

NO. 82728-1

FILED  
SUPERIOR COURT  
STATE OF WASHINGTON  
2010 MAY -3 P 2:29  
b/h

SUPREME COURT  
OF THE STATE OF WASHINGTON

OVERLAKE HOSPITAL ASSOCIATION and OVERLAKE HOSPITAL  
MEDICAL CENTER, Washington nonprofit corporations; and KING  
COUNTY PUBLIC HOSPITAL DISTRICT NO.2, d/b/a EVERGREEN  
HEALTHCARE, a Washington Public Hospital District,

Respondents,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,  
and SWEDISH HEALTH SERVICES,

Petitioners.

BRIEF OF AMICUS CURIAE PROLIANCE SURGEONS, INC., P.S.

Scott B. Easter  
WA State Bar No. 5599  
Benjamin I. VandenBerghe  
WA State Bar No. 35477  
Kristiana Farris O'Brien  
WA State Bar No. ~~25299~~ 29322  
MONTGOMERY PURDUE  
BLANKINSHIP & AUSTIN PLLC  
Attorneys for Proliance Surgeons, Inc., P.S.

5500 Columbia Center  
701 Fifth Avenue  
Seattle, WA 98104-7096  
(206) 682-7090

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 APR 20 AM 10:33

BY RONALD R. CARPENTER

CLERK

ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

## TABLE OF CONTENTS

	<i>Page</i>
I. IDENTITY AND INTEREST OF AMICUS .....	1
II. STATEMENT OF THE CASE .....	2
III. ARGUMENT .....	3
A.    THE DEPARTMENT METHOD MEETS PUBLIC POLICY GOALS AND CORRECTLY APPLIES GOVERNING CON STATUTES AND REGULATIONS .....	3
1.    The Legislature’s stated public policy behind the CoN process is to appropriately tailor regulatory activities to provide access to health services while controlling costs.....	3
2.    Respondents’ analysis of the public policy behind the CoN statutes and regulations is fundamentally flawed.....	5
3.    There is no statutory or regulatory requirement that the CoN need calculation be “balanced” .....	9
B.    THE DEPARTMENT METHOD CREATES A CONSISTENT, OBJECTIVE STANDARD FOR HEALTHCARE PROVIDERS .....	11
1.    Mount Vernon.....	11
2.    Edmonds .....	13
3.    Kirkland.....	13
4.    Proliance’s experiences with the CoN process demonstrate how the Department Method provides access to healthcare to all Washington citizens.....	14
C.    RESPONDENTS’ PROPOSED NEED DETERMINATION METHOD WOULD VIOLATE PUBLIC POLICY AND RESTRICT ACCESS TO SURGICAL CARE .....	16
IV. CONCLUSION .....	19

## TABLE OF AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>Overlake Hosp. Ass'n v. Dep't of Health</i> , 148 Wn. App. 1, 200 P.3d 248 (2008) .....	7
<i>St. Joseph Hosp. v. Dep't of Health</i> , 125 Wn.2d 733, 877 P.2d 891 (1995) .....	7
<b>Statutes</b>	
RCW 43.370 .....	4
RCW 70.38.015 .....	6
RCW 70.38.015(1) .....	passim
RCW 70.38.015(2) .....	6
RCW 70.38.115(2)(d)(ii) .....	5
<b>Regulations</b>	
WAC 246-310-270(9) .....	17, 18
<b>Rules</b>	
RAP 10.3(e) .....	3

## I. IDENTITY AND INTEREST OF AMICUS

Proliance Surgeons, Inc., P.S. (“Proliance”) is one of the largest surgical practices in the country, and its approximately 160 physicians provide care at over 30 Washington State clinics and offices located throughout King, Snohomish, Pierce, and Skagit Counties. Proliance’s surgeons, clinics, and offices specialize in orthopedic, ear, nose & throat, and general surgery. Proliance draws from the unparalleled experience of its many healthcare providers and administrators to offer first class surgical and clinical care to Washington residents in a variety of settings, including many conveniently located clinics and ambulatory surgery centers, which provide patients with a much-needed alternative to large hospitals for their surgical needs.

Proliance has decades of experience navigating Washington’s regulatory system, including specifically the Certificate of Need (“CoN”) program operated by the Washington State Department of Health (“Department”). As an active participant in the CoN system, Proliance is uniquely suited to weigh in on the issues before the Court in this matter. Additionally, as explained below, the CoN for one of Proliance’s facilities is currently under review in a separate action filed by King County Public Hospital District No. 2 d/b/a Evergreen Healthcare (“Evergreen

Hospital”), also one of the respondents in this case, and Evergreen Surgery Center, LLC (“ESC”), wherein Evergreen Hospital and ESC are asking the Court to order the Department to revoke Proliance’s CoN for one of its Eastside clinics based on the same flawed analysis and arguments presented to the Court in this case. The parties have agreed to stay actions in that proceeding pending final resolution of the instant case.

