

April 26, 2021	May 26, 2021	May 28, 2021	September 10, 2021	November 16, 2021
Lifespan/CNE file HCA Application	AG, RIDOH notified Lifespan/CNE of substantial deficiencies in application	AG issued robust antitrust-focused document request	AG and DOH notified parties that critical deficiencies remained unaddressed	AG and DOH deem Oct. 1 application complete; issue additional large information request

The Attorney General's Review

From November 2021 – February 2022, the Attorney General took statements under oath from dozens of Lifespan/CNE executives, consultants the Parties used for the merger, and representatives of Brown University.

The Office collected millions of documents; talked to physicians and workers, community organizations, businesses, and local healthcare systems; and reviewed public comments from hundreds of Rhode Islanders.

FTC pre-merger review; AG joining challenge

FTC conducted pre-merger review of Lifespan/CNE deal

- Examined merger under federal antitrust law
- Review occurred at the same time as AG's review under HCA

Attorney General, on behalf of State of Rhode Island, joining FTC challenge to merger in federal court.

Antitrust laws protect competition

Antitrust laws – state and federal – exist to ensure competition in the marketplace, including the healthcare marketplace.

Competition:

BENEFITS

Consumers and workers

LEADS TO

Lower prices, higher quality, and greater access

DRIVES

Innovation

INCREASES PAY

For workers and promotes better working conditions

When is a merger unlawful under antitrust law?

Competition matters:

It has a positive effect on cost, quality and access—and antitrust laws are designed to protect that competition.

Whether a merger is unlawful turns on federal and state antitrust law:
Is the merger **likely** to "**substantially lessen competition**"?
Clayton Act (15 U.S.C. § 18)

The AG has examined the transaction using this standard.

Antitrust Metrics: Market Share and HHI Index

Two established metrics for determining whether a proposed merger violates antitrust law:

Market Share	HHI Index
Market share **over 30%** is presumptively anticompetitive under the antitrust laws *Supreme Court in U.S. v. Philadelphia National Bank*	Another way of looking at market share through the lens of overall market concentration. Where a market is highly concentrated, **increase in HHI of over 200** points is presumptively illegal. *DOJ/FTC Horizontal Merger Guidelines*

Merger creates extraordinarily high market concentration

This merger, if approved, would create a single healthcare system that controls:

- **75%** of all inpatient acute care hospital beds in Rhode Island
- **80%** of Rhode Island market for inpatient hospital care
- **79%** of the Rhode Island market for inpatient psychiatric care
- **60%** or more of the Rhode Island market for many outpatient surgery specialties

Merger creates extraordinarily high market concentration

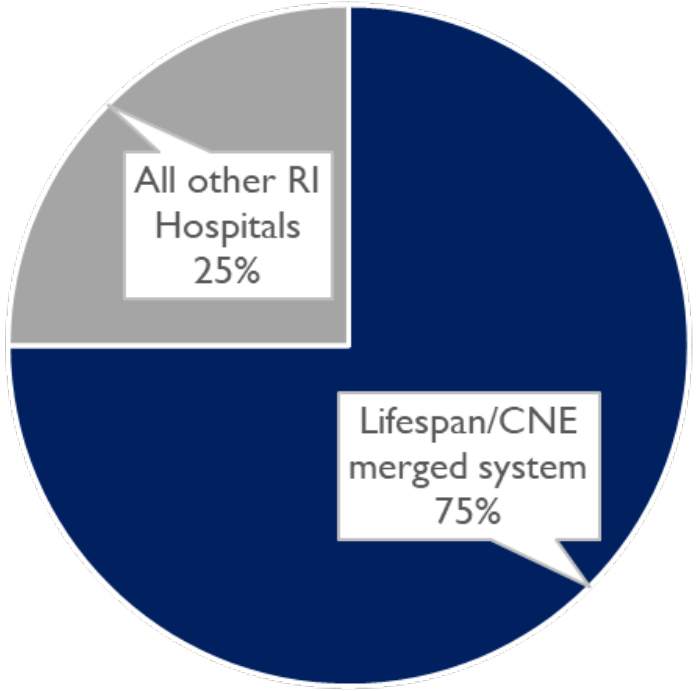
In addition:

