

September 6, 2006

Hon. Karleen Jackson
Commissioner
Department of Health & Social Services
P.O. Box 110601
Juneau, AK 99811-0601

Dear Commissioner Jackson:

This letter is in response to your August 17, 2006, and August 29, 2006, correspondence in which you assert that a recent decision by a superior court judge in Fairbanks requires you to reverse your prior determinations that IAP constitutes a physician office pursuant to AS 18.07.111, and that IAP must now apply for a Certificate of Need for the "imaging facility under development in the Matanuska-Susitna Valley." This letter also responds to your correspondence of August 29, 2006, regarding IAP's Abbott Road office, as the pertinent facts concerning that office are the same as those concerning the office in the Matanuska-Susitna Valley. On behalf of IAP, I very respectfully take exception both to your analysis and your conclusions. IAP was a physician group practice when you found it to be such on May 4, 2006, and again on June 14, 2006, and it remains a physician office today; nothing about the Fairbanks decision changes the facts supporting that determination or the nature of IAP's medical practice.

On April 19, 2006, you wrote to me asking on what basis IAP was not required to submit an application for a Certificate of Need ("CON"). I responded on April 26 to your request. I quote that letter substantially below because it is particularly pertinent with respect to this discussion (I have italicized those portions that I think are of particular significance):

IAP did not request a determination from the Department regarding whether a Certificate of Need ("CON") would be required because the statute governing the program is clear – physician offices are unequivocally exempted from the process. Under AS §18.07.111(8)(B), "the offices of private physicians or dentists whether in individual or group practice," are specifically removed from the definition of covered health care facilities.

Our office, *to be opened in June of 2006*, is a physician office. It is not a health care facility as contemplated by AS § 18.07.111(8). Thus our office, similar to all other physician offices in Alaska, is not subject to the CON program.

It might be helpful for us to share some information regarding our medical practice. *We are a group of Board Certified radiologists*, with sub-specialty training in *interventional radiology*, nuclear imaging, MRI, Body imaging and Breast imaging, and will be delivering a variety of professional services to *our patients*. Similar to other physicians, we require office space and tools to deliver these clinical services. As radiologists, like other specialties such as cardiologists and orthopedists, we also require access to specialized tools including imaging equipment. MRI machines, CT scanners and X-Ray equipment are tools that facilitate the timely diagnosis and appropriate treatment of patients.

The Centers for Medicare & Medicaid Services ("CMS") has recognized that Radiologists rarely perform Evaluation and Management ("E&M") in their offices but they do need access to specialized imaging equipment and specifically addressed the issue. To determine what constitutes a radiology physician office, CMS created a general test. *We found the CMS distinction between an IDTF and a radiology physician practice to be a very helpful guide.*

CMS states that a radiologist or group of radiologists are not required to enroll as an IDTF if all of the following conditions are met:

- 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 a testing facility and that it was organized to provide the professional services of radiologists (e.g., (1) 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 diagnostic

test, (3) the facility should bill for a substantial percentage 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.

We meet each and every one of these 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."

In conclusion, we are physicians and we will be utilizing our office space to deliver needed health care services to the Mat-Su Valley. As physician offices are specifically excluded from the Certificate of Need program, its rules, including requests for determinations, are not applicable.

[I]f the State has any other questions about our plans, we will not hesitate to answer them. Please contact me if you have further questions.

In a letter dated May 4 you stated in pertinent part:

I have concluded that the new Mat-Su facility will be constituted as an office of private physicians in group practice. And therefore in accordance with AS 18.07.111(8) is not considered a "health care facility" for the purposes of the certificate of need program. Thus, I have determined that a certificate of need is not required for this project.

On June 14, you denied a June 1 request for reconsideration submitted on behalf of Mat-Su Regional Medical Center.

On August 17, "notwithstanding [your] previous determinations to the contrary," you wrote me that IAP would be required to submit a CON application for the facility "under development" in the Matanuska-Susitna Valley. You indicated that the basis for

this action was a recent decision by a Fairbanks superior court judge declaring Alaska Open Imaging Center (“AOIC”) subject to CON requirements.¹

As you are well aware, the physician office exception to the “health care facility” definition existed prior to the legislature’s inclusion in 2004 of “independent diagnostic testing facility” under the “health care facility” definition, as part of HB 511. As I think you will agree, nothing in HB 511 eliminated or altered the physician office exception. Moreover, our attorneys inform us that none of the parties to the Fairbanks litigation argued that the physician office exception was eliminated by HB 511, or that the court’s order in any way affects the vitality of the physician office exception.

In my letter to you of April 25, 2006, I set forth a number of specific, substantive facts in support of our contention that IAP constituted a physician office under 18.07.111 and was thus exempt from the CON process. Among other things, I pointed out that we were board-certified radiologists engaged in interventional radiology (among other radiological subspecialties); that we were wholly owned by the physicians and Providence Alaska Medical Center; that we would be actively *treating* patients; and that we would bill globally (never for technical components only). I stated that we were referencing the CMS distinctions between “IDTF” and a radiologist practice because we thought it to be a “very helpful guide.” I submitted that we met *each* of those tests or guidelines.

Nothing in your May 4 letter to Mr. Stephens indicates that you took exception to any of our statements or any portion of our analysis.

The statements I made in my April 26 letter are as accurate today as when they were made. Nothing has changed. We constituted a physician office on April 26, 2006, when I made those statements, and on May 4, 2006, when you formally agreed that IAP constituted “an office of private physicians in group practice,” and on June 14, 2006, when you reaffirmed that decision. Moreover, had we, hypothetically, proceeded with the Mat-Su facility *prior* to the enactment of HB 511 – or one day *after* HB 511 became effective – we would have constituted a physician office then under AS 18.07.111 based on precisely the same rationale we set forth in the April 26 letter.

I am also troubled by two factual assertions made in your letter of August 17, 2006. First, you refer to the AOIC facility in Fairbanks as being “substantially similar” to IAP’s Mat-Su office. What is the factual foundation for that conclusion? While I do not pretend to have a detailed understanding of AOIC’s operation, I do know that it is substantially non-physician owned, and I believe that there are other very substantial

¹ Moreover, our attorneys inform us that the judge’s decision was premised entirely on her finding that the legislature’s intent was to require *AOIC* to submit to the CON process in Fairbanks. IAP is *not* AOIC.

differences between AOIC and IAP as well. But, more importantly, I cannot understand how a court's decision in Fairbanks that is specifically limited to the intent of the legislature with respect to AOIC, and in no way purports to consider IAP's status, could have any impact – adverse or otherwise – on whether *IAP* constitutes a physician's office for purposes of the CON statutory scheme. Also, the statement in the August 17 letter that IAP was "under development" is not accurate. Construction was completed in early June; IAP treated its first patients June 5.

In summary, we believe that the department's prior decisions that IAP constitutes a physician's office for purposes of the CON exemption are well considered, and that those determinations are unaffected by the Fairbanks AOIC lawsuit. We further believe that your assertion that the Fairbanks superior court decision compels you to reverse the department's prior determinations that IAP constitutes a physician group practice is based on a fundamental misreading of that decision. We thus most respectfully disagree with your conclusion that IAP is now required to submit a CON application.

Despite our disagreement concerning this matter, we sincerely hope that this dispute can be resolved quickly and amicably, and we stand ready to work with you toward that end.

Yours very truly,

Chakri Inampudi, M.D.
Medical Director
Imaging Associates of Providence