Proliance has considered the briefing submitted by the petitioners, the Department and Swedish Health Services (“Swedish”) (collectively “Petitioners”), and the briefing submitted by the respondents, Evergreen and Overlake Hospital Association (“Respondents”) both on appeal and before this Court, and Proliance joins Petitioners in urging this Court to reverse the Court of Appeals decision below, defer to the Department’s long-standing and logical interpretation of its CoN regulations, and affirm the Department’s approval of Swedish’s CoN application.

## **II. STATEMENT OF THE CASE**

Proliance adopts and incorporates by this reference the Statement of the Case set forth in Respondent Washington State Department of Health’s Supplemental Brief (“Department Brief”) on Pages 2-4, and the Statement of the Case set forth in the Supplemental Brief of Swedish Health Services on Pages 4-8 (“Swedish Brief”).

### III. ARGUMENT

It is not disputed that the Department has consistently interpreted its CoN regulations and the governing statutes<sup>1</sup> as requiring the Department to 1) *exclude* exempt ambulatory surgery centers (“ASC”) – small operating rooms in private offices not open to the public – in determining capacity, and 2) *include* the surgeries performed in these exempt facilities to calculate future need (the “Department Method”). Thus, the only question before the Court is whether the Department Method is a rational interpretation of the law governing the CoN process.

#### A. **The Department Method Meets Public Policy Goals and Correctly Applies Governing CoN Statutes and Regulations**

##### 1. **The Legislature’s stated public policy behind the CoN process is to appropriately tailor regulatory activities to provide access to health services while controlling costs**

At the core of this appeal is a fundamental question of public policy. The Legislature unambiguously declared the public policy intended to guide the Department’s CoN regulatory activity in RCW 70.38.015(1), which provides that it is the public policy of Washington State:

---

<sup>1</sup> For the sake of judicial efficiency, and in compliance with RAP 10.3(e), Proliance will not repeat the statutory and regulatory framework here, but instead adopts by this reference the arguments set forth in the Department Brief on pages 4-9.

That strategic health planning efforts must be supported by **appropriately tailored regulatory activities** that can effectuate the goals and principles of the statewide health resources strategy developed pursuant to chapter 43.370 RCW. The implementation of the strategy can promote, maintain, and **assure the health of all citizens** in the state, **provide accessible health services**, health manpower, health facilities, and other resources **while controlling increases in costs**, and recognize prevention as a high priority in health programs. Involvement in health planning from both consumers and providers throughout the state should be encouraged[.] (Emphasis added).

The four underlined and bolded passages above provide guidance to the Court on how to interpret the CoN statutes and regulations as they relate to this case. First, the Legislature notes that regulatory activities are intended to be “appropriately tailored” to meet health planning goals. This language is key because it denotes an acknowledgment by the Legislature that the Department would need to carefully craft its regulations and regulatory activities to fit the unique issues and challenges associated with the delivery of healthcare in the State of Washington.

Next, the Legislature states the public policy to “assure the health of all citizens” by providing “accessible health services.” This language is key because it clarifies that one of the primary concerns in crafting the CoN regulatory framework is to provide for health services that increase “access” to all Washington residents.

Finally, the Legislature states that these goals are to be achieved “while controlling increases in costs.” Notably, this policy goal of controlling costs is included as an overall consideration while meeting the preceding primary policy goals, such as providing accessible health services. Additionally, the language used denotes some acceptance that cost increases may occur through meeting other stated goals, and that these increases should be controlled (not avoided or eliminated).

The Legislature reemphasizes this public policy of providing accessible health services in RCW 70.38.115(2)(d)(ii), the provision which outlines the criteria for CoN approval, by requiring the Department to consider “the extent to which such proposed services will be accessible to all residents of the area to be served” in deciding whether to grant a CoN in any given case.

Thus, the Legislature has clearly stated that the public policy behind the CoN process requires the Department to appropriately tailor its regulatory activity to provide access to health services to all Washington citizens *and* to control increases in costs.

**2. Respondents’ analysis of the public policy behind the CoN statutes and regulations is fundamentally flawed**

Respondents’ public policy analysis is flawed in two respects. First, Respondents fail to address the provision in RCW 70.38.015(1)

requiring “appropriately tailored” regulatory efforts, and second, Respondents repeatedly and incorrectly argue that the overriding public policy declared by the Legislature is to control costs.

Respondents argue policy in their briefs almost entirely without quoting the actual language of RCW 70.38.015(1). In fact, the only time Respondents quote this provision in their briefing, they cite to an old version of the statute, which has since been revised to contain the reference to “appropriately tailoring” regulatory activity.<sup>2</sup> Respondents’ use of the former statute in their appellate brief is understandable, as it was filed in 2007, but Respondents also fail to address the new statutory language in their Supplemental Brief. Additionally, Respondents’ arguments related to the “fragmentation” language from RCW 70.38.015(2) are moot, as that provision was completely rewritten in 2007 and no longer contains such language.<sup>3</sup>

Instead of analyzing the entire public policy stated in the current statute, Respondents emphasize only the cost control provision, and argue throughout their briefing as if the only aspect of public policy stated by the

---

<sup>2</sup> Brief of Appellants on Appeal, Page 25.