- About **50%** of commercial healthcare spending will be on patients whose primary care physician is part of the merged system's Accountable Care Organizations

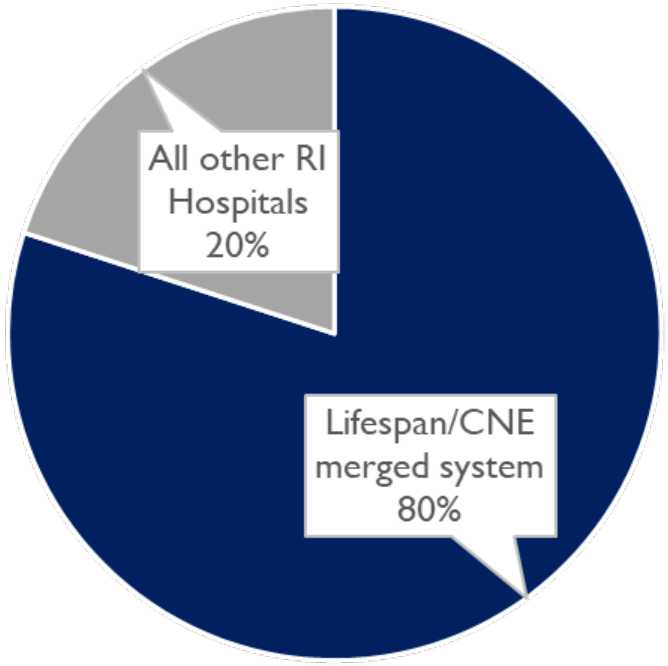
- The new system would employ **67%** of Rhode Island's full-time registered nurses working at a hospital

Lifespan/CNE's combined RI market share is overwhelming

Inpatient acute care hospital beds



Statewide market for acute inpatient care



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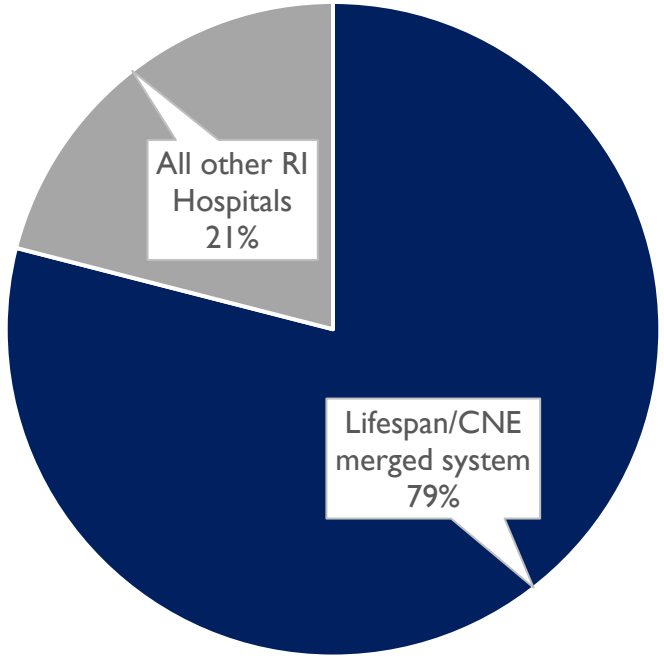
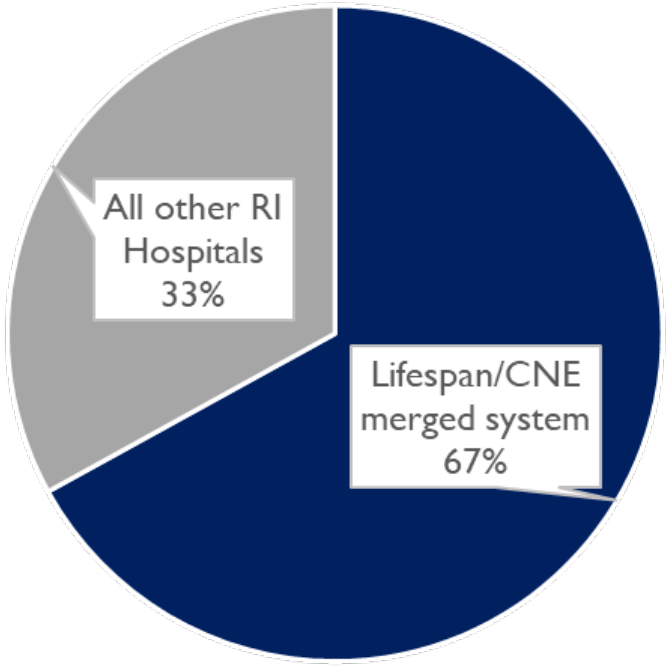


