BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of	)	
	)	
Imaging Associates of Providence	)	OAH No. 06-0743-DHS
	)	
	)	

PROPOSAL FOR ACTION OF IMAGING ASSOCIATES OF PROVIDENCE

INTRODUCTION

Imaging Associates of Providence ("IAP") respectfully submits the following Proposal for Action in response to the Administrative Law Judge's Decision on Summary Judgment ("DSJ").

IAP constructed two facilities, one in Anchorage and one in the Mat-Su Valley, at a total cost of over $10 million. It is undisputed that it did so in reliance on regulations that exempted it, as the offices of private physicians in group practice, from having to apply for a certificate of need. There is no question as to whether IAP was properly interpreting the regulations. Even today the Department of Health and Social Services ("the Department") concedes that IAP satisfied the regulatory test, and the DSJ necessarily does so too.[1] As importantly, the Department officially informed IAP – not once, but twice – in writing, from the Commissioner herself, that IAP did not need a certificate of need because it satisfied the regulatory test for exemption.

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[1] "The parties do not dispute that under 7 AAC 07.012, the department's previous determinations that IAP's Mat-Su Valley facility is exempt were correct." DSJ at 11.

Under these undisputed facts, it is inconceivable that any court would permit the Department to close these medical facilities down. This is true regardless of whether IAP is granted a CON at the end of the long and expensive process that the DSJ requires IAP to go through before it can get a decision on its estoppel defense. The threat of closure implicit in the DSJ is absurd, and the DSJ is erroneous for a number of reasons.

This Proposal for Action does not restate all of the grounds that IAP raised in its Motion for Summary Judgment, but IAP believes that all are meritorious and justify a rejection of the DSJ.

DISCUSSION

The DSJ is premised on the proposition that "[t]he department is not required to perpetuate errors." DSJ at 1. When it comes to demonstrating that the Commissioner made an "error" when she twice informed IAP that it was exempt from the CON process, however, the DSJ has to (1) utterly ignore the facts on which the exemption was based, and (2) create *ad hoc* and retroactively apply a completely novel, single-factor test for determining the difference between an "independent diagnostic testing facility" and the offices of private physicians in group practice.

A. The DSJ's Newly Invented Test for "Physicians' Office" Ignores the Word "Independent"

The DSJ's new test for "physicians' office" discards all factual considerations but one. The only one that matters to the DSJ is part ownership by a hospital, a factor that the DSJ now finds to mean the exact opposite of what it used to. The Department's actual codified regulation, 7 AAC 07.012(b)(2), which IAP indisputably interpreted correctly and relied upon heavily, referred the public to 42 C.F.R. § 410.33, which makes it crystal clear that the word

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"independent" in the phrase "independent diagnostic testing facility" means "independent of a physician's office ***or hospital***." *See* 42 C.F.R. § 410.33(a) (emphasis added).

In other words, under the regulations, a radiology practice that is *wholly owned* by physicians *and a hospital*, like IAP, *cannot* be an independent diagnostic testing facility "under 42 C.F.R. 410.33," the regulatory phrase, because it is not "independent of" what an "independent diagnostic testing facility" must be "independent of." And now, without even acknowledging that it is an abrupt about-face, the DSJ makes part-ownership by a hospital mean the exact opposite! It is as though the police suddenly started arresting people for running green lights, with the explanation that "red," as used in the Municipal Code, now means "green."

So what does "independent" mean now? The DSJ appropriately recites "the rule of construction that meaning must be give[n] to every word," *see* DSJ at 10, *citing Alaska Railroad Corp. v. Native Village of Eklutna*, 43 P.3d 588, 593 (Alaska 2002), but it ultimately applies the rule only selectively. In *Banner Health*, the imaging center at issue was largely owned by non-physician entrepreneurs, had no hospital affiliations at all, and was thus clearly "independent" as a commercial enterprise. What about IAP? What is IAP "independent" of that allows it to fit within the statutory phrase "independent diagnostic testing facility?" The DSJ does not say.

