

OFFICIAL OPINION NO. 76-67, Certificate of need for health care facilities

July 12, 1976

Miss Judith K. Call, Secretary  
Department of Health  
Foss Building  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 76-67

**Certificate of need for health care facilities**

Dear Miss Call:

You have requested an official opinion from this office in regard to the following factual situation:

Under SDCL 34-7A, the State Comprehensive Health Planning Agency of the State Department of Health is required to process applications for Certificate of Need for the construction or modification of health care facilities.

Blue Cross of Western Iowa and South Dakota, which is a third party payer for Medicare reimbursement in South Dakota and Iowa, has presented a plan to implement a proposal in South Dakota entitled "Technical Proposal Reducing Acute Care Costs Experiment." The proposed experiment enables a hospital participating therein to maximize utilization of its facilities by using currently unused beds for providing long term care services.

Based on the above factual situation and attached documents you ask:

Would a Certificate of Need be required under SDCL 34-7A by South Dakota hospitals to permit such hospitals to participate in the proposed experiment of Blue Cross of Western Iowa and South Dakota entitled "Technical Proposal Reducing Acute Care Costs Experiment" which would enable the participating hospitals to use currently unused beds for providing long term care services under conditions described in Attachment I to this letter?

SDCL 34-7A-16 provides that no construction or modification of a health care facility shall be commenced unless a Certificate of Need has been issued. The terms "health care facility" and "construction or modification" are defined in SDCL 34-7A-2 as follows:

(1) "Health care facility," any hospital or nursing home licensed as such under chapter 34-12 or any other licensed outpatient care facility, extended care facility or home care facilities.

(2) "Construction or modification," the erection, building, alteration, reconstruction, modernization, improvement, extension or purchase or acquisition by lease or deferred payment plan, of diagnostic or therapeutic equipment, which shall mean replacement of existing equipment, by a health care facility which requires a total expenditure in excess of one hundred thousand dollars or will either expand or extend the scope or type of service rendered, or increase the bed complement to the facility.

In answering your question one must consider what the proper interpretation of the above cited statute is. The issues to be resolved are: 1) are the institutions involved in the proposed plan "health care facilities," and if so; 2) are the institutions engaging in "construction or modification" by their proposed participation in the Blue Cross plan you refer to?

In answer to the first of these questions, the institutions involved appear to be assumed to fit the definitions of being a "health care facility" as defined above.

The answer to your second question is not as clear and is the crucial one for answering your inquiry.

The statutory definition of "construction or modification" cited above, provides the key to your question. In my opinion, the definition of "construction or modification," in SDCL 34-7A-2 is to be interpreted as follows.

There are two fundamental broad areas or situations within what I call part 1 of the definition which appear to me to be initially considered in the definition. The definition refers to: 1) the erection, building, alteration, reconstruction, modernization, improvement, or extension of the actual facility (i.e. brick and mortar), and 2) the purchase or acquisition by lease or deferred payment of diagnostic or therapeutic equipment. These two categories

in part 1 I characterize as: 1) physical plant improvements and 2) purchase of equipment.

The second portion of the definition which I call part 2 further limits the above categories. In my opinion, there is no "construction or modification" under SDCL 34-7A-2 unless there is also either: 1) an expenditure of over one hundred thousand dollars for either plant improvement or purchase or acquisition of equipment, as discussed above; 2) an expansion or extension of the type or scope of service rendered in regard to either the plant improvement or equipment purchase, as discussed above; or 3) an increase in bed complement of the facility by the plant improvement or purchase of equipment, as discussed above. Any combination of these two parts of the definition seem to me to fit the "construction or modification" definition.

Therefore, if there is an expenditure of over one hundred thousand dollars (part 2), for either construction or modification of plant improvement or purchase of diagnostic or therapeutic equipment (part 1), the Certificate of Need required by SDCL 34-7A-16 would be necessary.

Also, if there is an improvement of the physical plant as discussed above (part 1), and if that improvement does not cost over one hundred thousand dollars, expand or extend the scope or type of services rendered, or increase the bed complement of the facility (part 2), the Certificate of Need required by SDCL 34-7A-16 would not seem to me to be required as there would not in that event be any "construction or modification" by definition.

Within the above terminology there are still several concepts and terms that are somewhat difficult to pinpoint and to define. What is involved, for example, in an "expansion or extension of the scope or type of service rendered" is something that must be reviewed on the facts in any particular situation. By general statement I cannot define that concept for all situations except to point out that an "expansion or extension" covered under the "construction or modification" definition must relate to either the purchase of equipment or plant improvement as discussed above. "Expansion or extension of the scope of services" alone is not "construction or modification" under SDCL 34-7A-2.

In regard to the fact situation you present it appears to me that the Blue Cross proposal is largely directed toward making changes to accommodate the participating hospitals to be eligible to be reimbursed from SSI for occasional long-term care services rendered to SSI beneficiaries. Apparently under the present system the hospitals have been providing long-

term care, but have not been able to get reimbursed through SSI for the services rendered to SSI beneficiaries.

In my opinion, the possible applicability of the Certificate of Need law to this situation is at best doubtful. From the facts available to me, there does not appear to be any "construction or modification" as discussed above, so as to make SDCL 34-7A applicable. That absence of "construction or modification" is determinative for answering your question. Absent such "construction or modification" there does not seem to be any requirement that the Certificate of Need required by SDCL 34-7A-16 is here required before the hospitals can engage in the proposed program.

In view of our policy to limit the scope of opinions to the questions asked, the above opinion does not go beyond the scope of the specific question asked about the Certificate of Need Law.

Respectfully submitted,

WILLIAM J. JANKLOW  
ATTORNEY GENERAL

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