RI's registered, full-time hospital nurses employed



Market Concentration would exceed neighboring states

By comparison, study shows **Mass General Brigham** (formerly Partners) controls:

- 20% of all inpatient acute care hospital beds in MA statewide market
- 27% of MA statewide market for inpatient hospital care
- 27% of MA statewide market for outpatient care

Another study shows **Yale New Haven** controls:

- 31% of the CT statewide market for inpatient hospital care

HHI Index shows high concentration

Based on the HHI Index, Rhode Island is already a highly concentrated healthcare market. A healthcare market is considered highly concentrated if the HHI score is 2,500 or above.

Rhode Island's HHI score for inpatient GAC is 3,315 – well over 2,500.

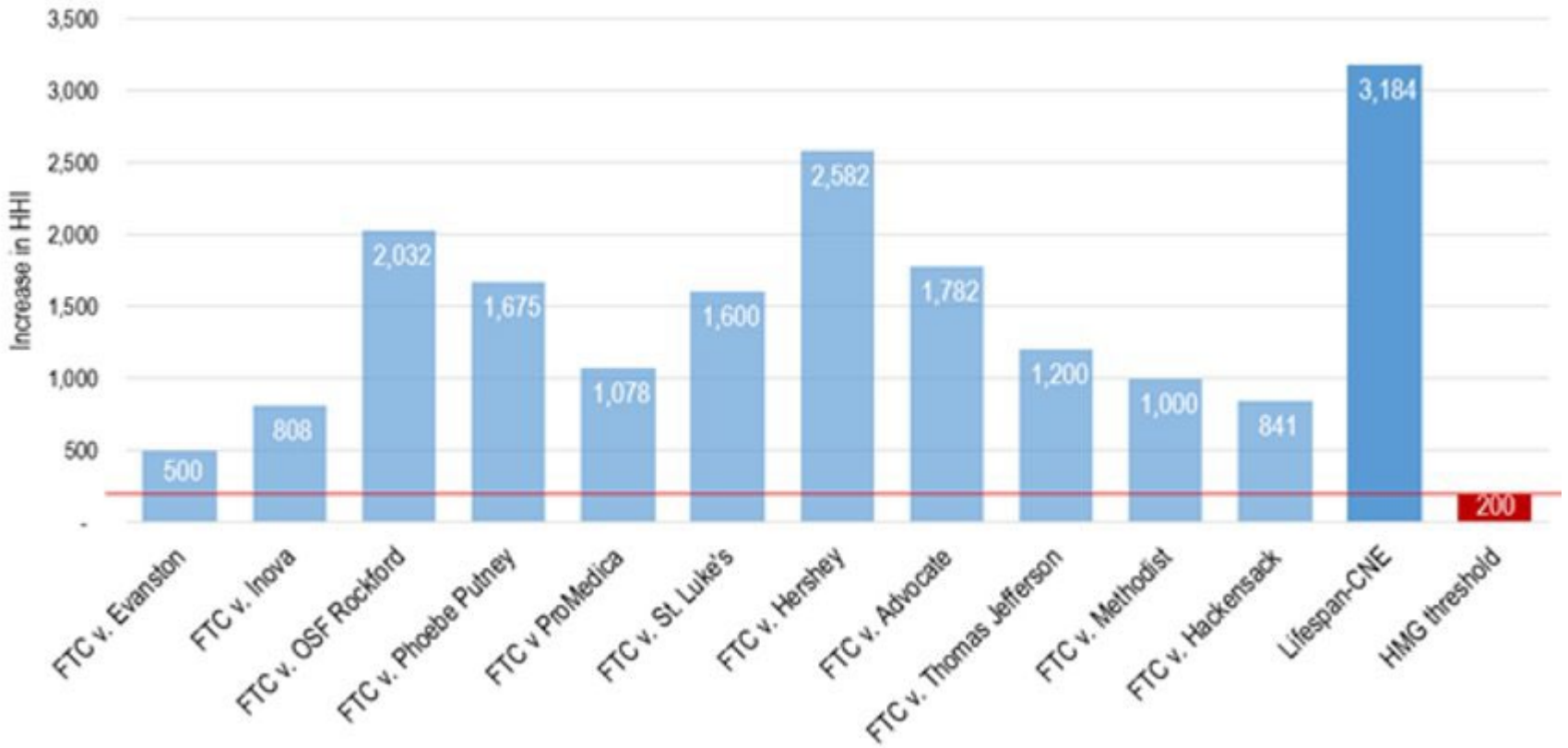
Under the Department of Justice/FTC Merger Guidelines, where a market is highly concentrated, an HHI increase resulting from a merger that exceeds 200 is presumptively illegal.

