



STATE OF WASHINGTON
DEPARTMENT OF HEALTH
Olympia, Washington 98504

July 24, 2017

Shawn Slack, MD, Shareholder Member
The Everett Clinic
3901 Hoyt Avenue
Everett, Washington 98201

RE: Determination of Reviewability (DOR) 17-17 and 17-07

Dear Doctor Slack:

On July 13, 2017, The Everett Clinic PLLC (TEC) and the Department of Health (Department) Certificate of Need Program (Program) filed a stipulated joint motion for consolidation and expedited decision in Matter No. M2017-348. This administrative case appealed the Program's Determination of Reviewability (DOR) 17-07 conclusion that TEC's proposed ambulatory surgical center (ASC) in The Everett Clinic at Edmonds practice site is not an exception to the definition of "ambulatory surgical facility" under WAC 246-310-010(4). The purpose was to consolidate TEC's appeal of the DOR 17-07 and probable appeal of DOR 17-17, which concerned the same ASC. Health Law Judge Farris determined the motion was premature but that she intended to sign the order if the Program reached a determination in DOR 17-17 that TEC appealed.

Pursuant to the joint motion, the Department has completed review of your DOR 17-17 request for establishment of the ASC in The Everett Clinic at Edmonds practice site in Snohomish County. In making this determination, the Department does not waive and expressly reserves all rights and defenses.

For reasons explained in the conclusion, the Department denies that TEC is eligible for this exception under both 17-07 and 17-17. First, I will identify the information considered and the facts relied upon by the Program in reaching its conclusion regarding your project.

INFORMATION CONSIDERED

- The documents and sources of information that the Program previously considered in this proceeding, including the application record for DOR 17-07 and the record of Program's withdrawal of DOR 17-07, are incorporated in this evaluation.
- Application Cover Letter dated March 22, 2017
- Stock Certificate dated February 9, 2017
- Ambulatory Surgery Center (ASC) exemption application received March 24, 2017 with exhibits:

- Ex. 1: List of Practice Sites
- Ex. 2: List of Services Provided at Practice Sites
- Ex. 3: Limited Liability Company Agreement of TEC PLLC
- Ex. 4: List of Physicians Proposed to Use the ASC
- Ex. 5: Single line drawings depicting operating rooms, pre-and post- surgical rooms, and clinical spaces
- Ex.6: Types of procedures to be performed at ASC
- Letter from Janis Sigman to Shawn Slack requesting additional information dated May 18, 2017
- Letter from Emily Studebaker to Janis Sigman dated July 7, 2017 with exhibits:
 - Ex. A: Administrative Services Agreement between TEC PLLC and The Everett Clinic Medical Group, PC, dated February 29, 2016 (redacted and unsigned).
 - Ex. B: Documents related to the arbitration award in *Baer et al. v. The Everett Clinic*
 - Ex. C: Minutes from TEC Board Compensation Committee meeting minutes dated January 19, 2017 (redacted) and TEC's 2017 1st Quarterly Report for the Employment Security Department
- Letter from Emily Studebaker to Janis Sigman dated July 19, 2017 with exhibits:
 - ASC Application for Kemp Surgery Center with exhibits:
 - Ex. 1: List of Practice Sites
 - Ex. 2: List of Services Provided at Practice Sites
 - Divider sheet for Exhibit 3 (exhibit not included)
 - Shawn Slack, MD, declaration with exhibits:
 - Ex. A: Physician Employment Agreement dated January 20, 2017 (redacted)
 - Ex. B: Minutes from TEC Board Compensation Committee meeting minutes dated January 19, 2017. (duplicate of similar item in 3.d.iii, above)
 - Ex. C: Clinical Leadership Board, current roster
 - Ex. D: The Everett Clinic Compact and TEC Core Values Statement
 - Ex. E: Copies of the following documents:
 - Ambulatory Surgery Center Ongoing Professional Practice Evaluation(OPPE)
 - Outside Income Policy,
 - Peer Review – Physician Policy,

- Productivity Standards for Physicians Policy (redacted),
- Supervision and Support for Advanced Clinical Practitioners in Medical/Surgical Departments
- Coordinated Quality Improvement Program
- Letter from Emily Studebaker to Janis Sigman dated July 22, 2017 with attachment:
 - Supplemental Declaration of Shawn Slack, MD
- HealthCare Partners press release
- The Everett Clinic website, Clinic Services page
- Complete application record for DOR #16-18 Kemp Surgery Center

ANALYSIS

The Everett Clinic

- TEC is registered with the Washington State Department of Revenue. [source: Department of Revenue website]
- TEC is a group practice employing 397 physicians and 165 advance care practitioners who serve about 322,000 patients a year. [source: Application; TEC website]
- TEC employs all physicians and advance care practitioners who provide services on behalf of TEC. [source: Application; Declaration of Shawn Slack, M.D.]
- TEC has 27 practice sites in the counties of Snohomish (24), Island (1), and King (1). The list below provides the address for each site.

