



New Jersey Health Law

Bulletin

A summary of recent developments provided by the health care law firm **Garfunkel, Wild & Travis, P.C.**

NJ Supreme Court Landmark Decision May Affect Hospital Property Tax Exemptions

The New Jersey Supreme Court issued a landmark decision, reworking the test that taxing authorities use for determining whether a hospital is exempt from real property taxes. In *Hunterdon Medical Center v. Township of Readington*, the Tax Court determined that portions of a building (the Building) owned by a hospital that is a tax-exempt and charitable organization (the Hospital), did not qualify for a real property tax exemption pursuant to N.J.S.A. 54:4-3.6. The Building contained a Wellness Center, a physical therapy service, a cardio-pulmonary rehabilitation service and a pediatric practice.

Moreover, the Tax Court articulated a new framework for determining whether a building, not part of the hospital, is used for hospital purposes: (1) the nature and extent of the integration between the hospital and the subject facility (Integration); (2) the extent to which the activity conducted in the facility was under the control or supervision of the hospital medical staff (Control or Supervision); and (3) whether the facility primarily served hospital patients or members of the public (Population Served). Using the new framework

tenets, the Tax Court granted the real property tax exemption only to the cardio-pulmonary rehabilitation service. The Appellate Division affirmed the decision of the Tax Court.

The New Jersey Supreme Court ordered the use of a flexible, functional test to interpret the definition of "hospital purpose," while noting the "many medical pursuits permitted to the 'modern' hospital in New Jersey" beyond the traditional notions associated with an acute care facility. The Supreme Court also affirmed the Integration, Control or Supervision and Population Served framework expressed in the previous decisions.

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Governor Corzine Appoints Medicaid Inspector General

New Jersey Governor Jon Corzine recently nominated Mark Anderson to be New Jersey's first Medicaid Inspector General. The position was created by statute last year and duties include preventing, detecting, and investigating fraud and abuse and coordinating the anti-fraud efforts of all State agencies funded by Medicaid.

Anderson, who currently serves as an assistant federal prosecutor for the Eastern District of Pennsylvania and has extensive experience handling cases involving health care and Medicaid fraud, is in the process of moving to Hamilton, NJ. ■

Senate Passes Legislation in Response to Reinhardt Report

The New Jersey Senate recently passed four bills aimed at ensuring State hospital viability in the wake of the startling findings from the State's Commission on Rationalizing Health Care Resources (the Reinhardt Report).

The first bill expands training

requirements for persons serving as members of board of trustees of state hospitals to include all hospital board members – not only those appointed after April 30, 2007. Training requirements would need to be completed within 12 months from the effective date of the bill. The training program would be approved by the Commissioner of the New Jersey Department of Health and Senior Services (DHSS) and would be designed to clarify the roles and duties of a hospital trustee. The

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actual training would be at least one day in length. A current rule proposal found in the June 16, 2008 New Jersey Register sets forth the requirements for the training program and, if adopted, would apply to all board members, regardless of the date of their appointment.

The second bill requires each general hospital and State psychiatric hospital in New Jersey to conduct annual public meetings for the communities that they serve. At a minimum, the chief execu-

tive officer of the hospital, the chairman of the hospital board of trustees and at least 25% of the members of the board of trustees would have to be present at the meeting to take questions. The meeting would be open to all members of the public and there would be strict notice requirements for informing the public of the meeting time and location.

A third bill provides that hospitals shall charge a patient who is an uninsured resident of New Jersey, and whose family gross income is less than 500% of the federal poverty level (the

Patient), an amount no greater than 15% more than the applicable payment rate under the federal Medicare Program for the health services rendered to the Patient. The bill also directs the DHSS to establish a sliding scale based on income that stipulates the percentage of a hospital charge that the Patient is required to pay for health care services rendered at the hospital.