HHI Index shows high concentration

Here, looking at the inpatient general acute care services market, our expert has calculated that the HHI increase from the proposed merger would be 3,251 points, resulting in an overall HHI score of 6,499.

This indicates that the merger would result in an enormously concentrated, anticompetitive healthcare market.

Merger compared to other FTC merger challenges



The merger will **increase** the concentration of RI's healthcare market by more than the increase in **all hospital mergers challenged by the FTC in the last 18 years.**

CNE and Lifespan Compete in the Healthcare Market

- Based on these well-established metrics, under federal and state antitrust law, the proposed merger is "likely to substantially lessen competition," and is therefore presumptively unlawful.

- The Parties undoubtedly see this – they have experts too – but claim that their situation is different – unique even – because, according to them, they don't compete at all.

- According to them, the merger just joins together two systems that do separate, "complementary" things.

CNE and Lifespan Compete in the Healthcare Market

This argument explains the need for diligence by state regulators.

Because the record is very clear: Lifespan and Care New England **DO** compete, aggressively, across many areas and service lines.

CNE and Lifespan Compete in the Healthcare Market

The Parties themselves, other providers, and our experts confirm this existing state of competition.

Dr. Jack Elias, who was tapped by Brown's President as the point person for the University on the merger, describes Lifespan and Care New England as competing "all over the place."