<sup>3</sup> Appendix 1 contains a copy of RCW 70.38.015 showing its annotations and 2007 amendments along with the relevant pages of SB 5930 – 2007-08, which enacted these changes.

Legislature is controlling costs. Proliance acknowledges the Legislative intent behind the CoN process includes controlling costs, but Respondents' continuous reference to this single factor without adequate consideration of providing access to healthcare is simply a misapplication of a clear statutory provision.

The Court of Appeals applied the same faulty analysis and prioritized cost control over access to healthcare. *Overlake Hosp. Ass'n v. Dep't of Health*, 148 Wn. App. 1, 8, 200 P.3d 248 (2008). Unlike Respondents, the Court of Appeals quoted the current language of RCW 70.38.015(1), but then repeated Respondents' mistake by avoiding any analysis of the "appropriately tailored" regulation provision. *Id.*

Additionally, the Court of Appeals relied heavily on *St. Joseph Hosp. v. Dep't of Health*, 125 Wn.2d 733, 877 P.2d 891 (1995) to arrive at its conclusion that the "primary purpose" of RCW 70.38.015(1) was to control costs. *Id.* Respondents adopted this reliance and cited to *St. Joseph* on multiple occasions in their Supplemental Brief. This reliance on *St. Joseph* is misplaced for two reasons. First, the holding in *St. Joseph* determined only the narrow question of whether a competing service provider had standing to challenge the Department's decision to grant a CoN, and second, the Court in *St. Joseph* based its decision on the pre-2007 language of RCW 70.38.015(1).

Thus, the public policy analysis put forth by the Respondents and adopted by the Court of Appeals is flawed in that it fails to include the recently revised language of RCW 70.38.015(1), which requires the Department to “appropriately tailor” its regulatory activity to meet multiple stated goals, including access to healthcare *and* controlling costs. Respondents’ argument that the Legislative intent behind the CoN process is merely cost control is simply wrong. Similarly, the Court of Appeals’ conclusion that the “primary purpose” stated in RCW 70.38.015(1) is to control costs is contradicted by the language of the statute, and the case upon which the Court of Appeals relies is inapposite.

By comparison, the Department’s interpretation of its CoN regulations takes into consideration the entire public policy stated in RCW 70.38.015(1). The Department Method is precisely the type of “appropriately tailored” regulatory activity the Legislature directed the Department to accomplish in support of the legislative statewide health resources strategy in general, and more specifically to “provide accessible health services” to all Washington residents. The Department Method achieves this legislative directive by intentionally omitting exempt ASCs from its capacity determinations, which is completely appropriate in light of the fact that exempt ASCs are not open to the public and have no

obligation whatsoever to allow access for general procedures or to serve low income, elderly, or charitable care patients.

The Department Method also meets the Legislature's stated policy goal of controlling increases in cost by requiring the Department to reject CoN applications where a surplus of capacity exists, which the Department has done as demonstrated by the rejected CoN application described by Swedish in its supplemental brief.<sup>4</sup>

**3. There is no statutory or regulatory requirement that the CoN need calculation be "balanced"**

Respondents argue repeatedly that the Department Method is "unbalanced" and that it defies "common sense" and "mathematical application." Not surprisingly, this erroneous interpretation of the CoN statutes and regulations inevitably leads to an outcome which protects Respondents' established medical facilities from any further competition, and does so at the cost of reduced access to operating rooms.

It is unclear what authority Respondents rely upon to arrive at the conclusion that the Department must apply mathematical principles or balance the equation while determining need. What is clear from the Legislature's declaration of public policy is that the Department has an

---

<sup>4</sup> Swedish Brief at 17.

obligation to “appropriately tailor” its regulatory activity to meet the CoN statutes’ goals, including providing access to healthcare. Although it may seem to the untrained eye that excluding exempt ASCs to determine capacity while including surgeries performed at exempt ASCs to determine future need is “unbalanced,” it does not follow that this is a valid criticism of the Department Method. Respondents’ argument that the need determination method must be performed like an accounting spreadsheet is misleading and utterly lacks legal authority. Boiled down to its essentials, Respondents present a simple disagreement with the manner in which the Department in its need calculation “appropriately tailors” its approach to encouraging increased access while controlling costs. This does not satisfy Respondents’ substantial burden here.

Instead of imposing a judicially-created standard requiring accounting on both sides of some artificially constructed mathematical equation for the need determination, the Court should approve the Department’s well-reasoned interpretation and consistent application of the CoN statutes and its own regulations. The Department Method accomplishes the CoN process fairly, openly, and in direct accord with the public policy declared by the Legislature to be the foundation of the CoN program. Thus, the Department Method, not Respondents’ arbitrary

adherence to the concept of “balance,” is not only a rational application of governing law, but is also the most logical approach to determining need.

