



STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
Office of Health Care Access

February 4, 2010

IN THE MATTER OF:

An Declaratory Ruling filed pursuant to
Section 4-176, C.G.S. and Section 19a-
643-24 of the Regulations of
Connecticut State Agencies

Notice of Final Decision
Office of Health Care Access Division of
the Department of Public Health
Docket Number: 09-31433-DCR

To: John D. Blair, Esq.
Brown Rudnick LLP
CityPlace I
185 Asylum Street
Hartford, CT 06103

Dear Attorney Blair:

This letter will serve as notice of the Final Decision of the Office of Health Care Access in the above matter as provided by General Statutes § 4-176 and §19a-643-24 of the Regulations of Connecticut State Agencies. A copy of the Final Decision is attached hereto for your information.

By Order of the
Office of Health Care Access

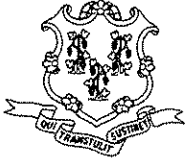
A handwritten signature in cursive script, appearing to read "Cristine A. Vogel", written over a horizontal line.

Cristine A. Vogel
Deputy Commissioner

CAV:mad

Enclosure

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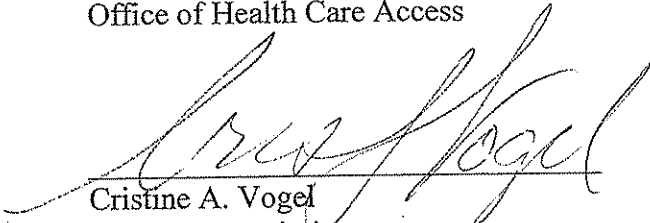
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Docket Number: 09-31433-DCR

To: Stephen M. Cowherd, Esq.
Jeffers & Cowherd
55 Walls Drive
Fairfield, CT 06824

Dear Attorney Cowherd:

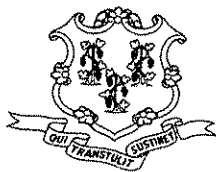
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By Order of the
Office of Health Care Access


Cristine A. Vogel
Deputy Commissioner

CAV:mad

Enclosure



Department of Public Health Office of Health Care Access

In Re: Petition for Declaratory Ruling

Docket Number: 09-31433-DCR

Petitioners: Greenwich Hospital & Yale-New Haven Hospital

RULING ON GREENWICH HOSPITAL AND YALE-NEW HAVEN HOSPITAL'S PETITION FOR DECLARATORY RULING

Procedural History

On August 11, 2009, the Office of Health Care Access Division of the Department of Public Health ("OHCA") received a petition from Greenwich Hospital and Yale-New Haven Hospital ("Petitioners") seeking a declaratory ruling from OHCA on the following:

Whether Sections 19a-634 and 19a-637 of the Connecticut General Statutes require or allow the Agency to exclude patients who live out of state, but are treated in a Connecticut health care facility, when evaluating the need for a particular health care service.

OHCA published notice of the Petition for Declaratory Ruling on its website and in the September 15, 2009 publication of the Connecticut Law Journal. Additionally, notice was specifically provided to all acute-care short-term general hospitals located in the state of Connecticut. In the notice, OHCA indicated that it would issue a decision on the Petition for Declaratory Ruling on or before February 4, 2010.

The Stamford Hospital ("TSH" or "Intervenor") filed a petition for status on October 14, 2009. The Petitioners and the Radiological Society of Connecticut ("RSC") filed petitions for status on October 15, 2009. In its Petition for Status, TSH objected to OHCA designating the Petitioners as parties to the proceeding, asserting that the petitioners' legal rights, duties and privileges are no greater than those of any other Connecticut hospital subject to Certificate of Need statutes and therefore, they are not entitled to party status.

On October 30, 2009, the Petitioners filed a response to TSH's objection to party status asserting, *inter alia*, that Greenwich Hospital's ability to provide new and expanded services and make significant expenditures to provide services for its current

population in its primary and secondary service areas would be “greatly impaired” by an adverse decision in this proceeding.

On November 3, 2009, OHCA designated the Petitioners and TSH as intervenors with full procedural rights in this matter and denied RSC’s petition for status. Additionally, OHCA requested that the intervenors submit briefs by November 30, 2009. On November 30, 2009, the Petitioners and TSH submitted their briefs.