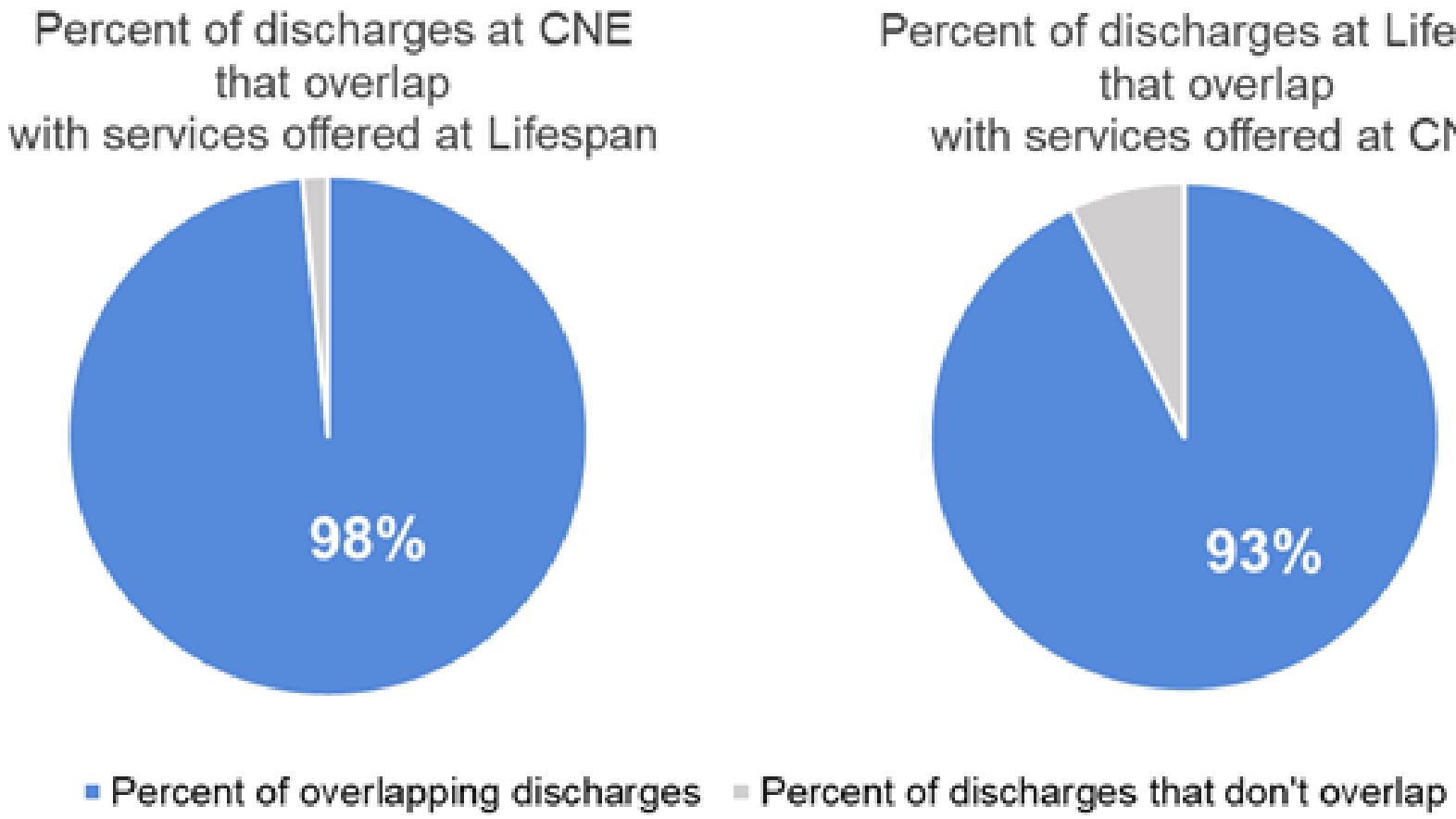
Other hospital systems in Rhode Island, like Landmark and South County Health know it: "Lifespan and Care New England strongly compete against each other, and this competition benefits patients."
- *South County Health CFO Thomas Breen*

CNE and Lifespan Compete in the Healthcare Market

The evidence obtained through this investigation demonstrates it – Lifespan and CNE acknowledge they compete head-to-head on various services, including:

- Cardiology
- Oncology
- Orthopedics
- Spine surgery
- Thoracic Surgery
- Emergency Medicine

RI'ers will have to spend more on health care



Dr. Pflum's expert analysis shows significant overlap in the inpatient acute care services that Lifespan and CNE offer

CNE and Lifespan Compete in the Healthcare Market

The proposed merger's elimination of competition between CNE and Lifespan, and their resulting dominant position in the state's healthcare marketplace, would significantly impact Rhode Islanders.

RI'ers will have to spend more on health care

Rhode Island health insurance companies will no longer be able to rely on competitive pressures to keep rates down.

Across the country, over and over again, studies show and experts recognize that mergers that result in high market concentration lead to increased healthcare costs:

"[S]tudies consistently show that when hospital consolidation is between close competitors it raises prices, and by substantial amounts." *Professor Martin Gaynor, Carnegie Mellon University, in testimony to U.S. Senate*

RI'ers will have to spend more on health care

Our expert, Dr. Pflum, examining Rhode Island data, confirms what has happened nationally will happen here.

He concludes that increased leverage means a new system could increase prices by at least 9%.

Insurers directly pass on increased healthcare costs to consumers through higher premiums and out of pocket costs.

When insurers pay more for care, RI'ers will too

Who are those cost increases passed down to?

Consumers, small businesses, and employers are all going to pay increased healthcare costs.