**B. The Department Method Creates a Consistent, Objective Standard for Healthcare Providers**

Unlike Respondents’ unsupported arguments, which consist of a merely superficial consideration of the reasoning behind the method, the Department Method is logical and well-reasoned. It is reasonable to omit exempt ASC beds since they are not available to the general public, may or may not be available in the future, and therefore do not accurately reflect capacity and public access to healthcare services. It also makes sense to count ASC procedures because the number of procedures actually performed accurately reflects surgical cases in the area which must be performed somewhere and the corresponding need for a facility to perform these procedures.

Proliance has applied for multiple CoNs, and is therefore intimately aware of how the Department Method serves the public by providing access to healthcare while avoiding increasing the costs of healthcare.

**1. Mount Vernon**

In early 2004, Proliance applied for a CoN to open an ASC in Mount Vernon (in the East Skagit Planning Area as opposed to the East

King Planning Area involved in this appeal). The application process was long and challenging, and in May 2005, the Department completed its extensive investigation. The Department rejected Proliance's application despite the Department's finding that there was an unmet need in this planning area. The primary reason for the denial was that the Department had concerns about sufficient access to elderly and low income patients and about the provision of charity care at the facility. Proliance continued to work with the Department to insure the Legislature's policy goal of accessible healthcare would be met, and on August 8, 2006, the Department granted Proliance a CoN for its two operating room facility in Mount Vernon.

Because these operating rooms were now to be regulated by the Department through the CoN program, and would therefore be required to be "accessible" to the public, the Department required Proliance to guarantee provision of a certain amount of charitable care and to maintain its participation in Medicaid as a condition of the CoN. Notably, this ASC had not generally accepted Medicaid prior to the CoN process, and enrolled with Medicaid in response to the Department's concerns related to access. Since being granted the CoN, this Proliance facility has maintained enrollment with Medicaid and has provided surgical services

to hundreds of Skagit County and surrounding area residents, including low-income, elderly, and charity patients.

## **2. Edmonds**

Proliance had a very similar experience in obtaining a CoN for its ASC in Edmonds (in the Southwest Snohomish Planning Area). In May 2005, the Department denied the application, again determining there was adequate need for an additional ASC in this planning area, but basing the denial on its concerns regarding accessibility for elderly, low-income and charity care patients. Like Mount Vernon, this ASC had not generally contracted with Medicaid prior to seeking a CoN.

On October 3, 2006, after working with Proliance to insure access for all patients, the Department granted Proliance's CoN for its two operating room facility in Edmonds, with the same two conditions applied to the Mount Vernon ASC. Since being granted this CoN, this Proliance facility has maintained its contract with Medicaid and has provided surgical services to hundreds of patients, including many elderly, low-income, and charity care patients.

## **3. Kirkland**

Proliance also applied for a CoN for a facility it operates in Kirkland, which is within the same East King Planning Area as Respondents' facilities and the ASC for which Swedish is seeking a CoN

in this matter. Proliance had existing operating rooms in this facility, but had historically elected to keep these rooms exempt from the CoN regulatory process, meaning these rooms were open only to Proliance's patients and were not subject to the CoN accessibility and other requirements. Like Mount Vernon and Edmonds, this facility did not generally accept Medicaid prior to being awarded a CoN. On November 28, 2006, the Department granted Proliance's CoN for its Kirkland facility with the same conditions in place to insure accessibility for elderly and low-income patients (i.e. that the facility maintain its contract with Medicaid), as well as charity patients.

On December 22, 2006, Evergreen Hospital and ESC filed a Petition for Judicial Review and a Request for Adjudicative Proceeding seeking to have the CoN for Proliance's Kirkland facility revoked. Because the litigation in this matter was further along and based upon the same challenge to the Department Method, Proliance, the Department, Evergreen Hospital, and ESC stayed the adjudicative proceeding and the superior court action pending the outcome of this appeal.

**4. Proliance's experiences with the CoN process demonstrate how the Department Method provides access to healthcare to all Washington citizens**

Proliance is an example of a healthcare provider trying to provide access to healthcare by filling the need for surgical facilities in Western

Washington. Proliance, and healthcare providers throughout Washington State, have relied for years on the Department's consistently applied calculation. Through the Department's careful application of the Department Method, Proliance has been able to reasonably expand the options available to Washington residents with a wide variety of surgical needs.

Proliance's experiences with its CoN applications for its Mount Vernon, Edmonds, and Kirkland facilities demonstrate the critical importance of access to healthcare as a public policy goal of the CoN procedure. These experiences demonstrate how the Department's CoN process effectively meets the Legislature's stated public policy goal of providing accessible health services, and are examples of how the Department's efforts to provide access have resulted in CoN facilities which guarantee access to health services to Washington residents. These examples also reveal that the most vulnerable of Washington's residents will bear the heaviest burden in the event their access to healthcare is reprioritized to become a mere secondary consideration behind controlling costs, as Respondents suggest.