B. The DSJ's Newly Invented Test for "Physicians' Office" Perverts the Words' Common Meaning

The DSJ fills an alleged regulatory gap by purporting to rely on "plain meaning" rules of construction, but its conclusion perverts ordinary language. The DSJ declines to apply 7 AAC 07.012(b), the regulation under which IAP was repeatedly told it was exempt from the CON requirement, on grounds that Judge Steinkruger later held the regulation invalid in *Banner Health* and "the department is free to respect the court's ruling invalidating the regulation." *See*

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DSJ at 1. The existing regulation has yet to be replaced by a new one. *See* DSJ at 9 ("It would be premature to address in this appeal whether some future regulation could have retroactive effect on IAP"). This leaves a gap – no valid old regulation, and no enacted new regulation – and in this gap, according to the DSJ, the only governing law is the statutory definition of "health care facility":

> ["Health care facility"] means a private, municipal, state, or federal hospital [or] independent diagnostic testing facility [but] excludes . . . the offices of private physicians or dentists whether in individual or group practice.

DSJ at 9, *quoting* AS 18.07.111(8)(B). With all prior regulatory guidance for the interpretation of these phrases out the window, the DSJ turns completely on whatever distinction an individual ALJ, in the exercise of her "reason, practicality, and common sense," can draw between an "independent diagnostic testing facility" and "the offices of private physicians . . . in . . . group practice."

No one, either in the legislature or the industry, could have expected the result. The DSJ explains:

> Applying reason, practicality and common sense, and taking into account the plain meaning of the combination of words "the offices of private physicians in group practice," the exclusion should be construed as applying to the place where a group of physicians practice medicine together, among themselves and not as part of an enterprise owned, in full or in part, by someone not authorized to practice medicine. To hold otherwise would have the effect of reading the word "practice" out of the [statutory] phrase "whether in individual or group practice."

DSJ at 10. Since the "[r]adiologists affiliated with IAP's Abbott Road and Mat-Su Valley facilities . . . are in business with a non-physician," *i.e.,* a hospital, then, under the DSJ's new *ad hoc* single-factor test, they "are not the offices of private physicians in group practice." *Id.* at 10-11.

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The DSJ acknowledges that the IAP radiologists "may or may not be in group practice with one another," and, indeed, that "their co-equal ownership of the IDRC [may constitute] a 'group practice' for other purposes." DSJ at 10. That IAP is a "group practice" is obviously the case; for example, it squarely meets the definition provided by the federal Medicare & Medicaid regulations, which define "group practice" to mean "a single legal entity" that "may be organized by any party or parties, including, but not limited to, physicians, *health care facilities*, or other persons or entities." 42 C.F.R. § 411.352(a) (emphasis added). According to the DSJ, however, for purposes of the definition of "offices of private physicians in group practice" under state law, the group of IAP radiologists somehow stopped being "in practice" as soon as they entered into a joint venture with a hospital. *Id.*

This makes no sense at all. Hospitals exist to provide medical care. It cannot seriously be disputed that physicians who work in a hospital, or on a hospital's staff, or in a building owned by a hospital, or in a facility partly owned by a hospital, are nonetheless "in practice" in every ordinary sense of the term. *See, e.g.,* AS 08.64.380(6) (definition of "practice of medicine" makes no reference to location, employer, or affiliation)[2]; *Chijide v. Maniilaq Ass'n*, 972 P.2d 167, 171 (Alaska 1999) (denial of staff privileges by a quasi-public hospital may raise constitutional concerns if it "prevents him or her from practicing medicine"); *Ward v. Lutheran*

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[2] The "'practice of medicine' . . . means:

> (A) for a fee, donation or other consideration, to diagnose, treat, operate on, prescribe for, or administer to, any human ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition; . . .
>
> (B) to use or publicly display a title in connection with a person's name including 'doctor of medicine,' 'physician,' 'M.D.,' or 'doctor of osteopathic medicine' or 'D.O.'. . ."

AS 08.64.380(6).

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Hospitals & Homes Society of America, 963 P.2d 1031, 1040 (Alaska 1998) (Compton, C.J., dissenting in part) ("Hospitals do not practice medicine independently of the individuals they employ"). Under every reasonable construction of the normal English words, the group of radiologists who practice in IAP are a "group" and they are "in practice," and the DSJ's contrary conclusion is so strained as to be arbitrary and capricious.

