Washington Ambulatory Surgery Center Association
Our Patients Come First

WASCA Files *Amicus Curiae* Brief in Declaratory Action to Invalidate New Certificate of Need Rule Subjecting ASFs to Review

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Citing as "persuasive" an *amicus curiae* brief filed on behalf of the Washington Ambulatory Surgery Center Association ("WASCA"), a Thurston County superior court struck down a new rule of the Department of Health Certificate of Need Program last week.

WASCA had requested leave to file a brief as *amicus curiae* in *The Polyclinic, et al. v. Department of Health of the State of Washington*, Thurston County Superior Court, No. 14-2-01413-6, a declaratory action seeking to invalidate a new rule that required certificate of need ("CN") review where an existing CN-approved ambulatory surgical facility ("ASF") seeks to increase the number of operating rooms ("ORs") at its facility. Importantly, hospital outpatient departments ("HOPDs") were not subject to review in the same circumstance.

In its *amicus curiae* brief, WASCA advised the court of the negative impact the rule would have on the ambulatory surgery industry, increasing the cost of regulation for ASFs while at the same time paving the way for hospital competition. WASCA argued that patient access to the lower cost outpatient surgery alternative that ASFs represent is critical to the state's health care delivery system.

WASCA's *amicus curiae* brief is available at www.wasca.net.

Application of Certificate of Need Review Requirements to Increases in ASF ORs

Washington's CN law expressly subjects eight specific activities to CN review by the Program. Relevant to this action, the CN law requires review in connection with the "establishment of a new health care facility . . . ." Since the CN law was enacted in 1979, the Program has interpreted and implemented this provision as the legislature wrote it, subjecting only the establishment of a *new* ASF to review. The Program has consistently held that an increase in the number of ORs at an existing CN-approved ASF does *not* result in the establishment of a new health care facility and therefore is *not* subject to CN review.

Nearly 35 years after the CN law took effect, this year the Program reversed its longstanding interpretation of the CN law and unilaterally determined that CN review is required where an existing, CN-approved ASF seeks, not to open a new facility, but only to increase the number of ORs at the existing facility.

WASCA argued that ASFs have long relied on the Program's prior interpretation of the CN law, and conducted their businesses with the understanding that, if they needed to increase the number of ORs to serve their communities, no additional CN review would be required. The Program should not be able to change its interpretation after nearly 35 years of reasonable reliance by ASFs on its prior interpretation, WASCA further argued.

The Program's Arbitrary and Capricious New Rule

WASCA also argued that the Program's new rule was arbitrary and capricious due to its application to ASFs but not HOPDs. Any change in triggers for CN review that applies to ASFs should logically apply to HOPDs due to the similarity in purpose, function, and service provided at these two types of health care facilities. Any requirement for additional CN review for one type of facility, but not for another type that performs the same services would impose a significantly disproportionate regulatory burden on ASFs as compared to hospitals. The Program's disregard for these facts and circumstances required a finding that the new rule was arbitrary and capricious.

Conclusion

At the October 10th hearing, the court held that the Program could not adopt such a rule without complying with statutory requirements under Washington's Administrative Procedure Act. Therefore, for now, CN-approved ASFs can still increase the number of their operating rooms without undergoing CN review anew. The Program may in future undertake rulemaking in an effort to require CN review where an existing CN-approved ASF seeks to increase the number of ORs at its facility. WASCA will advise its membership if the Program gives notice of any such rulemaking. ■