"Health expenses are already a large expense for the operation of my small business…and when health insurance costs continue to rise, things like wage increases or additional worker benefits become unsustainable …. Health costs often crowd out other incentives I would like to provide for my workforce but cannot afford."

- Pawtucket Small Business Owner

Competition also drives Quality, Innovation, & Access

Competition does more than help keep healthcare costs down:

"Enhanced market power can also be manifested in non-price terms that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation."

Horizontal Merger Guidelines Section 1

Competition between Lifespan/CNE has improved RI'ers access to high quality care

Existing competition has delivered better results for Rhode Islanders – better quality, improved access, and more innovation.

There are many examples, including:

Improved performance regarding hospital-driven infections

When Kent Hospital's quality ratings dropped relative to other RI hospitals, it purchased robots that sterilize hospital rooms between patient stays (lower infection rates also lead to higher quality scores in national ratings like Leapfrog).

Competition between Lifespan/CNE has improved RI'ers access to high quality care

Improved cardiology services at both CNE and Lifespan

Kent Hospital built a catheterization lab and affiliated with Brigham and Womens' cardiologists, subsequently the Lifespan Cardiovascular Institute established a call center to improve appointment scheduling and win back more patients.

Improved thoracic service line at CNE and Lifespan:

Kent Hospital, again, made investments. Lifespan responded by hiring a world class thoracic surgeon specializing in minimally invasive robotic surgeries.

Quality, Innovation and Access

- The proposed merger, if approved, would eliminate this competition that has driven improvements in the healthcare delivered to Rhode Islanders.
- The research confirms what the record in this review tells us: competition drives good outcomes for consumers beyond price.

> "Research evidence indicates that hospital consolidation does not improve access to care but in fact hurts it."
>
> *- Burns Expert Report*

Quality, Innovation and Access

The new system would have:

- Nearly uncontrolled discretion to decide which services would be available at which hospitals, cutting services in certain locations, thereby limiting access.
- Nearly uncontrolled discretion to decide that its doctors can only provide certain types of surgeries at one of the system's hospitals, or that primary care physicians under its control should be incentivized to shorten patient visits.
- Nearly uncontrolled discretion to direct its hospitals to focus on higher revenue-generating care system-wide.

Quality, Innovation and Access

The bottom line, as noted in our decision:

"The Proposed Transaction would eliminate the head-to-head competition between Lifespan and CNE that produces real benefits for Rhode Island patients, whether they have commercial insurance, obtain coverage on the individual market, or utilize Medicare or Medicaid, and for plan sponsors, including small businesses."

"Because a merged entity with an inpatient [general acute care] market share of 80% would face little competition for patients, it would have no incentive to make the investments that Lifespan and CNE, as separate entities, have previously made or contemplated making to improve the quality of their services, add service lines, and increase patient safety, convenience and access."

Anticompetitive harms extend beyond core hospital services

Outpatient surgery markets: Of the 10 most intensive outpatient procedure specialties--Lifespan/CNE would have a market share greater than 60% for four specialties, and for 7 of the 10 would result in presumptively anticompetitive transaction.

Inpatient behavioral health services: Lifespan/CNE would account for 79% of behavioral health market for commercially insured patients under 65 in Rhode Island, also presumptively anticompetitive.

Anticompetitive harms extend beyond core hospital services

Accountable Care Organization market: three ACOs would account for 81% of commercial lives "attributed" to Rhode Island ACOs. Consolidation of ACOs would reduce incentives to improve patient experience and to work with insurers to find ways to reduce the overall cost of care.

Labor market for nurses: Lifespan/CNE would employ 67% of the full-time registered nurses employed by Rhode Island hospitals. Elimination of competition to recruit is likely to result in lower wages, worse benefits, and limited options for nurses.

Conditions can't solve for these issues

- The Parties, the Rhode Island Foundation, and advocates and stakeholders have all recommended various conditions and initiatives that the Parties could pursue.
- Many of the initiatives proposed are worthy opportunities that Lifespan and CNE should consider without merging.
- Here, the combined system would simply be too large and control too many levers in the marketplace for conditions or additional regulation to effectively cure the risks and harms to cost, quality, and access.