Building Name	Address	City/Zip	County Location
Pacific Building	1303 Pacific Avenue	Everett/98201	Snohomish
Colby Building	3726 Colby Avenue	Everett/98201	Snohomish
Colby Building	4004 Colby Avenue	Everett/98201	Snohomish
Hoyt Building	4005 Hoyt Avenue	Everett/98201	Snohomish
Hoyt Building	4027 Hoyt Avenue	Everett/98201	Snohomish
Conference Center	3830 Hoyt Avenue	Everett/98201	Snohomish
Evergreen Building	7600 Evergreen Way	Everett/98203	Snohomish
Founders Building	3901 Hoyt Avenue	Everett/98201	Snohomish
Gunderson Building	3927 Rucker Avenue	Everett/98201	Snohomish
<i>Kemp Surgery Center</i>	<i>3927 Rucker Avenue</i>	<i>Everett/98201</i>	<i>Snohomish</i>
Marina Village	1728 West Marine View Drive	Everett/98201	Snohomish
Medical Office Building	1330 Rockefeller Avenue	Everett/98201	Snohomish
Pavilion for Women & Children	900 Pacific Avenue	Everett/98201	Snohomish
Providence Regional Cancer Partnership	1717 13 th Street	Everett/98201	Snohomish
Vision Center Building	3802 Colby Avenue	Everett/98201	Snohomish
Silver Lake	1818 – 121 st Street SE	Everett/98208	Snohomish
Lake Stevens	8910 Vernon Road	Lake Stevens/98258	Snohomish
Marysville	4420 – 76 th Street NE	Marysville/98270	Snohomish
Smokey Point	2901 174 th Street NE	Marysville/98271	Snohomish

Building Name	Address	City/Zip	County Location
Mill Creek	15418 Main Street	Mill Creek/98012	Snohomish
Harbour Pointe	4410 – 106 th Street SW	Mukilteo/98275	Snohomish
Harbour Pointe Pediatrics	4430 – 106 th Street SW	Mukilteo/98275	Snohomish
Snohomish	401 Second Street	Snohomish/98290	Snohomish
The Everett Clinic Shoreline	1201 N 175 th Street	Shoreline/98133	King
Stanwood	7205 – 256 th Street NW	Stanwood/98292	Island
Everett Clinic at Edmonds	21401 – 72nd Avenue W	Edmonds/98026	Snohomish

- Exhibit 2 of the application provides a listing of services provided by TEC at its practice sites. Since the Kemp Surgery Center (in italics above) is the only practice site with an associated surgery center, the surgical services are provided at this site.

Merger Transaction with DaVita

- TEC originally filed as a corporation on February 9, 1925 with the Washington Secretary of State's office and eventually converted to a professional service corporation (PS) [source: Washington Secretary of State documents]
- DaVita Medical Group is a division of DaVita Inc., a Fortune 500® company (in the collective “DaVita”) that operates and manages medical groups and affiliated physician networks in California, Colorado, Florida, Nevada, New Mexico, Pennsylvania, and Washington. [source: HealthCare Partners/A DaVita Medical Group press release June 29, 2017]
- On March 1, 2016, DaVita HealthCare Partners (predecessor to DaVita) announced a merger, under which DaVita acquired TEC. [source: DaVita news release March 1, 2016]
- The “merger” between DaVita and TEC was a complex series of transactions pursuant to an Agreement and Plan of Merger. The Department requested a copy of the Agreement and Plan of Merger; TEC asserts that it is unable to provide it to the Department because of confidentiality concerns. Based on documents that TEC did provide and public records, the transactions, put simply, were as follows:
 - DaVita acquired or merged with TEC
 - TEC transferred its property to DaVita;
 - TEC entered into an administrative services agreement with DaVita, through a subsidiary that during the transactions was identified as the Everett Clinic Medical Group and is now identified as Everett MSO; and
 - DaVita Everett Physicians, Inc. PS acquired TEC medical practice through a separate merger and payment of a “medical group purchase price” to DaVita.

[source: see DOR 17-07 letter of withdrawal dated June 29, 2017]

- At present, DaVita Everett Physicians, PS is the sole owner of TEC PLLC clinical practice. [source: see DOR 17-07 letter of withdrawal dated June 29, 2017, Application, Declaration of Shawn Slack, M.D.]
- The governor and apparent sole shareholder of DaVita Everett Physicians, Inc. PS, a

Washington corporation formed February 26, 2016, is currently Shawn Slack, M.D. [source: see DOR 17-07 letter of withdrawal dated June 29, 2017, Application, Declaration of Shawn Slack, M.D.]