Law & Participants’ Arguments

Prior to July 1, 2009, General Statutes § 19a-634 provided as follows:

(a) The Office of Health Care Access, in consultation with the Department of Public Health, shall carry out a continuing state-wide health care facility utilization study, including a study of existing health care delivery systems; recommend improvements in health care procedures to the health care facilities and institutions; recommend to the commissioner legislation in the area of health care programs; and report annually to the Governor and the General Assembly its findings, recommendations and proposals, as of January first, for improving efficiency, lowering health care costs, coordinating use of facilities and services and expanding the availability of health care throughout the state.

(b) The office shall establish and maintain a state-wide health care facilities plan, including provisions for an ongoing evaluation of the facility utilization study conducted pursuant to subsection (a) of this section to: (1) Determine the availability of acute care, long-term care and home health care services in private and public institutional and community-based facilities providing diagnostic or therapeutic services for residents of this state; (2) determine the scope of such services; and (3) anticipate future needs for such facilities and services. The health care facilities plan shall be considered part of the state health plan for purposes of office deliberations pursuant to section 19a-637.

Pursuant to Public Acts 09-77 and 09-3, Section 19a-634 was amended and now provides:

(a) The Office of Health Care Access shall conduct, on an annual basis, a state-wide health care facility utilization study. Such study shall include, but not be limited to, an assessment of: (1) Current availability and utilization of acute hospital care, hospital emergency care, specialty hospital care, outpatient surgical care, primary care and clinic care; (2) geographic areas and subpopulations that may be underserved or have reduced access to specific types of health care services; and (3) other factors that the office deems pertinent to health care facility utilization. Not later than June thirtieth of each year, the Commissioner of Public Health shall report, in

accordance with, to the Governor and the joint standing committees of the General Assembly having cognizance of matters relating to public health and human services on the findings of the study. Such report may also include the office's recommendations for addressing identified gaps in the provision of health care services and recommendations concerning a lack of access to health care services.

(b) The office, in consultation with such other state agencies as the Commissioner of Public Health deems appropriate, shall establish and maintain a state-wide health care facilities plan. Such plan may include, but not be limited to: (1) An assessment of the availability of acute hospital care, hospital emergency care, specialty hospital care, outpatient surgical care, primary care, and clinic care; (2) an evaluation of the unmet needs of persons at risk and vulnerable populations as determined by the commissioner; (3) a projection of future demand for health care services and the impact that technology may have on the demand, capacity or need for such services; and (4) recommendations for the expansion, reduction or modification of health care facilities or services. In the development of the plan, the office shall consider the recommendations of any advisory bodies which may be established by the commissioner. The commissioner may also incorporate the recommendations of authoritative organizations whose mission is to promote policies based on best practices or evidence-based research. The commissioner, in consultation with hospital representatives, shall develop a process that encourages hospitals to incorporate the state-wide health care facilities plan into hospital long-range planning and shall facilitate communication between appropriate state agencies concerning innovations or changes that may affect future health planning. The office shall update the state-wide health care facilities plan on or before July 1, 2012, and every five years thereafter. **Said plan shall be considered part of the state health plan for purposes of office deliberations pursuant to section 19a-637.**

(Emphasis added.) General Statutes § 19a-634, as amended by Public Act 09-77, § 1 and September Special Session, Public Act 09-3, § 8.

General Statutes § 19a-637 provides in relevant part as follows:

(a) In any of its deliberations involving a proposal, request or submission regarding (1) services provided by a health care facility or institution under section 19a-638; (2) capital expenditures by a health care facility under section 19a-639; and (3) the acquisition of equipment by a person, provider, health care facility or institution under section 19a-639, the office shall take into consideration and make written findings concerning each of the following principles and guidelines: **The relationship of the proposal, request or submission to the state health plan** pursuant to section 19a-7; the relationship of the proposal, request or submission to