Conditions can't solve for these issues

- Regulatory constraints: Consistently result in higher costs over the long term without improving quality

- OHIC: Agency and the tools at its disposal are not enough to regulate a new system that will dominate the state's healthcare market, and OHIC agrees

OHIC Rate Caps can't solve for this degree of market power

OHIC Commissioner acknowledges that OHIC Rate Caps are insufficient to control the anticompetitive implications of this merger.

"[Rate caps] are insufficient by themselves to adequately mitigate the risks to affordability resulting from higher prices that could materialize following the proposed merger of CNE and Lifespan"

Regulators should evaluate "the likely price effects of the proposed merger of CNE and Lifespan assuming an unregulated environment."

OHIC Rate Caps can't solve for this degree of market power

The problem with relying on OHIC's rate caps are many:

- They **can be overridden** by the General Assembly at a future date.
- OHIC Rate Caps **only apply to inpatient hospital services**. Don't apply to physician groups or services performed at non-hospital facilities, including ambulatory surgery centers, where health care is increasingly headed.
- OHIC Rate Caps **do nothing to solve for the non-price harms** arising from market concentration: quality, access and innovation.

Balancing Anticompetitive Harm vs Anticipated Benefits

- The proposed merger would have a substantially anticompetitive effect on the Rhode Island healthcare market, to the detriment of Rhode Islanders.

- The proposed merger is unlawful because of those anticompetitive impacts under the HCA and the Rhode Island Antitrust Act.

Nevertheless, we went on to consider: would the claimed benefits of the proposed merger be of such magnitude that they would outweigh these demonstrably anti-competitive effects?

Balancing Anticompetitive Harm vs. Anticipated Benefits

This required us to ask two separate questions:

First, do the Parties have **a credible plan** to effectuate the merger – to integrate the two systems and deliver on its promised benefits?

Second, would the combined system have **the financial wherewithal** to deliver on those promises?

Finding the **answers** to both questions **proved elusive**, at best.

The Parties Failed To Provide A Detailed Plan of What They Intend to Do

Parties have been **unwilling or unable to describe with any precision** how they intend to integrate the two systems and deliver the benefits they promise.

Over many months, we repeatedly told CNE and Lifespan that a real, **detailed integration plan** was **essential** to our evaluation of the merger proposal, and their failure to provide one was a **significant problem**.

The Parties Failed To Provide A Detailed Plan of What They Intend to Do

- **Apr. 26, 2021**: **Application filed without an integration plan**. Parties admitted, "At this point, there is not a board approved integration plan."
- **May 26, 2021**: AG and DOH issued joint **deficiency letter**, requesting, among other things, an **integration plan**.
- **July 2021**: Attorney General met with the Parties and informed them that their HCA Application **remained deficient** because it lacked a final, specific, system integration plan.
- **Sep. 10, 2021:** AG and DOH issue second joint deficiency letter identifying "significant areas of deficiency" including the lack of an integration plan. Regulators told the Parties, **"[we] cannot evaluate what [we] cannot see."**
- **Oct. 1, 2021:** Parties resubmit HCA Application including the "**Chartis Report**," which according to the Parties, provides guidance on the Parties' realization of the merger's promised benefits.

The Parties Failed To Provide A Detailed Plan of What They Intend to Do

The Chartis Report is, ultimately, **merely a statement of objectives**, and a **commitment to plan in the future**.

It **fails to adequately describe** what the merged system will ultimately be, and, most importantly, precisely and in detail, the benefits the merger will provide to Rhode Islanders, and how the system will deliver those promised benefits.

The Parties Failed To Provide A Detailed Plan of What They Intend to Do

The Chartis Report, by its own admission, **is not an integration plan**.

"The Parties will develop a comprehensive integration plan that includes a detailed workplan and timeline, estimated improvements in access, quality, cost and equity; and projected capital needs. This process will be overseen by a Pre-Integration Steering Committee consisting of representatives from CNE, LS, and Brown, and the pre-integration plans will be shared with state and federal regulators and other stakeholders … as they become available."

This was in October of 2021, after this Office had repeatedly told the Parties to deliver an actual integration plan, and explained why that was necessary.