C. The DSJ's Newly Invented Test for "Physicians' Office" Ignores All Facts but One

The notion that part ownership by a hospital can be the sole determinant of whether IAP is an "independent diagnostic testing facility" or "the offices of private physicians in group practice" is a very simplistic one. The Department's initial decision that IAP was exempt from the CON process was much more fact-based, and the DSJ's decision to ignore all criteria but one is inexplicable.

IAP, and the departmental review, did not rely on the simple billing designation given by the federal Center for Medicare and Medicaid Services ("CMS"), which was what AOIC had done when it opened the Fairbanks facility that was successfully challenged in *Banner Health.* Instead, IAP had shown the Department how it fit the multi-factor *fact-based* test that CMS had developed in order to determine when the "physicians' office" exception applied:

* The practice is owned by radiologists, a hospital or both;

* The owning radiologist(s) and any employed or contracted radiologist(s) regularly perform physician services (e.g., test interpretations) at the location where the diagnostic tests are performed;

* The billing patterns of the enrolled facility indicate that the facility is not primarily housing a testing facility and that i[t] was organized to provide the professional services of radiologists (e.g., (1) the enrolled facility should not be billing for a significant number of purchased interpretations, (2) the facility should rarely bill for the technical component of a

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diagnostic test, (3) the facility should bill for a substantial percent of all interpretations of the diagnostic tests performed by the practice)), and

* A substantial majority of the radiological interpretations are performed at the practice location where the diagnostic tests are performed.

Ex. F to IAP's MSJ, at 1-2. In response to the Department's questions, Dr. Inampudi had explained how IAP met "each and every one of these [CMS] criteria":

> Our radiology practice is equally owned by the Radiology group and Providence Alaska Medical Center. The practice is fully managed by the Radiologists. A Radiologist will be on-site during regular office hours actively treating patients, performing tests, interpretations, and interventional procedures. The practice will global bill, will never bill for a technical component only, and does not anticipate billing for "purchased interpretations."

Id.

None of these facts has been challenged in this proceeding.[3] When the DSJ was at a loss for anything that could help interpret the phrase "the offices of private physicians in group practice" other than the "reason, practicality, and common sense" of a single ALJ, why did it not consider any of these undisputed facts – facts which once ***proved*** IAP's exempt status? According to the DSJ, these once dispositive facts now do not even ***weigh in favor of*** IAP's exempt status – indeed, do not even deserve a passing mention.

D. The DSJ's Newly Invented Test for "Physicians' Office" Ignores the Purpose of the Law

The DSJ pays lip service to the principle that "the intent of the drafters" must be taken into account when construing the phrase "the offices of private physicians in group practice." DSJ at 10, *citing Alaska Department of Commerce v. Progressive Casualty Insurance Co.*, 165

[3] As a necessary premise to its various rulings, the DSJ holds that there is no factual dispute and that "[a]n evidentiary hearing is not necessary in this matter." DSJ at 4-5.

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P.3d 624, 628 (Alaska 2007). But the DSJ never mentions the legislative purpose of the statutory phrases at issue.

The clear purpose for distinguishing between an independent diagnostic testing facility and a physician's office is that the legislature wanted to regulate enterprises established primarily for the purpose of selling the results of diagnostic tests to other physicians, while not infringing upon the right of physicians to practice their profession with the tools of their trade, which in the case of radiologists necessarily includes x-ray machines, MRI's, and other sophisticated diagnostic tools. Only by ignoring this legislative intent could the DSJ focus exclusively on one criterion – joint ownership with a hospital – and then turn it upside down, so that instead of being ***a*** factor that militates ***in favor*** of finding a physicians' practice it becomes a **disqualifier** to the exclusion of all other criteria.