The Kemp Surgery Center

- On December 23, 2015, TEC applied for a Determination of Reviewability that would be required for TEC's continued operation of the Kemp Surgery Center ACS following the reorganization of TEC from a professional services corporation to a professional limited liability company. The application also noted the closure of TEC's Trask Surgery Center [source: record of DOR 16-18]
- TEC explained in its application that it would be entering into an administrative services agreement with Everett MSO, Inc., which was a subsidiary of DaVita. The application included unsigned and incomplete drafts of a limited liability company agreement and an administrative services company agreement. [source: record of DOR 16-18]
- On February 29, 2016, the Department issued DOR 16-18 in which the department concluded that the Kemp ASC would not be subject to a CN review.

The Proposed ASC at the Everett Clinic at Edmonds

1. General

- The proposed surgery center would be located in the existing Everett Clinic at Edmonds practice site of 21401 – 72nd Avenue West. [source: Application]
- The Everett Clinic at Edmonds practice site will continue to provide clinical services in addition to the services provided by the ASC. [source: Application]
- The procedures proposed at the surgery center include cataracts, blepharoplasty, knee arthroscopy, shoulder arthroscopy, sinus surgery, tonsils and adenoids, myringotomy, epidural steroid injections, carpal tunnel, bunionectomy, cystoscopy, hysteroscopy (D&C), laparoscopic cholecystectomy, inguinal hernia repair, and ventral hernia repair. In its responses to screening questions for the DOR 17-07 application, the applicant stated that total joint replacements will not be provided at the surgery center. [source: Application]
- Eighty physicians or advanced care providers, all employed by TEC, would have access to the proposed surgery center. [source: Application, Declaration of Shawn Slack, M.D., TEC's 2017 1st Quarterly Report for the Employment Security Department.]
- TEC Board Compensation Committee apparently determines compensation to physicians and advance care practitioners. [source: TEC Board Compensation Committee meeting minutes.]

2. Ownership and Identity

- The application provides that DaVita Everett Physicians will be the 100% owner of the ASC. [source: Application, Declaration of Shawn Slack, M.D.] The Department presumes that to mean 100% of the clinical practice.

- The proposed ASC will be operated under TEC, PLLC; it will not be under a separate legal identity. [source: Application]
- TEC uses the name “DaVita” in marketing, branding, and public statements. [source: The Everett Clinic website, Declaration of Shawn Slack, M.D.]
- DaVita uses the name “The Everett Clinic” in its press releases. [source: DaVita website, press releases]
- Currently, no buildings used by TEC have signage stating “DaVita.” [source: Declaration of Shawn Slack, M.D.]

3. Management

- The application identifies that the ASC will not be operated under a management agreement.

Limited Liability Company Agreement (LLC agreement)

- The LLC agreement for TEC vests the authority to manage and control clinical decisions to a Clinical Leadership Board (CLB) [source: LLC agreement, ¶ 9.1(b); Declaration of Shawn Slack, M.D.]
- The LLC agreement refers to “physician employees or physician-independent contractors of [Everett MSO],” which implies that physicians employed by or contracting with Everett MSO participated in The Everett Clinic’s health care practice and can serve on the CLB. In response to the Department’s request for clarification, Dr. Slack submitted a supplemental declaration in which he stated that, at present and in the future, TEC does not have any existing agreement with any entity to allow any physicians other than TEC employees to deliver health care at TEC practice sites or provide surgical services at the proposed ASC. Further, Dr. Slack’s attorney representative asserts that Dr. Slack intends to amend the PLLC agreement such that it restricts voting membership on the CLB to only TEC employed providers. [source: LLC agreement ¶ 9.1(c)(iii); July 22, 2017 letter; Second Declaration of Shawn Slack]
- Everett MSO’s President/CEO is a non-voting member of the CLB who may be excluded from CLB executive session. [source: LLC agreement ¶ 9.1(c)(iii)]
- The LLC agreement delegates all of TEC’s general business and affairs to DaVita Everett Physicians and the “Medical Group Physician Owner,” who is Dr. Slack. Dr. Slack may give prior approval to the CLB to take action involving TEC’s general business and affairs. [source: Application, LLC agreement]
- The LLC agreement provides that CLB “will work together with [Everett MSO] to effect the objectives of a TEC’s five (5) year strategic plan to be developed and approved by [Dr. Slack].” [source: LLC agreement ¶ 9.1(d)]
- As the “Administrative Services Company” Everett MSO’s management team advises on opening and closing of offices; patient safety, clinical quality, etc., promoting workplace goals, approving TEC’s budgets, and reviewing, evaluating, and approving Everett MSO and

TEC's corporate performance, including the award of bonuses to Everett MSO. [source: LLC agreement ¶ 9.1(d)]

- Dr. Slack, as the Medical Group Physician Owner, has ultimate authority to approve or disapprove any action upon which Everett MSO advises. [source: LLC agreement ¶ 9.1(d)].
- DaVita Everett Physicians has the authority to dissolve TEC. [source: LLC agreement ¶ 9.1(d)].