The Parties Failed To Provide A Detailed Plan of What They Intend to Do

The **Chartis Report** makes **only vague promises**, like:

- "RIAHCS will expand the services at its Express Care Center"
- "RIAHCS can more effectively ensure programs and resources are developed and deployed in ways that will help overcome [social] barriers"
- "RIAHCS and Brown can serve as catalysts to grow research and innovation across the state"

The Parties are asking this Office to approve this proposed merger before we know precisely what they are going to do, or not do, and how they intend to accomplish it, financially and otherwise.

The HCA demands more from the Parties. And they have failed to deliver it.

Claimed Benefit: AMC with Brown

- The Parties continue to extol the potential benefits of an academic medical center with Brown University.
- Yet, Lifespan and Care New England structured their transaction and application to exclude the university and keep it largely out of the regulatory review process.

Questions remain:

- What will Brown's role be?
- Lifespan and CNE already have deep affiliations with Brown. How will those change or deepen as part of the development of an AMC?
- What about the role of Brown's physicians' group?

Financial feasibility

The Attorney General cannot approve an HCA Application where the proposal is not financially feasible.

While Lifespan and CNE's promises to carry out a number of new initiatives is laudable, the **evidence does not demonstrate that these systems have the financial wherewithal** to make the investments required to achieve those goals.

Even more critically, this transaction would leave the vast majority of Rhode Island's healthcare services in one system that is both financially vulnerable and too big to fail at the same time.

The Costs of Integration and Financial Sustainability are Great and Unaccounted For

Combining two large health systems costs money – both to pay for the **basic costs of integration** (like implementing a common electronic medical records system) and to make any **investments in actually improving care for patients**.

Notably, the Parties would enter this proposed transaction with **two systems that are already under significant financial strain**—from both the ongoing COVID-19 pandemic and other factors.

The Costs of Integration and Financial Sustainability are Great and Unaccounted For

Almost ten months after Parties filed their HCA application, the Office is still left without answers to basic questions like:

- How much **will it cost to integrate** these two system?
- How much **will it cost to fund all the new initiatives** the Parties have promised Rhode Islanders?
- Does a combined Lifespan/CNE **have the capacity** to make those investments? If not, where will it come from?

There is a substantial gap between what the Parties have and what they need

There is still **a substantial gap** between the Parties' financial projections and the amount of money they need to (1) create **a financially stable system,** and (2) to make the types of **investments** they need to **integrate** or **deliver on their promises**.

There is a substantial gap between what the Parties have and what they need

The Parties have still not developed a plan to close that gap. Brown has agreed to invest $125M if the deal goes through, but that money won't be used to pay for the basic, but substantial, costs of combining these two entities.

The fate of healthcare in Rhode Island does not depend on this transaction

Healthcare isn't moving out of state:

- Data shows that **nearly 90 percent** of Rhode Islanders receive inpatient care at Rhode Island hospitals.

- When they leave the state, they are going to nearby hospitals, as St. Anne's or Charlton Memorial in Fall River are for Bristol, Tiverton, and Warren residents, or because they are receiving specialized care, like cardiac care or cancer treatments in Boston.

The fate of healthcare in Rhode Island does not depend on this transaction

Healthcare isn't moving out of state:

- A **potential future merger** with an **out-of-state party would not significantly change** these patterns**.**
- Competition would continue to apply pressure on any new entities to serve Rhode Islanders locally, **because that is their preference**.
- **Attorney General has the tools** under the HCA tools to address concerns regarding local governance and control.

The fate of healthcare in Rhode Island does not depend on this transaction

We have tools to address for-profit health systems:

The Attorney General has demonstrated an understanding of and willingness to act on the specific perils and concerns posed by transactions involving for-profit health systems seeking to acquire Rhode Island hospitals.

In the **Prospect Medical HCA decision issued in June 2021**, the Attorney General imposed unprecedented conditions to safeguard two Rhode Island hospitals. Any similar proposed merger or acquisition will require robust review under the HCA, and the Attorney General will continue to scrutinize these transactions to safeguard care, access, and affordability for healthcare in Rhode Island.

Questions?

Full HCA decision is available on riag.ri.gov.