the applicant's long-range plan; the financial feasibility of the proposal, request or submission and its impact on the applicant's rates and financial condition; the impact of such proposal, request or submission on the interests of consumers of health care services and the payers for such services; the contribution of such proposal, request or submission to the quality, accessibility and cost-effectiveness of health care delivery in the region; **whether there is a clear public need for any proposal or request**; whether the health care facility or institution is competent to provide efficient and adequate service to the public in that such health care facility or institution is technically, financially and managerially expert and efficient; that rates be sufficient to allow the health care facility or institution to cover its reasonable capital and operating costs; the relationship of any proposed change to the applicant's current utilization statistics; the teaching and research responsibilities of the applicant; the special characteristics of the patient-physician mix of the applicant; the voluntary efforts of the applicant in improving productivity and containing costs; and any other factors which the office deems relevant, including, in the case of a facility or institution as defined in subsection (c) of section 19a-490, such factors as, but not limited to, the business interests of all owners, partners, associates, incorporators, directors, sponsors, stockholders and operators and the personal backgrounds of such persons. Whenever the granting, modification or denial of a request is inconsistent with the state health plan, a written explanation of the reasons for the inconsistency shall be included in the decision.

(Emphasis added.) General Statutes § 19a-637 (a).

Pursuant to Section 19a-634, OHCA is required to conduct a state-wide health care utilization study and prepare a state-wide health care facilities plan. See General Statutes § 19a-634. Section 19a-634 also provides that the facilities plan shall be considered part of the state health plan for purposes of deliberations under section 19a-637. See General Statutes § 19a-634. Section 19a-637 provides the guidelines for OHCA to follow with respect to Certificate of Need ("CON") applications and includes among other things a requirement that OHCA consider the state health plan, which includes the state-wide health care facilities plan. See General Statutes § 19a-634.

The petitioners assert that §§ 19a-634 and 19a-637 do not require or allow OHCA to exclude patients who live out of state, but are treated at a Connecticut health care facility, when evaluating the need for a particular health care service. In support of this contention, the petitioners argue that the statutes do not expressly or implicitly prohibit OHCA from considering out of state volume when evaluating the need for a particular service. Specifically, the petitioners assert that while § 19a-634 governs state wide health care planning for the state of Connecticut; it has no relevance to CON deliberations. In fact, the petitioners claim that "the connection between 19a-634 and OHCA's evaluation of CON applications is tenuous at best." (Petition for Declaratory Ruling, p. 28.) The

Petitioners also assert that had the legislature intended to exclude out of state volume from deliberations in CON decisions, it could have explicitly stated so in § 19a-637.

The petitioners also argue that OHCA decisions are inconsistent because OHCA does not always exclude out of state volume when evaluating the need for a particular service. The petitioners further argue that the purported inconsistent treatment of out of state patients in its CON deliberations violates statutory requirements for administrative agency decisions. Finally, the petitioners assert that OHCA's exclusion of out of state patients from its evaluation of need in CON decisions violate the Commerce Clause and the Equal Protection Clause of the United States Constitution.

The intervenor asserts that the petitioners have failed to demonstrate that OHCA relied upon out of state volume to establish a clear public need for a new or expanded health care service. The intervenor also highlights the fact that in six of the seven decisions in which OHCA specifically stated that it was not considering out of state volume, the CON applications were approved. With respect to the denial, OHCA set forth several reasons for the denial in accordance with the guidelines under § 19a-637. *See* Docket Number 08-31210, pp. 15-16. The intervenor countered the petitioners' arguments with respect to the tenuous relationship between §§ 19a-634 and 19a-637 by highlighting OHCA's responsibilities under the Office of Health Care Access Act. In particular, the intervenor notes that OHCA is charged with overseeing and coordinating health system planning for the state. (Intervenor's Brief, p. 11; *see also* General Statutes § 19a-613.) The intervenor also asserts that OHCA is not empowered to oversee or to address the health care needs of citizens of other states. The states bordering Connecticut – Massachusetts, Rhode Island and New York–each have an agency that oversees CON and health care planning for those states. The intervenor further asserts that OHCA does not have jurisdiction to address the constitutional issues raised in the petition. Notwithstanding the claim that OHCA lacks authority to address constitutional issues, the intervenor asserts that the petitioners' arguments with respect to the alleged violations of the Commerce Clause and the Equal Protection Clause are meritless.