Finally, and perhaps most controversial, is a bill that would authorize enhanced DHSS monitoring of hospital financial performance and intervention in management of identified distressed hospitals. Pursuant to the bill, a hospital in financial distress would be appointed a monitor to participate in the development and oversight of corrective measures to resolve the distress. The monitor would be paid through a contingency contract established between the hospital and the monitor and (1) shall be authorized to attend all hospital board meetings, executive committee meetings or any other meetings concerning the hospital's fiscal matter; and (2) may be authorized to have voting and veto powers over actions taken at the above mentioned meetings. ■

DHSS Proposes Rules Governing Hospital Reporting of HAIs

The New Jersey Department of Health and Senior Services (DHSS) has proposed new rules pertaining to hospital reporting and prevention of healthcare-associated infections (HAIs). The Health Care Facility Associated Infection Reporting and Prevention Act (the Act) will require hospitals to report quarterly to the DHSS and process quality indicators and data on infection rates for the major site categories that define HAIs (such as urinary tract infections, surgical site infections, ventilator-associated pneumonia, and central line-related bloodstream infections). HAIs are identified by the Centers for Medicare and Medicaid Services and selected by the Commissioner of the DHSS in consultation with the Quality Improvement Advisory Committee (the QIAC).

The reports will be made available to the public on the DHSS website in a format that will allow comparison between the different hospitals. While the rule currently provides that the reporting requirements may eventually extend by regulation to other facilities, for the time being the Act is only applic-

able to hospitals. Future regulations made in consultation with the QIAC will establish standards for reporting HAIs.

The Commissioner of the DHSS may advise a hospital in the event the Commissioner determines a change in facility practices or policy is necessary to improve performance in the prevention of health care facility-associated infections and the quality of care provided at the facility. ■

Governor Corzine Signs Health Care Stabilization Fund Act Into Law

On June 30, 2008, Governor Jon Corzine approved S-1978/A-2809, thereby creating the Health Care Stabilization Fund Act (the Act). The Act provides "emergency grants to general hospitals and other licensed health care facilities to ensure continuation of access and availability of necessary health care services to residents in a community served by a hospital facing closure or significantly reducing ser-

vices due to financial distress."

The grants provided by the Act will be administered by the New Jersey Department of Health and Senior Services (DHSS), in consultation with the Department of Treasury. In determining whether a general hospital or licensed health care facility is eligible for the grant, DHSS will consider: (a) whether extraordinary circumstances

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Immunity for Certain Volunteer Physicians

A new bill was proposed in the New Jersey Assembly that is aimed at encouraging retired physicians to volunteer their services in the community. The proposed bill would provide immunity from civil liability to certain volunteer physicians who provide patient care or treatment at non-profit free-standing clinics that are not owned or controlled by licensed health care facilities or at federally qualified health centers (FQHC). Pursuant to A-2861, immunity would extend to trustees, directors, officers, employees, agents and volunteers as long as treatment was reasonably provided in good faith.

A “volunteer physician” means a retired physician who remains licensed pursuant to the New Jersey statutes at the time he or she provides the treatment and whose professional practice is limited to providing patient care exclusively without compensation or the expectation of compensation. Prior to rendering such care, the volunteer physician and patient must agree to the provision of uncompensated patient care or treatment and the immunity granted under the bill. Civil liability immunity will not extend to gross negligence, willful or wanton misconduct or the negligent operation of a motor vehicle.

MCOs to Pay Claims Based on Assignment of Benefits

A proposed bill in the New Jersey Senate provides that a carrier that issues a managed care plan with out-of-network benefits shall remit payments for reimbursements of health care services

directly to the out-of-network provider. S-2670 provides that once a covered individual has made an assignment of payments to an out-of-network care provider, any payment made directly to the covered individual will be considered unpaid, and unless remitted in an appropriate timeframe, will be considered overdue and subject to an interest charge.

The disbursements must be made in accordance with the Health Care Quality Act and any interest charge will be assessed pursuant to N.J.S.A. 17B:30-23 *et al*, which is known as the Prompt Pay Law.