E. DSJ's Newly Invented Test for "Physicians' Office" Has Nothing to Do with *Banner Health*

One of the most ironical parts of the DSJ is that the factor it finds determinative – part ownership by a hospital – has absolutely nothing to do with *Banner Health*, the case that supposedly prompted the Department's abrupt about-face in the first place. AOIC was primarily owned by non-physician entrepreneurs; it had no hospital ownership at all and only 10.6% ownership by a single physician, Dr. Robert Bridges. *See* IAP's MSJ, Ex. V. No one in *Banner Health* argued that 100% physician ownership was necessary for the application of the physicians' office exception. So how did we get here from there? Only by ignoring the actual order in *Banner Health.*

As the DSJ correctly observes, Judge Steinkruger's decision in *Banner Health* declared 7 AAC 07.012 "void *to the extent* it negates the legislature's intent to include AOIC *and other*

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like independent diagnostic testing facilities within the definition of health care facility." *See* IAP's MSJ, Ex. Q, pp. 1-2 (emphasis added). By the order's express language, it was only "AOIC and *other like"* facilities that Judge Steinkruger found to be included in the statutory phrase, not every single professional office that performs imaging. What is it that makes IAP "like" AOIC? Disturbingly – for a process that was purportedly launched in the first place by the judicial treatment of AOIC in *Banner Health* – the DSJ does not attempt even the most rudimentary comparison of the two entities.

Again, the facts are undisputed. As Dr. Inampudi explained, "Our radiology practice is equally owned by the Radiology group and Providence Alaska Medical Center." Ex. F to IAP's MSJ, at 1-2. What is it about this that makes it "like" AOIC? The DSJ does not say. In fact, the evidence in this case shows the two entities to be utterly *unlike* with regard to this factor, with AOIC having only 10.6% physician ownership and no hospital ownership. *See* IAP's MSJ, Ex. V.

Dr. Inampudi further explained, "The [IAP] practice is fully managed by the Radiologists." *Id.* How about AOIC? The DSJ does not say. The record in this case is barren of information.

Dr. Inampudi explained, "[An IAP] Radiologist will be on-site during regular office hours actively treating patients, performing tests, interpretations, and interventional procedures." *Id.* Did AOIC do the same thing? Again, the DSJ does not say; and the record here is barren of information.

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Dr. Inampudi wrote, "The [IAP] practice will global bill, will never bill for a technical component only, and does not anticipate billing for 'purchased interpretations.'" *Id.* What about AOIC? The DSJ does not say.

For a decision that purports to rest on *Banner Health,* the DSJ's lack of any factual discussion of how IAP in this case and AOIC in *Banner Health* are alike, or not alike, or wildly dissimilar in every way, can only leave IAP with the impression that it is on the losing side of a completely arbitrary process.

F. *May* Is Inapt by Its Own Terms

The DSJ's conclusion that the Department, in making its about-face on IAP's exempt status, is only exercising its "ability to correct errors" (DSJ at 7) arises primarily from an Alaska Supreme Court case decided just a month ago (more than six months after the instant motions were ripe for decision), *May v. State, Commercial Fisheries Entry Comm'n*, 2007 Alas. LEXIS 128 (October 12, 2007). The DSJ discusses *May* as if it contains important new principles of law applicable to this case. It does not. Moreover, the DSJ's reading of *May* is wholly inapt – indeed, the Supreme Court goes out of its way in *May* to *distinguish* a situation like this one.

The Supreme Court in *May* decided that the CFEC, having erroneously decided to award participation credits for a certain area to a fisherman in one case (*Leask*), was not collaterally estopped from deciding the same issue differently – and correctly – in May's case and declining to award him credits for the same area. The Supreme Court noted that all elements of the collateral estoppel doctrine were met, but it applied an exception that depended upon "the unique position of the state when it acts in a quasi-judicial role." *May*, 2007 Alas. LEXIS at 25. "In the instant case, *the CFEC did not issue a new regulation whose merits were ruled upon by another*

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court, but instead rendered an erroneous decision and opted not to perpetuate its error when faced with similar facts in a different case." *Id.* at 25 (emphasis added).