Discussion

General Statutes § 4-166 (1) defines an agency as “each state board, commission, department or officer authorized by law to make regulations or determine contested cases, but does not include either house or any committee of the General Assembly, the courts, the Council on Probate Judicial Conduct, the Governor, Lieutenant Governor or Attorney General, or town or regional boards of education, or automobile dispute settlement panels established pursuant to section 41-181.” General Statutes § 4-166. Additionally, “[a]n administrative agency within the meaning of the UAPA has been defined as a body in which the legislature has reposed general powers of administration of a particular state program in connection with which it has been given statutory authority to act for the state in the implementation of that program.” Sobocinski v. Statewide Grievance Committee, 215 Conn. 517, 525 (1990), citing Catholic Family & Community Services v. Commission on Human Rights and Opportunities, 3 Conn.App. 464, 467 (1985). OHCA is a division of the Department of Public Health, an agency of

the state of Connecticut. Accordingly, OHCA has the authority to act on behalf of the state of Connecticut pursuant to its enabling legislation, the Office of Health Care Access Act, General Statutes §§ 19a-610 to 19a-662, inclusive. Section 19a-613 enumerates the powers and duties of OHCA and provides among other things that OHCA shall “oversee and coordinate health care planning for the state.” See General Statutes § 19a-613. Pursuant to § 19a-634, OHCA is mandated to conduct a “state-wide health care utilization study” and “maintain and establish a state-wide health care facilities plan.” See General Statutes § 19a-634. In addition to “state-wide” health care facility planning, OHCA has the sole authority to render decisions with respect to CON applications. Health care facilities within the state of Connecticut must obtain a CON for various activities as enumerated in General Statutes §§ 19a-638 and 19a-639. Connecticut hospitals are also required to file financial and discharge data with OHCA on an annual basis. See General Statutes §§ 19a-644 and 19a-654. As a division of an administrative agency within the state of Connecticut, OHCA only has the authority to act on behalf of the state within the parameters of its enabling statutes and its jurisdiction is limited to health care facilities located within the state. Thus, OHCA has no jurisdiction over health care facilities located in other states just as those states have no authority to regulate facilities located within Connecticut.

OHCA finds there is nothing in §§ 19a-634 and 19a-637 providing that out of state volume shall be included in OHCA’s evaluation of clear public need. Pursuant to § 19a-637, OHCA shall “take into consideration and make written findings concerning...whether there is a clear public need for any proposal or request.” Section 19a-637 is silent with respect to how OHCA determines “clear public need” as the term is not defined in the statute. Accordingly, the determination of need has been left to the discretion of OHCA. Based upon the statutory scheme referenced above, which includes a clear directive by the legislature to oversee health planning for the state and to prepare a statewide health care facilities plan, OHCA has reasonably interpreted this to mean that it should primarily consider the needs of residents of the state of Connecticut when evaluating CON applications. “When ... a statutory provision is silent with respect to [the issue at hand], our analysis is not limited by ... § 1-2z, which provides that the meaning of statutes shall be ascertained from only their text and their relationship to other statutes if those sources reveal an unambiguous meaning that is not absurd or unworkable.” Curry v. Allen S. Goodman, Inc., 286 Conn. 390, 407 (2008). “In addition to the words of the statute itself, we look to ... the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.” (Internal quotation marks omitted.) Id. Furthermore, in evaluating the interpretation of a statute by an agency, courts will consider the agency’s interpretation in light of the policy framework of the act. Board of Selectman Town of Ridgefield v. Freedom of Information Commission, 294 Conn. 438, 450 (2010). As discussed above, OHCA is directed to prepare a statewide health care facility plan and responsible for overseeing health planning for the state. Therefore, in light of the policy framework of the Office Health Care Access Act, it is reasonable for OHCA to exclude out of state patients from its evaluation of need for a particular health care service.