Critically, Proliance's three CoN experiences described above demonstrate the actual impact on the community when the Department grants a CoN. In all three cases, the Department was able to create and

insure increased access to surgical centers for all patients, in particular for low-income, elderly, and charity care patients, and to do so frequently at lower costs than available through hospital-based surgeries. These populations make up some of the most vulnerable members of our communities, and through the CoN regulatory process, the Department has been able to guarantee there will be operating rooms available to this population as their need arises. Without these CoN regulated ASCs, some of the patients who have been granted access to care may have been unable to find a facility close to them that could meet their surgical needs and financial circumstances. Proliance's experience with the CoN process is real-world evidence of the Department "appropriately tailoring" the entire public policy behind the CoN process, not just controlling costs as Respondents would have the Court believe the Legislature intended.

**C. Respondents' Proposed Need Determination Method Would Violate Public Policy and Restrict Access to Surgical Care**

Respondents are requesting this Court determine that the Department Method must blindly follow the directive of "controlling costs" before all other considerations. This is a thinly veiled euphemism for restricting competition at all costs. It is no coincidence that the Respondents, the only parties who have objected to either Swedish's CoN application or (along with ESC) the CoN granted to Proliance for its

Kirkland facility, are established facilities with ASCs in this planning area. At the root of this appeal is Respondents' fear that additional ASCs in their planning area will actually tend to drive down costs to patients and affect their bottom line through competition.

Proliance asks the Court to consider the following question: if public policy requires a need determination method that includes the private ASC capacity, weighed heavily in favor of restricting competition, what are the ramifications of the application of that method? The answer is that the CoN process will cease to be used for its long-time purpose of providing access to healthcare *and* controlling costs, and will instead become a tool used to protect the status quo. Without question, this will restrict access by reducing the number of available operating rooms. Ironically, it also likely will drive up costs, rather than reduce them, because procedures performed in ASCs frequently cost less than the same procedures at hospitals. Thus, contrary to Respondents' assertion, costs can frequently be reduced (controlled) by granting a CoN, not just by blindly restricting access as Respondents suggest.

Crucially, if the Court adopts the Respondents' flawed analysis of WAC 246-310-270(9), the Department will be forced to include all exempt operating rooms in calculating the surgical capacity required by the entire population of each planning area. The Department has never

included exempt facilities in this side of the calculation, as it explains in its briefing. These exempt facilities may provide only cosmetic or specialized surgical services, have no manner of requirement to serve low-income, elderly, or charity care patients, are not by definition available for any doctor outside the facility to utilize, and may or may not even be open to accommodate future need. In sum, the Department cannot control how many people can utilize exempt ASCs, nor can the Department do anything to insure access to these facilities for the general public or the most vulnerable members of our society.

Moreover, the Department is entitled to substantial deference with respect to its interpretation and application of its own regulations. Here, the Department Method correctly applies WAC 246-310-270(9) in a way that is well thought out by the regulatory agency with the most insight and experience in this area, has been consistently applied over the years, and acts to provide access to healthcare while controlling costs. As the Department Brief and Swedish Brief explain, this Court should accord substantial deference to the Department's interpretation of its own regulations, and should not upset years of statutorily mandated healthcare planning decisions by substituting Respondents' flawed interpretation over the Department Method.

Instead of skewing the need calculation by forcing the Department to include exempt facilities in determining capacity, which would drastically favor a conclusion of less need and thereby provide less access to healthcare for all Washington residents, the Court should approve the Department's statutory analysis and the Department Method, which emphasizes *providing* access to Healthcare. This is the correct application of the public policy stated in RCW 70.38.015(1), and this Court should defer to the Department's interpretation of its own regulations adopted and applied to meet the Legislature's stated public policy goals.

#### IV. CONCLUSION

In 2007, the Legislature clarified its mandate to the Department by amending the public policy declaration behind the CoN process, which now directs the Department to narrowly tailor its regulatory activities to provide accessible health services, among other things, while controlling increases in costs. The Department Method meets this mandate by appropriately omitting private ASCs from its capacity calculations while considering the procedures performed in these facilities to calculate future need. The Department Method is logical, reliable, and favors ensuring access to healthcare over restricting competition and protecting established hospitals (the goal of the interpretation proposed by Respondents). The

Court should approve the Department's consistent interpretation of its rules and application of the CoN statutes under which it has operated for years. Proliance requests the Court grant the relief requested by the Department and Swedish in their Supplemental Briefs.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April, 2010.

MONTGOMERY PURDUE  
BLANKINSHIP & AUSTIN PLLC

By 

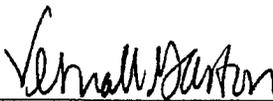
Scott B. Easter  
WA State Bar No. 5599  
Benjamin I. VandenBerghe  
WA State Bar No. 35477  
Kristiana Farris O'Brien  
WA State Bar No. 29322  
5500 Columbia Center  
701 Fifth Avenue  
Seattle, WA 98104-7096  
(206) 682-7090  
Attorneys for Proliance Surgeons,  
Inc., P.S.

## CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: on April 20, 2010, I caused to be delivered by email pursuant to the prior agreement of all parties a true and correct copy of the Brief of Amicus Curiae Proliance Surgeons, Inc., P.S. addressed to:

<b>Counsel for Petitioner:</b>  Richard A. McCartan Assistant Attorney General Anne Egeler Deputy Solicitor General Office of the Attorney General P.O. Box 40109 7141 Cleanwater Drive S.W. Olympia, WA 98504 <a href="mailto:RichardM@atg.wa.gov">RichardM@atg.wa.gov</a> <a href="mailto:anne1@atg.wa.gov">anne1@atg.wa.gov</a>	<b>Counsel for Petitioner:</b>  Peter S. Ehrlichman Brian W. Grimm Dorsey & Whitney LLP U.S. Bank Centre 1420 Fifth Avenue, Suite 3400 Seattle, WA 98101 <a href="mailto:ehrichman.peter@dorsey.com">ehrichman.peter@dorsey.com</a> <a href="mailto:grimm.brian@dorsey.com">grimm.brian@dorsey.com</a>
<b>Counsel for Respondents:</b>  Donald W. Black Jeffrey Dunbar Ogden Murphy Wallace, P.L.L.C. 1601 Fifth Avenue, Suite 2100 Seattle, WA 98101 <a href="mailto:dblack@omwlaw.com">dblack@omwlaw.com</a> <a href="mailto:jdunbar@omwlaw.com">jdunbar@omwlaw.com</a>	  James S. Fitzgerald Gregory A. McBroom Livengood, Fitzgerald & Alskog, PLLC 121 Third Avenue Kirkland, WA 98033 <a href="mailto:fitzgerald@lfa-law.com">fitzgerald@lfa-law.com</a> <a href="mailto:mcbroom@lfa-law.com">mcbroom@lfa-law.com</a>

DATED this 20<sup>th</sup> day of April, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
Verna Garton

# **APPENDIX 1**

**C**

West's Revised Code of Washington Annotated Currentness

Title 70. Public Health and Safety (Refs & Annos)

▣ Chapter 70.38. Health Planning and Development (Refs & Annos)

→ **70.38.015. Declaration of public policy**

It is declared to be the public policy of this state:

- (1) That strategic health planning efforts must be supported by appropriately tailored regulatory activities that can effectuate the goals and principles of the statewide health resources strategy developed pursuant to chapter 43.370 RCW. The implementation of the strategy can promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources while controlling increases in costs, and recognize prevention as a high priority in health programs. Involvement in health planning from both consumers and providers throughout the state should be encouraged;
- (2) That the certificate of need program is a component of a health planning regulatory process that is consistent with the statewide health resources strategy and public policy goals that are clearly articulated and regularly updated;
- (3) That the development and maintenance of adequate health care information, statistics and projections of need for health facilities and services is essential to effective health planning and resources development;
- (4) That the development of nonregulatory approaches to health care cost containment should be considered, including the strengthening of price competition; and
- (5) That health planning should be concerned with public health and health care financing, access, and quality, recognizing their close interrelationship and emphasizing cost control of health services, including cost-effectiveness and cost-benefit analysis.

**CREDIT(S)**

[2007 c 259 § 55, eff. July 22, 2007; 1989 1st ex.s. c 9 § 601; 1983 c 235 § 1; 1980 c 139 § 1; 1979 ex.s. c 161 § 1.]

**HISTORICAL AND STATUTORY NOTES**

**Severability--Subheadings not law--2007 c 259:** See notes following RCW 41.05.033.

Laws 1980, ch. 139, § 1, in subsec. (1), added a last sentence pertaining to regional health planning; added a subsec. (5); and added a last paragraph.

Laws 1983, ch. 235, § 1, rewrote the section, which formerly read:

“In consideration of the findings made and national health priorities declared by the congress in the National Health Planning and Resources Development Act of 1974, Public Law 93-641, it is declared to be the public policy of this state:

“(1) That planning for promoting, maintaining, and assuring a high level of health for all citizens of the state, and for the provision of health services, health manpower, health facilities, and other resources is essential to the health, safety, and welfare of the people of the state. Such planning is necessary on both a statewide and regional basis and must maintain responsiveness to changing health and social needs and conditions. The marshaling of all health resources to assure the quality and availability of health services to every person must be the goal of such planning, which must likewise assure optimum efficiency, effectiveness, equity, coordination, and economy in development and implementation to reach that goal. Regional health planning under the provisions of this chapter and in a manner consistent with RCW 36.70.015 is declared to be a proper public purpose for the expenditure of funds of counties or other public entities interested in regional health planning;

“(2) That the development and offering of new institutional health services should be accomplished in a manner which is orderly, timely, economical, and consistent with the effective development of necessary and adequate means of providing quality health care for persons to be served by such facilities without unnecessary duplication or fragmentation of such facilities;

“(3) That the development of health resources, including the construction, modernization, and conversion of health facilities, should be accomplished in a planned, orderly fashion, consistent with identified priorities;

“(4) That the development and maintenance of adequate health care information and statistics essential to effective health planning and resources development be accomplished;

“(5) That the strengthening of competitive forces in the health services industry, wherever competition and consumer choice can constructively serve to advance the purposes of quality assurance, cost-effectiveness, and access, should be implemented.

