

September 30, 2013

Dear Janice Sigman and Other Members of the Department of Health Licensing Division,

Problem

The Certificate of Need (CON) Program is charged to “address major health problems in the state or community and population or groups at greatest risk” (WAC 246-01-020b). For the past 3 years dialysis units in Clark County have operated well-over capacity during a protracted CON battle which involved two corporations and the Department of Health. As the months dragged on our newest and most ill dialysis patients were relegated to night-shifts because there were not enough dialysis services. Current law has failed to protect patients and is affirmatively doing damage now. The resulting situation is one to which patients have no recourse.

Background

In 2009 all three dialysis units serving Clark County were approaching capacity. Almost simultaneously two corporations applied for a CON. Both companies paid application fees and spent money for additional staff and legal fees during the prolonged application process. Meanwhile the dialysis population continued to grow at a rate of about 40%, mirroring the growth rate of the community at large. During this period the growth in the number of dialysis chairs was zero. By August of 2012 approximately 80 individuals were on dialysis after 10 pm. In the spring of 2013 a CON was finally granted, only to be overturned on appeal. A decision was finally granted mid-summer. A new unit will finally open sometime in early 2014.

Current Rules Do Not Save Money

Some argue that the CON process is necessary to conserve scarce Medicare/Medicaid funds, and therefore justifies any unfortunate adverse impacts on patient care. Under current billing procedures, this is not so. Dialysis services are paid for on a per-treatment basis. Fifty patients cared for in one 12-chair unit or in two 6-chair units generates the same disbursements by Medicare. A full unit increases a dialysis unit's income-to-cost ratio, but neither Fresenius or Northwest Kidney Centers are likely to refund such savings to the government.

Current Rules Keep Focus Away from Patient Care

CON rules encourage companies to focus on keeping others out of the market, instead of on providing quality patient care. The Certificate of Need process is most often used by applicants for this anti-competitive purpose. Companies legally contend, or occasionally even illegally collude to secure a CON award. The appeals process is a predictable source of delay in CON decision-making. The result is waste of time and money. The real impact on patients generally rarely figures into the strategies used to secure a CON certificate.

The CON process further creates perverse incentives for medical directors because their medical practice is linked financially with the units they oversee. Further aligning corporate and medical interests, it is standard practice for a nephrologist and his or her associates to direct patients to their units. When their unit wins a CON, the medical directors benefit financially. This encourages them to participate in the CON deliberations for their own financial interest rather than for fostering quality patient care.

Better Patient Care

Better patient care means improving the CON process so it responds to actual patient needs by freeing dialysis providers to compete on the basis of quality care. An effective change should include the following:

1. *Make it easier for applicants to demonstrate need.* For example, reduce the calculation for projected station need in Clark County from 4.8 resident in-center patients per station to 3.2, which is the current standard for 16 other counties across the state. Apply that requirement to all units in the planning area (WAC 246-310-284 5, 6a).
2. *Allow simultaneous applicants to be granted a certificate of need.* Currently there is a cumbersome method for settling a tie between simultaneous applicants. This provision is central to the delays experienced in Clark County. The best way to correct this is to eliminate the tie-breaker rule and approve all concurrent applications which meet medical quality criteria (WAC 246-310-282, 288). Such a change would have prevented the shortage which currently exists in Clark County.

The benefits of these rule changes are three-fold. They will:

1. Discourage costly appeals as applicants focus on successfully meeting medical criteria without fear of contest
2. Ensure adequate capacity and thus decrease administrative cost to the state for reviewing competing applications
3. Foster patient choice as dialysis service providers compete for patients on the basis of quality medical service rather than their ability to win a CON award from the state

The Department of Health is Obligated to Protect Patients

Dialysis patients have few advocates at the state government level. Many patients express dismay at the current situation in Clark County but they have few resources to influence public health policy debates such as this one. On the other hand, dialysis providers or associated medical groups stand to gain or lose financially on the result of these CON proceedings. This explains the dominant presence of business lobbyists at these meetings. Business interests are well-represented, patient interests are not. Given this reality, the Department of Health has a moral obligation to promote the best interest of patients. This can be accomplished through the rule changes recommended above.

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