There is no question in this case of collateral estoppel, the doctrine at issue in *May*; IAP's estoppel argument is based on *equitable* estoppel, *i.e.,* the effect of direct representations made to it, by the Commissioner, on which IAP reasonably relied (and was fully expected to rely). Furthermore, in this case, unlike *May*, it is undisputed that the Department applied its regulation correctly to IAP; it did not render one quasi-judicial interpretation of a regulation that turned out to be wrong, then get it right in the next case to come along.

This case would be more like *May* if, in *May*, the CFEC had decided *Leask* based on an erroneous reading of the regulation, then decided *May* based on the correct interpretation of the regulation, then gone back and attempted to apply the result in *May* to *Leask*, the case it had already decided. Under those circumstances, there is no question but that the CFEC would have been collaterally estopped from changing the result in *Leask*.

G. The DSJ's Application of Estoppel Is Seriously Flawed

The DSJ decides the estoppel issue solely on the basis of the fourth element of a four-element test for the application of estoppel against the government: "the estoppel serves the interest of justice so as to limit public injury." DSJ at 11, *citing Crum v. Stalnacker*, 936 P.2d 1254, 1256 (Alaska 1997). According to the DSJ, since the legislature has already gone on record as requiring a CON application of certain health-care facilities, the process of applying for a CON cannot, as a matter of law, cause any "public injury" that the estoppel doctrine may be called upon to limit.

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This truncated approach to estoppel – relying solely on the fourth factor to determine the applicability of the doctrine – was considered by the Alaska Supreme Court in *Crum* and specifically disapproved. In *Crum*, the Division of Retirement and Benefits had rejected a teacher's claim for unused sick leave because he had filed the claim after the statutory deadline. The teacher argued that the Division's instructions were confusing and that it had failed to provide him with the required claim form. The Supreme Court reversed a trial court decision against the teacher and held that equitable estoppel applied. Discussing the fourth element of the test, the Court explained:

> [A]pplication of the equitable estoppel doctrine in this case "serves the interest of justice so as to limit public injury." In discussing this final element, we observed in *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 97 (Alaska 1984), that
>
> > even where reliance has been foreseeable, reasonable, and substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced. However, this is not true in every case. When the public will not be significantly prejudiced, and the other elements of the theory are present . . . foreclos[ing] the use of estoppel causes arbitrary and unjust results.
>
> In *Schneider,* we also noted with approval a commentator's statement that "courts should be encouraged to weigh in every case the gravity of the injustice to the citizen if the doctrine is not applied against the injury to the commonwealth if the doctrine is applied." *Id.* at 97 n. 6 (citing 2 C. Antieu, *Municipal Corporation Law* § 16A.06, at 16A-15 (1984)). In this case, estoppel will prevent Crum from suffering a substantial and unfair hardship while causing no harm to the public.

Crum, 936 P.2d at 1258.[4]

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[4] The DSJ's argument here, if made in *Crum*, would be that since the legislature had statutorily determined that claims had to be made by a certain deadline, there could be no "public injury" involved in failing to estop the Division from enforcing the deadline. The argument is circular and could be used to evade the estoppel doctrine in almost any case.

Under *Crum*, it was clearly erroneous for the ALJ in this case to look at supposed "public injury" in isolation, without attempting to balance it against "the gravity of the injustice to the citizen if the doctrine is not applied." Injustice to the State's citizens is itself a form of public harm. The gravity of the injustice to the citizen here includes both the cost and distraction of a CON process and the prospect that what waits at the end of that process is a denial of the application, with the consequent closure of two functioning, expensive medical-care facilities.

The DSJ nonetheless concludes, facilely, that simply "requiring IAP to ***apply*** for certificates of need" will not result in any public injury. DSJ at 15 (emphasis in original). The DSJ makes no assessment of the actual cost of the application, in either dollars or administrative burden, other than a nod to the possibility of "some inconvenience and expense in preparing the applications." *Id.* The DSJ then leaps over the entire doctrine by suggesting that a determination of the estoppel doctrine is not even appropriate until after IAP has gone through the entire process and its application has been denied. Only then, according to the DSJ, does IAP have standing to contend that it should not have been required to apply for a CON at all.