“This chapter has been updated to reflect amendments to the National Health Planning and Resources Development Act of 1974, Public Law 93-641, by the Health Planning and Resources Development Amendments of 1979, Public Law 96-79.”

Laws 1989, 1st Ex.Sess., ch. 9, § 601, in subsec. (1), in the second sentence, substituted "responsive" for "fostered on both a state wide and regional basis and must maintain responsiveness"; and deleted a former last sentence pertaining to regional health planning; in subsec. (5), following "concerned with" inserted "public health and health care"; substituted "their" for "the"; and, following "interrelationship" deleted "of the three"; and deleted a former subsec. (6), which read:

"That this chapter should be construed to effectuate this policy and to be consistent with requirements of the federal health planning and resources development laws."

#### 2007 Legislation

Laws 2007, ch. 259, § 55 rewrote subsecs. (1) and (2), which formerly read:

"(1) That health planning to promote, maintain, and assure the health of all citizens in the state, to provide accessible health services, health manpower, health facilities, and other resources while controlling excessive increases in costs, and to recognize prevention as a high priority in health programs, is essential to the health, safety, and welfare of the people of the state. Health planning should be responsive to changing health and social needs and conditions. Involvement in health planning from both consumers and providers throughout the state should be encouraged;

"(2) That the development of health services and resources, including the construction, modernization, and conversion of health facilities, should be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation;"

#### Source:

Former § 70.38.010.

#### LIBRARY REFERENCES

##### 2002 Main Volume

Asylums 1 to 3.

Health and Environment 20.

Hospitals 1 to 3.

Westlaw Topic Nos. 43, 199, 204.

C.J.S. Asylums and Institutional Care Facilities §§ 2 to 8.

C.J.S. Health and Environment §§ 2 to 6, 40, 44 to 47, 62 to 64, 106, 125, 128, 130, 132, 137.

C.J.S. Hospitals §§ 2 to 6, 8 to 11.

#### NOTES OF DECISIONS

In general 1

1. In general

Legislature intended to protect interests of competing health care providers when it enacted certificate of need (CN) statute; thus, competing health care providers satisfy "zone of interest" prong of statutory standing test, and may challenge CN applications. *St. Joseph Hosp. and Health Care Center v. Department of Health* (1995) 125 Wash.2d 733, 887 P.2d 891. Health 104; Health 246

West's RCWA 70.38.015, WA ST 70.38.015

Current with all 2009 legislation

(C) 2009 Thomson Reuters.

END OF DOCUMENT

CERTIFICATION OF ENROLLMENT

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5930

Chapter 259, Laws of 2007

(partial veto)

60th Legislature  
2007 Regular Session

BLUE RIBBON COMMISSION ON HEALTH CARE COSTS AND ACCESS--IMPLEMENTING  
RECOMMENDATIONS

EFFECTIVE DATE: 07/22/07 - Except sections 18 through 22, which become effective 01/01/09; and  
section 30, which becomes effective 05/02/07.

Passed by the Senate April 21, 2007  
YEAS 31 NAYS 17

CERTIFICATE

BRAD OWEN

\_\_\_\_\_  
**President of the Senate**  
Passed by the House April 20, 2007  
YEAS 63 NAYS 35

FRANK CHOPP

\_\_\_\_\_  
**Speaker of the House of Representatives**

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **ENGROSSED SECOND SUBSTITUTE SENATE BILL 5930** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

\_\_\_\_\_  
**Secretary**

Approved May 2, 2007, 10:36 a.m., with the exception of sections 59 and 74 which are vetoed.

FILED  
May 3, 2007

CHRISTINE GREGOIRE

\_\_\_\_\_  
**Governor of the State of Washington**

**Secretary of State**  
**State of Washington**

---

ENGROSSED SECOND SUBSTITUTE SENATE BILL 5930

---

AS RECOMMENDED BY THE CONFERENCE COMMITTEE

Passed Legislature - 2007 Regular Session

State of Washington

60th Legislature

2007 Regular Session

By Senate Committee on Ways & Means (originally sponsored by Senators Keiser, Kohl-Welles, Shin and Rasmussen; by request of Governor Gregoire)

READ FIRST TIME 03/05/07.