New Rules for Advanced Practice Nurses

The New Jersey Board of Nursing has adopted, amended and repealed rules pertaining to the certification of Advanced Practice Nurses (APNs) which includes nurse practitioners, clinical nurse specialists and certified registered nurse anesthetists (CRNAs). New educational requirements call for APNs to complete either a Master's degree in nursing in a school accredited by a nursing accrediting association or a Master's degree in nursing and a post-Master's program that focuses on an advanced practice nursing specialty from a school accredited by a nursing accrediting association.

To ensure that APNs are adequately prepared to prescribe medications, including controlled dangerous substances (CDS), applicants must also complete at least 39 hours of pharmacology during their education, as well as six contact hours in pharmacology related to CDS.

The rules protect CRNAs by ensuring that these individuals (who are not required to obtain a Master's degree) can obtain certification as an APN. A CRNA must (a) be licensed as a registered professional nurse, (b) have successfully completed an education program accredited by the American Association of Nurse Anesthetists (AANA), (c) be currently certified by the Council on Recertification of Nurse Anesthetists of the AANA, (d) have completed at least 1600 hours as a nurse anesthetist over the previous 24 months and (e) have completed pharmacology requirements. ■

Health Care Stabilization Fund Act

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threaten access to essential health services to residents in a community; (b) whether a grant from the fund is likely to stabilize access to the essential health care services; (c) whether there is a reasonable likelihood that the essential health care services will be sustainable upon the termination of the grant; and (d) whether funding is unavailable from other sources to preserve or provide essential health care services.

As a condition of receiving a grant, the general hospital may have to agree to corrective measures in governance, management, and business operations, as the DHSS deems reasonable and appropriate. Licensed health care facilities, other than general hospitals, will have to agree to facilitate the enrollment of individuals in appropriate government insurance programs and provide the DHSS with such quality of care, utilization and financial information as determined by the DHSS to be reasonably necessary. ■

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Proposed Bill May Subject ACFs to Double Tax

A bill, proposed by the New Jersey Assembly on May 5, 2008, will subject Ambulatory Care Facilities (ACF or Facility) to an increased tax liability. As the law is currently written, the tax assessment applies to ACFs that offer one or more enumerated services and have \$300,000 or more in gross receipts. ACFs with (a) less than \$300,000 in gross receipts or (b) which are licensed to a hospital in New Jersey as an off-site Facility, are exempt from paying the assessment. The bill states that for fiscal year 2009, the assessment

will be based on gross receipts for the 2007 tax year and covered Facilities will be obligated to pay an assessment equal to 7.0% (increased from 3.5%) of its gross receipts or \$400,000 (increased from \$200,000), whichever is less.

Monies raised by the assessment are deposited in the Health Care Subsidy Fund to help fund hospital charity care subsidies. A May 22, 2008 amendment to the bill added an additional exemption from the assessment for physician-owned or operated facilities that provide one or more of the enumerated services

listed, provided 25% of the facility's gross receipts for the applicable fiscal year are from the Medicaid or NJ FamilyCare programs.

While the bill poses a potential threat to the financial viability of ACFs in New Jersey, the Legislature has not taken any action since the bill was introduced and the bill was *not included* in the Legislature's budget negotiations. ■

Landmark Decision

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The Supreme Court did, however, reverse and remand to the Tax Court the decision to deny exempt status to the physical therapy service. Pursuant to the Population Served framework, the Tax Court will have to decide whether the physical therapy service competes with similar commercial enterprises and whether it is predominantly used by patients or the general public. If competitive in nature and used primarily by patients, the physical therapy service may not qualify for real property tax exemption. ■

About Garfunkel, Wild & Travis, P.C.

Garfunkel, Wild & Travis, P.C. (GWT) is among the most active health care specialty law firms in the country, with offices in New Jersey, New York and Connecticut. It serves numerous New Jersey hospitals, licensed health facilities, medical practices, physicians and other health care practitioners, and health care related companies.

The firm specializes in addressing the complex legal, regulatory, business and financial needs of its clients: it helps clients negotiate favorable reimbursement rates from insurers and government; gain regulatory approval for facilities expansion or new services; merge, acquire or network with other organizations; and purchase or lease new technology and equipment. GWT also assists numerous health care providers and others to comply with complicated, costly, and often onerous state and federal regulations.

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