But preparing a CON application is expensive, time-consuming work and prompts an expensive and time-consuming review process. It diverts the time and resources of the applicant's medical and administrative personnel. There is nothing about the law of estoppel that says the doctrine can be applied to halt the waste of sophisticated, operational medical facilities but cannot be applied to halt the waste of a costly administrative process.

The DSJ's cursory treatment of *Municipality of Anchorage v. Schneider*, 685 P.2d 94 (Alaska 1984) (DSJ at 14 n. 56) is also seriously flawed. The undisputed facts of this case are far more compelling. IAP relied in good faith on the Commissioner's *correct* understanding of the

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governing regulation and expended millions of dollars on its facilities in reliance on her *correct* understanding of the governing regulation. To permit the closure of these medical facilities under these circumstances would be a huge miscarriage of justice – the kind of injustice that *Schneider* made clear the courts should not permit. The DSJ's essential inaction on the estoppel issue – simply kicking it down the road to the end of the CON review process – is an abdication of the quasi-judicial role.

H. The DSJ Raises Constitutional Issues that Require Remand

According to the DSJ, radiologists who create a joint venture with a hospital are not allowed to spend over $1.15 million on facilities and equipment without being subject to CON approval, which includes the prospect that approval will be denied on grounds that there is no demonstrated need for the radiologists' service in the community. No similar restrictions govern the practice of cardiologists, ophthalmologists, or practitioners of any other medical specialty. This different treatment of radiologists violates their constitutional right to equal protection, an issue that the ALJ must consider on remand.

Alaska's equal protection guarantee is found in Article I, section 1 of the Alaska Constitution: "This constitution is dedicated to the principles that . . . all persons are equal and entitled to equal rights, opportunities, and protection under the law." Equal protection law therefore "concerns itself largely with the reasons for treating one group differently from another." *Stanek v. Kenai Peninsula Borough*, 81 P.3d 2687, 269 (Alaska 2003).

Statutory classifications are viewed on a sliding scale, which places a greater or lesser burden on the government to justify the classification depending upon the nature of the individual interest that it impairs. *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-70

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(Alaska 1983); *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978). The first phase of an equal protection analysis is therefore to determine the level of scrutiny to be applied. This is a question of law, determined by the importance of the right asserted and the degree of suspicion with which the court views the classification scheme. *ACLU v. State*, 122 P.3d 781, 785 (Alaska 2005); *Alaska Pacific*, 687 P.2d at 270.

The right of a radiologist to earn a living in his chosen field is an "important" right. *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1262 (Alaska 1980) ("right to engage in economic endeavor" is "important"); *State v. Enserch Alaska Construction, Inc.*, 787 P.2d 624, 632 (Alaska 1989) ("the right to engage in an economic endeavor within a particular industry is an 'important' right for state equal protection purposes"); *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003) ("right to seek and obtain employment in one's profession" is "important for equal protection purposes"). As an "important" right, any burdening of it must be justified by an important governmental objective, and there has to be a close nexus between the governmental objective and the means chosen to accomplish it. *State v. Enserch Construction Co.*, 787 P.2d 624, 633 (Alaska 1989).

The Alaska Supreme Court found an equal protection violation in the legislature's different treatment of various professionals in *Turner Construction Co. v. Scales*, 752 P.2d 467 (Alaska 1988). The plaintiffs in two superior court actions had been injured in accidents that they attributed to faulty home design or construction, and they challenged the constitutionality of a new statute of limitations that protected architects, engineers, and contractors. Applying the "fair and substantial relationship" test to the statute, and noting that the legislative purposes were to encourage construction and to avoid stale claims, the Supreme Court found that the statute

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nonetheless violated equal protection. The Court observed that the result of the law was to shift a greater share of liability for construction defects onto owners, material suppliers, and others not specifically covered by the new law, and it found "no substantial relationship between exempting design professionals from liability, shifting liability for defective design and construction to owners and material suppliers, and the goal of encouraging construction." *Turner Construction*, 752 P.2d at 472; *see also Malabed*, 70 P.3d 421-22, 426-27 ("the disparate treatment of unemployed workers in one region in order to confer an economic benefit on similarly-situated workers in another region is not a legitimate legislative goal").