With respect to determining the clear public need for any CON application under § 19a-637, OHCA evaluates whether there is a need for a particular service or facility on a case-by-case basis based upon the evidence submitted by the applicant. In each CON application, the Applicant has the burden to demonstrate that there is a clear public need for any proposal. Regulations of Connecticut State Agencies § 19a-643-71 (c) (9). In fact, the numerous CON decisions attached to the petition demonstrate that each CON application is unique. The applications include proposals for facility renovation projects, the acquisition of imaging equipment, the establishment of new services or facilities, transfers or changes of ownership and the termination of services. Generally, applicants for CON will provide OHCA with the service area for the facility or proposal, historical utilization statistics, if available, and volume projections for the proposed service as well as information regarding other providers of that service in their service area. Eight of the decisions provided by the petitioners involved the acquisition of equipment and the applicant in each of these decisions was able to provide historical utilization statistics and base volume projections on those statistics. With respect to these cases, there were only a few decisions in which the applicant provided utilization statistics by the town from which they originated. More importantly, a couple of decisions involving the acquisition of equipment did not even mention the applicant's service area; therefore, it appears that reliance on those cases is misguided. There were also four applications involving transfers or changes of ownership, four facility improvement projects and one termination of service. In the case of a transfer or change of ownership or facility improvement project, OHCA focused on the applicant's ability to provide quality services and to maintain access. With respect to termination of services, the focus was on maintaining access to those services within the area. The remaining ten applications involved the establishment of new facilities or services and in seven of those cases, OHCA indicated that it was not considering out of state volume in its determination of need. Nonetheless, all but one of those applications was approved and OHCA did not specifically rely upon out of state volume to establish need in any of the decisions.

Nonetheless, the petitioners maintain that twenty of the OHCA decisions relied upon out of state volume to establish need and in seven other decisions OHCA did not consider out of state volume in its determination of need; thereby, showing inconsistency by OHCA. A review of these decisions demonstrates that OHCA has not been inconsistent. OHCA denied the CON in only two of the referenced decisions. In one decision, the historical utilization statistics provided by the applicant demonstrated a decline in utilization of a CT scanner by a facility that requested authorization to replace an existing CT scanner.¹ See Docket Number 08-31162-CON, p.7. In the other decision, OHCA denied the CON for several reasons, one of which was the applicants' failure to establish a clear public need, not only because of a large percentage of the projected volume originated from out of state but also because the applicants failed to provide sufficient evidence substantiating a need for the service and similar services were available within the same area. See Docket Number 08-31210-CON, p. 16. Furthermore, that CON application was truly unique in that the applicants requested approval for a five-year demonstration project to prove that elective angioplasty without on-site surgical

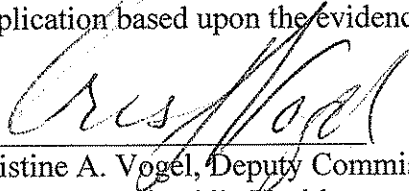
¹ The petitioners nonetheless cited this as one of the decisions in which OHCA allegedly relied upon out of state volume to establish need.

backup is safe. *See* Docket Number 08-31210-CON, p. 3. Overall, the petitioners failed to show that OHCA was inconsistent and instead demonstrated that OHCA evaluates each CON application on a case-by-case basis and even when there is a general statement that out of state volume is not being considered, OHCA nonetheless conducts a careful analysis of all of the evidence to determine whether the applicant has demonstrated that there is a clear public need for the proposal. Furthermore, the attached decisions fail to support the petitioners' contention that OHCA has relied specifically upon out of state volume to conclude that there was a clear public need for a particular service.

Regarding the petitioners' constitutional challenges to §§ 19a-634 and 19a-637, OHCA does not have authority to decide these issues. *See Savage v. Aronson*, 214 Conn. 256, 269 (1990) (adjudication of facial constitutional challenges to regulation not within the scope of agency authority). To the extent that the petitioners are raising an "as applied" constitutional challenge, OHCA finds the petitioners' argument meritless that OHCA's exclusion of out of state patients from its evaluation of need for a particular service violates the Commerce Clause. The attempt by the petitioners to assert that OHCA has violated the Equal Protection Clause of the Fourteenth Amendment fails as well.

Conclusion

Based upon the foregoing, OHCA concludes that §§ 19a-634 and 19a-637 do not require OHCA to exclude patients who live out of state, but are treated at a Connecticut health care facility, from its evaluation of need for a particular health care service. Nonetheless, OHCA is allowed to exclude such volume from its evaluation of need in any CON application based upon its review of all of the evidence submitted by the applicant. OHCA will continue to evaluate each CON application based upon the evidence in each case.


Cristine A. Vogel, Deputy Commissioner
Department of Public Health

2-4-10
Date