AN ACT Relating to providing high quality, affordable health care to Washingtonians based on the recommendations of the blue ribbon commission on health care costs and access; amending RCW 7.70.060, 70.83.040, 43.70.110, 70.56.030, 48.41.110, 48.41.160, 48.41.200, 48.41.037, 48.41.100, 48.41.120, 48.43.005, 48.41.190, 41.05.075, 70.47.020, 70.47.060, 48.43.018, 43.70.670, 41.05.540, 70.38.015, 70.38.135, 70.47A.030, 43.70.520, and 70.48.130; reenacting and amending RCW 42.56.360; adding new sections to chapter 41.05 RCW; adding new sections to chapter 74.09 RCW; adding new sections to chapter 43.70 RCW; adding a new section to chapter 70.83 RCW; adding a new section to chapter 48.20 RCW; adding a new section to chapter 48.21 RCW; adding a new section to chapter 48.44 RCW; adding a new section to chapter 48.46 RCW; adding a new section to chapter 48.43 RCW; adding a new section to chapter 70.47A RCW; adding a new chapter to Title 70 RCW; adding a new chapter to Title 43 RCW; repealing RCW 70.38.919; repealing 2006 c 255 s 10 (uncodified); prescribing penalties; providing effective dates; providing expiration dates; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**USE STATE PURCHASING TO IMPROVE HEALTH CARE QUALITY**

NEW SECTION. **Sec. 1** (1) The health care authority and the department of social and health services shall, by September 1, 2007, develop a five-year plan to change reimbursement within their health care programs to:

- (a) Reward quality health outcomes rather than simply paying for the receipt of particular services or procedures;
  - (b) Pay for care that reflects patient preference and is of proven value;
  - (c) Require the use of evidence-based standards of care where available;
  - (d) Tie provider rate increases to measurable improvements in access to quality care;
  - (e) Direct enrollees to quality care systems;
  - (f) Better support primary care and provide a medical home to all enrollees through reimbursement policies that create incentives for providers to enter and remain in primary care practice and that address disparities in payment between specialty procedures and primary care services; and
  - (g) Pay for e-mail consultations, telemedicine, and telehealth where doing so reduces the overall cost of care.
- (2) In developing any component of the plan that links payment to health care provider performance, the

updated strategy. The health care facilities and services plan as it pertains to a distinct geographic planning region may be updated by individual categories on a rotating, biannual schedule.

(5) The office shall hold at least one public hearing and allow opportunity to submit written comments prior to the issuance of the initial strategy or an updated strategy. A public hearing shall be held prior to issuing a draft of an updated health care facilities and services plan, and another public hearing shall be held before final adoption of an updated health care facilities and services plan. Any hearing related to updating a health care facilities and services plan for a specific planning region shall be held in that region with sufficient notice to the public and an opportunity to comment.

**NEW SECTION. Sec. 53** The office shall submit the strategy to the department of health to direct its activities related to the certificate of need review program under chapter 70.38 RCW. As the health care facilities and services plan is updated for any specific geographic planning region, the office shall submit that plan to the department of health to direct its activities related to the certificate of need review program under chapter 70.38 RCW. The office shall not issue determinations of the merits of specific project proposals submitted by applicants for certificates of need.

**NEW SECTION. Sec. 54** (1) The office may respond to requests for data and other information from its computerized system for special studies and analysis consistent with requirements for confidentiality of patient, provider, and facility-specific records. The office may require requestors to pay any or all of the reasonable costs associated with such requests that might be approved.

(2) Data elements related to the identification of individual patient's, provider's, and facility's care outcomes are confidential, are exempt from RCW 42.56.030 through 42.56.570 and 42.17.350 through 42.17.450, and are not subject to discovery by subpoena or admissible as evidence.

**Sec. 55 RCW 70.38.015** and 1989 1st ex.s. c 9 s 601 are each amended to read as follows:

It is declared to be the public policy of this state:

(1) That strategic health planning ((to)) efforts must be supported by appropriately tailored regulatory activities that can effectuate the goals and principles of the statewide health resources strategy developed pursuant to chapter 43.-- RCW (sections 50 through 54 of this act). The implementation of the strategy can promote, maintain, and assure the health of all citizens in the state, ((to)) provide accessible health services, health manpower, health facilities, and other resources while controlling ((excessive)) increases in costs, and ((to)) recognize prevention as a high priority in health programs((, is essential to the health, safety, and welfare of the people of the state. Health planning should be responsive to changing health and social needs and conditions)). Involvement in health planning from both consumers and providers throughout the state should be encouraged;

(2) ~~((That the development of health services and resources, including the construction, modernization, and conversion of health facilities, should be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation))~~ That the certificate of need program is a component of a health planning regulatory process that is consistent with the statewide health resources strategy and public policy goals that are clearly articulated and regularly updated;

(3) That the development and maintenance of adequate health care information, statistics and projections of need for health facilities and services is essential to effective health planning and resources development;

(4) That the development of nonregulatory approaches to health care cost containment should be considered, including the strengthening of price competition; and

(5) That health planning should be concerned with public health and health care financing, access, and quality, recognizing their close interrelationship and emphasizing cost control of health services, including cost-effectiveness and cost-benefit analysis.

**NEW SECTION. Sec. 56** (1) For the purposes of this section and RCW 70.38.015 and 70.38.135, "statewide health resource strategy" or "strategy" means the statewide health resource strategy