An interpretation of the law that prohibits radiologists, and only radiologists, from forming entities for the practice of their specialty lacks the required close nexus with the objectives of the CON laws, and it is therefore unconstitutional.

I. If the Commissioner Requires a Certificate of Need, IAP Requests 90 Days for its Application

If the Commissioner determines that IAP is required to file a CON application, IAP requests that it have 90 days from the date of the Commissioner's order for the submission of the application.[5] As the Commissioner is well aware, CON applications in cases such as this can be complex, time-consuming and expensive. IAP believes it will need at least 90 days to submit a quality application that would be of maximum assistance to Staff. IAP further requests that it have the right to request an additional 30 days if an extension is needed.

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[5] The DSJ requires that the application be filed "within sixty days after the effective date of this decision." DSJ at 16. It is unclear to IAP whether this means 60 days from the date of the DSJ or 60 days from the date of the Commissioner's order. If the former, then the application would actually be due before the Commissioner's decision and would raise obvious questions of due process, particularly given the fact that IAP is challenging that portion of the DSJ.

CONCLUSION

The DSJ's reasoning and legal analysis are unsound, and its recommendations to the Commissioner should be rejected for the following independent reasons:

1) Under *existing* regulations, IAP constitutes a physicians' office. Despite the passage of 14 months since Judge Steinkruger's ruling (and 14 months from the time that the Department noticed its intent to amend the regulation in light of the superior court decision), the regulation has not been amended. The ALJ cannot cure the Department's inaction by substituting her own judgment and applying an *ad hoc,* utterly inconsistent new regulation retroactively to IAP.

2) The DSJ misunderstood and misapplied *Banner Health.* Judge Steinkruger did not find that any of the CMS substantive criteria were invalid, only that the Department could not rely solely on a CMS determination that an entity met those criteria, since that finding could be mistaken or based on a fraudulent application. The injunction against AOIC was predicated on AOIC's failure to prove that it was a physicians' office and not an independent diagnostic testing facility.[6] The one CMS criterion that the DSJ declares void – part ownership by a hospital – was not even at issue in *Banner Health.*

3) Even if *Banner Health* involved precisely the same issues, and even if the ruling in *Banner Health* were directly applicable to this case, it is well-settled black-letter law that only parties involved in an action are bound by its result. *See* case law cited at pp. 15-16 of IAP's Motion for Summary Judgment.

4) Even if the Department had timely adopted changes to the pertinent regulations, and even if those newly adopted regulations arguably disqualified IAP as a physicians' office, they

[6] Indeed, AOIC did not even attempt to make such a showing, implicitly conceding that it could not do so.

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cannot retroactively govern IAP's status. *See* AS 44.62.240, and case law cited by IAP at pp. 17-21 of its Motion for Summary Judgment.

5) Equitable estoppel prevents the Department from reversing course. The *undisputed* facts of this case are that the Department twice confirmed to IAP that it constituted a physicians' office under the existing regulations; IAP did, in fact, meet the factual criteria for constituting a physicians' office; IAP proceeded to build approximately $10 million-worth of medical facilities in reliance on that understanding, in good faith. The Supreme Court's decision in *Schneider* controls the issue of equitable estoppel here; indeed, the facts here are far more compelling.

6) Application of the DSJ's recommendation will violate the IAP physician-owners' right to practice their chosen profession with the tools of their trade, in derogation of their equal protection rights under the Alaska Constitution.

7) Adoption of the DSJ would be inconsistent with the term "independent" as defined by 7 AAC 07.012(b)(2), through the express adoption of 42 CFR § 41.33, as "independent of a physician's office or hospital." That definition, which was not challenged in *Banner Health*, is still effective.

If the Commissioner adopts the DSJ's recommendation, IAP requests that, before the CON application process begins, she remand to the ALJ the issue of whether the application of the DSJ's recommendations would violate the equal protection rights of the IAP physician-owners.

If the Commissioner determines that it is necessary for IAP to file a CON application, IAP requests that it be given 90 days from the date of the Commissioner's order in which to do it, with the right to ask for an additional 30 days if necessary.

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DATED this 23rd day of November, 2007, at Anchorage, Alaska.

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