Commonwealth Court Invalidates Department of Public Welfare “Need Review” Process

Last November, the Pennsylvania Commonwealth Court struck down several Statements of Policy (the “Policies”) of the Department of Public Welfare (“DPW”), which required an approval process for new or expanded nursing facilities that are enrolled in or plan to enroll in the Medical Assistance (“MA”) Program. The Court concluded: (1) the Policies are regulations that were not promulgated in accordance with Pennsylvania law, and (2) the Policies are inconsistent with federal Medical Assistance law that requires DPW to administer the MA Program in the “best interests of the recipients.” See *Eastwood Nursing & Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134 (Pa. Commw. Ct. 2006). DPW has filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

DPW’s Policies

DPW's “Need Review” process began with the “sunset” of the certificate of need (“CON”) program on December 18, 1996. One month after the legislation that authorized CON expired, DPW published two Statements of Policy banning expansion or development of nursing facility, ICF/MR, psychiatric hospital, or rehabilitation hospital beds, in excess of ten beds or ten percent over a two year period, without receiving an exception to do so from DPW. No process or criteria were provided for obtaining these exceptions. DPW stated further that it would terminate agreements of existing MA providers that added beds without obtaining DPW approval.

Over a year later, in January 1998, DPW amended the Policies to eliminate the ten bed/ten percent limitation and require review of any bed expansion. DPW also published, for the first time, its process for nursing facility exception requests. (DPW never published a process for exception requests related to psychiatric hospitals, rehabilitation hospitals, or ICFs/MR.) DPW advised that the most important factor in its consideration of whether to grant an exception would be the MA program’s need for additional nursing facilities or services in the applicant facility’s primary services areas. DPW instructed providers that it would grant an exception if the applying facility had demonstrated that additional MA beds would be “in the best interests of the Department.”

Eastwood’s Application for Exception

In June 2000, Eastwood Nursing and Rehabilitation Center (“Eastwood”) applied under the exception process to become enrolled in the MA program. DPW rejected Eastwood’s application, claiming two reasons for the decision: (1) there was no need for additional nursing facility services in the county for the MA program, and (2) even if there was a need, more appropriate and less costly options were available to meet those needs. Eastwood timely appealed the denial to an Administrative Law Judge. Three years later, the ALJ issued a recommendation to deny the appeal. The Secretary of Public Welfare adopted the ALJ’s recommendation. Eastwood then appealed to the Commonwealth Court.
The Commonwealth Court found the Policies were not properly promulgated as regulations, but were applied as “binding norms” for providers and DPW. Thus, the Policies were illegal in that they were applied like regulations, but had not been developed and published in accordance with the Regulatory Review Act and the Commonwealth Documents Law. In addition, the Court rejected DPW’s argument that in promulgating the Polices, it acted in accordance with federal law to assure that “MA payments are consistent with efficiency, economy and quality of services.” The Court reasoned that DPW’s duty to administer the MA program under federal law must consider the best interests of the recipients, not the best interests of DPW.

Impact of the Commonwealth Court’s Decision

DPW filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. As of the date of this Alert, the Pennsylvania Supreme Court has not made a decision as to whether it will accept the appeal. While the Supreme Court is considering DPW’s Petition, the impact of the Commonwealth Court’s decision on other pending applications for exception and new applications is under debate.

DPW is relying on a rule of procedure which gives a Commonwealth agency an automatic stay of an Order that is under appeal. However, the question is whether that stay is of the Order only and therefore applicable only to Eastwood, or a stay of the Court’s reasoning and opinion and therefore applicable to any interested party. In the meantime, DPW is working on developing new Statements of Policy to replace the ones invalidated by the Court, which allegedly will address the concerns of the Commonwealth Court and receive greater support among the regulated providers. In addition, the Governor’s health care reform proposals include a suggestion that some form of certificate of need program, under a different label, is in the works. Whether a new “Need Review” program or some revised review by DPW is ultimately employed in this area of facility development remains to be seen.

We recommend that providers (including ICFs/MR, psychiatric hospitals, and rehabilitation hospitals, in addition to nursing facilities) become familiar with these developments when considering expansion of beds or construction of a new facility. Appropriate contact with DPW and consultation with a lawyer should be prerequisites to filing any application for exception under DPW’s Policies. Depending on the timing and substance of the Supreme Court’s decision, the implementation of “new” Statements of Policy by DPW, and the potential legislative revival of a “Need Review” process, the landscape for development of these services is certainly subject to change within the year. We are watching DPW’s appeal, DPW’s work on new Statements of Policy, and the Governor’s initiatives and intend to issue a further Alert once a change or clarification becomes apparent.

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