

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES
DIVISION OF HEALTH SERVICE REGULATION
RALEIGH, NORTH CAROLINA**

**IN RE: REQUEST FOR DECLARATORY)
RULING BY SURGICAL CARE) DECLARATORY RULING
AFFILIATES, LLC)**

Surgical Care Affiliates, LLC (“Petitioner”) has requested a declaratory ruling which asks the North Carolina Department of Health and Human Services (“Department” or “Agency”) to issue a ruling “confirming that the Licensure Act and agency rules do not specify that [Petitioner] must discharge patients home without care and that if [Petitioner] discharges total joint patients with home care, or to another non-hospital licensed facility type, it will not amount to a substantial failure to comply with the Licensure Act.” Pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A .0103, and the authority delegated to me by the Secretary of the Department, and for the reasons given below, I hereby decline to issue any ruling to Petitioner. Frank Kirschbaum and Robert Hamill of Nexsen Pruet, PLLC have requested this ruling on behalf of Petitioner.

STATEMENT OF THE FACTS

Petitioner owns and operates ambulatory surgical facilities (“ASC”) throughout the state of North Carolina. These facilities are licensed and regulated by the Agency. Petitioner intends to begin authorizing the performance of procedures involving the total replacement of hip and knee joints in its ASCs. According to Petitioner, doing so is in conformity with national and local trends. Petitioner states intent to offer total joint procedures to patients whose stay in the ASC for greater than twenty-four hours is determined, prior to surgery, to be medically unnecessary, and it is anticipated that total joint patients will be discharged home following surgery. According to Petitioner, it is possible that some patients may require or request home health care following their stay at the ASC and some patients may be discharged to an alternative

non-hospital location, such as an assisted living facility, skilled nursing facility, hotel, or other similar location based upon the clinical determination of the patient's physician or upon the patient's preference.

Petitioner requests that the Agency issue a declaratory ruling confirming that the Licensure Act and agency rules do not specify that Petitioner must discharge patients home without care and that if Petitioner discharges total joint patients with home care or to another non-hospital licensed facility type it will not amount to a substantial failure to comply with the Licensure Act.

Petitioner's interpretation of Article 6 of N.C. Gen. Stat. § 131E, entitled Health Care Facility Licensure Act (hereinafter "Licensure Act"), is that discharging ASC patients with home care or to another non-hospital licensed facility does not amount to a substantial failure to comply with the Licensure Act or related rules. In summary, Petitioner states that

no law or regulation mandates that an ASC discharge a surgical patient to the patient's home without home healthcare. Similarly, no law or regulation prohibits an ASC from discharging a patient to a skilled nursing facility, assisted living facility, recovery center, or other similar facility. Simply put, state law requires ASCs to discharge patients within twenty-four hours, but does not dictate where those patients must go.

Petition p. 8.

Petitioner is, therefore, requesting a declaratory ruling that speaks to the absence of a relevant statute or rule.

ANALYSIS

The North Carolina Administrative Procedure Act ("ACA") provides that:

On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.

N.G. Gen. Stat. § 150B-4.

The APA further instructs that an agency “shall prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued.” N.C. Gen. Stat. §150B-4. Pursuant to this directive, the Agency has adopted the following rules:

Whenever the Director believes for good cause that the issuance of a declaratory ruling will not serve the public interest, he may refuse to issue one. When good cause is deemed to exist, the Director shall notify the petitioner of his decision in writing stating reasons for the denial of a declaratory ruling.

The Director may refuse to consider the validity of a rule and therefore refuse to issue a declaratory ruling:

(1) if there has been similar controlling factual determination in a contested case, or if the factual context being raised for a declaratory ruling was specifically considered upon adoption of the rule being questioned as evidence by the rulemaking record; or

(2) if circumstances stated in the request or otherwise known to the agency show that a contested case hearing would presently be appropriate.

10A NCAC 14A .0103(c) & (d).

An “ambulatory surgical facility” is defined, in relevant part, as a

facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. *An ambulatory surgical facility may only admit patients for a period of less than 24 hours....*

N.C. Gen. Stat. § 131E-146(1) (emphasis added). In addition, an “ambulatory surgical program” is defined as a

formal program for providing on a same-day basis those surgical procedures which require local, regional or general anesthesia and a period of post-operative observation to patients whose admission for more than 24 hours is determined, prior to surgery or gastrointestinal endoscopy, to be medically unnecessary.

N.C. Gen. Stat. § 131E-146(1a).

State law does not specify the manner in which a patient must be discharged from an ASC in non-emergent cases. The Licensure Act does not specify that patients be discharged home, does not specify that a patient may not be discharged home under the supervision of home health care, and does not specify whether patients can be discharged to a nursing facility, a rehab center, a hotel, or other location. Petitioner is correct that neither statute nor regulation address the discharge scenarios set forth in Petitioner's petition.

Given these circumstances, Petitioner is requesting a declaratory ruling that speaks to the absence of a specific rule or statute. Yet, pursuant to the APA, the scope of a declaratory ruling is "the validity of a rule or ... the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C. Gen. Stat. § 150B-4. The relevant rules state that the Director may refuse to issue a declaratory ruling for good cause. *See* 10A NCAC 14A .0103 (c). In addition, 10A NCAC 14A .0103(d) states that the Director may refuse to consider the validity of a rule in certain circumstances, which are not applicable here, and this rule does not apply because Petitioner is not requesting a ruling on the validity of a specific rule. Because there is no rule or statute which addresses the facts presented by Petitioner, there is good cause to refuse to issue a declaratory ruling as requested by Petitioner.

Good cause exists because Petitioner has asked for a ruling which would affirmatively allow Petitioner to take action based on the lack of a rule or statute. To issue a ruling would be akin to either legislating or promulgating a rule, which is not within the purview of a declaratory ruling. Accordingly, Petitioner requests a ruling that exceeds the statutory and regulatory scope of declaratory rulings.

CONCLUSION

For the reasons given above, I decline to issue any ruling in response to the Request for Declaratory Ruling filed by Petitioner.

This the _____ day of November, 2013.

Drexdal Pratt, Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Declaratory Ruling upon the PETITIONERS by certified mail, return receipt requested, by causing a copy of same to be placed in the United States Mail, first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Frank Kirschbaum
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

This the _____ day of November, 2013.

Cheryl Ouimet
Chief Operating Officer