

**N.D.A.G. Letter to Wentz (March 30, 1992)**

March 30, 1992

Dr. Robert M. Wentz  
State Health Officer  
Department of Health and  
Consolidated Laboratories  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Dr. Wentz:

Thank you for your December 20, 1991, letter requesting my opinion as to the proper interpretation to be given North Dakota Century Code (N.D.C.C.) § 23-17.2-03. More specifically, your letter poses the following two questions:

1. Should the costs of clinical activity conducted by physicians be included as an operating cost of a service proposed by a health care facility in determining whether the proposal is subject to full review under N.D.C.C. § 23-17.2-03?
2. Does the phrase, "on behalf of," found in part b of N.D.C.C. § 23-17.2-03(1), require the inclusion of such clinical costs if they are incurred by a separate corporate entity such as an independent clinic?

N.D.C.C. § 23-17.2-03 identifies what activities by a health care facility are covered by the certificate of need program.

The certificate of need program required under this chapter provides for the following:

1. . . . The certificate of need program applies to:  
    . . . .
  - b. The addition or expansion of a health service by or on behalf of a health care facility beyond that which was offered within the previous twelve-month period. . . which is associated with a capital expenditure and entails an annual operating cost of at least three hundred thousand dollars; . . . .

N.D.C.C. § 23-17.2-03 (emphasis supplied).

The term "operating costs" is defined in N.D.C.C. § 23-17.2-02(14) as "the financial requirements necessary to effect a proposed activity or health service which under generally accepted accounting principles is not properly capitalized." The term "health services" is defined in N.D.C.C. § 23-17.2-02(10) as "institutionally related (i.e. diagnostic, treatment, or rehabilitative) services, and includes alcohol, drug abuse, and mental health services."

In any specific instance it is a question of fact whether the clinical activity costs for services provided directly by a physician would be included as an operating cost of the service. If the physician is a member of the staff of the health care facility and the clinical activities conducted by the physician are billed as a non-segregated portion of the cost of the service, the costs of clinical activity might well be included as part of an operating cost of the service.

If the physician's services are provided directly to individual patients and those services are separately billed to the patient or to a third party, then those services would not be attributable to nor included in the operating costs of the health care facility. On the other hand, the costs of any physician services rendered for administration of, or for the primary benefit of, the health care facility would be includable in the operating costs of the facility. A strong indication of whether the costs of the physician services are allocable to the operating costs for purposes of determining the need for review pursuant to N.D.C.C. § 23-17.2-03 is whether the costs have been allocated as part of the reasonable cost basis in determining costs billed by the health care facility to Medicare, Medicaid, private health insurance carriers, or private pay patients. If they are so allocated, they are part of the operating costs.

It is my opinion that the annual operating cost of a service proposed by a health care facility includes only those costs which are included in the computation of costs used to determine the amount billed by the facility for the service. Because the clinical activities of physicians are generally billed separately and not as a part of the fee of the health care facility, those costs would generally not be included in the operating costs of the service in determining whether the proposal is subject to full review under N.D.C.C. § 23-17.2-03.

The language in N.D.C.C. § 23-17.2-03 "by or on behalf of a health care facility" modifies the term "addition or expansion of a health service" rather than modifying the phrase "an annual operating cost." Therefore, the quoted language would not affect the inclusion or exclusion of the clinical services of a physician from the operating costs of the health service.

I trust that the above discussion is sufficient to guide your determinations pursuant to N.D.C.C. § 23-17.2-03.

Sincerely,

Nicholas J. Spaeth

pg