Administrative Services Agreement (AS agreement)

- The Applicant provided a copy of the AS Agreement between TEC and Everett MSO in response to the Department's screening questions. TEC redacted several parts of the AS Agreement asserting confidentiality concerns.
- Under the AS agreement, TEC employs all non-physician clinical personnel except nursing staff (RNs and LPNs) [source: AS agreement ¶ 3.4].
- Everett MSO employs RNs and LPNs, as well as all non-clinical support personnel. [source: AS agreement ¶ 3.4, 5.6].
- TEC is responsible for its licensing and certifications. [source: AS agreement ¶ 3.5].
- TEC must not enter into any agreements with any other person or entity relating the "Administrative Services" under the agreement during the term of the agreement, except in the case that MSO has elected to subcontract its services to another entity [source: AS agreement ¶ 3.6] The term of the agreement has been redacted from the copy provided to the Department.
- Under the LLC agreement, TEC and Everett MSO remain independent contractors. [source: AS agreement ¶ 4].
- In consultation with Everett MSO, TEC has exclusive authority to make all final decisions with regard to clinical personnel. [source: AS agreement ¶ 5.2(m), (n)].
- TEC has exclusive authority to adopt policies with regard to provider utilization rates. [source: AS agreement ¶ 5.2(p)].
- TEC has exclusive authority for approval of programs to improve quality of care. [source: AS agreement ¶ 5.2(q)].
- TEC's patient records are the property of TEC. [source: AS agreement ¶ 5.4, 8].
- TEC determines its fee schedule [source: AS agreement ¶ 5.5(c)].
- TEC directs and has final approval of managed care agreements. [source: AS agreement ¶ 5.5(c)].
- TEC must maintain professional qualifications and credentials and comply with all laws. [source: AS agreement ¶ 3.1, 3.2].
- Everett MSO has irrevocable license to use "Everett Clinic" in connection with provision of administrative services. [source: AS agreement ¶ 3.7].

- Everett MSO determines, and retains possession of, medical equipment, office equipment, furniture, improvements, computer hardware, and software necessary for operation of TEC's practice sites. [source: AS agreement ¶ 5.1].
- Everett MSO determines medical supplies necessary for proper and efficient operation of practice sites. [source: AS agreement ¶ 5.3].
- Everett MSO negotiates rates for and procures all medical and office space [source: AS agreement ¶ 5.2(i)].
- Everett MSO assists with management of clinical staff; TEC has exclusive authority to make all final decisions. [source: AS agreement ¶ 5.2(m)].
- Everett MSO is expressly authorized to negotiate, execute and deliver all contracts on behalf of TEC for legal, actuarial, marketing, and all other goods and services. [source: AS agreement ¶ 5.7].
- TEC redacted entire provisions of the agreement concerning bank accounts, disbursements, management fees, insurance, indemnification, termination, and dispute resolution. The Department cannot assess the full extent of obligations between TEC and Everett MSO.

CONCLUSION

A facility for performing surgical procedures not requiring hospitalization is an exception to the definition of an ambulatory surgical facility for certificate of need purposes if it is in the office of private physicians and use of the facility does not extend to physicians outside the practice.

The proposed Everett Clinic at Edmonds ASC does not qualify for the exception for the following reasons:

- The highly integrated contractual relationship between TEC and Everett MSO, a subsidiary of a national corporate entity, creates an entirely new type of practice management that is not within the scope of the term "private physicians" in the rule. Although TEC identifies Everett MSO as a vendor of administrative services, Everett MSO has authority to, among other things, determine what medical equipment and supplies are necessary to operate the facilities, manage clinical staff, employ nursing staff, and contract for TEC's legal, actuarial, and marketing services. At the very least, the AS agreement is a management agreement, that appears to usurp control or authority of TEC to oversee the practical functions of a medical practice.

A private physician practice is more than merely a matter of personal or corporate ownership but goes to the traditional understanding of a private physician's office as entirely identified with and directed by the physicians. In this case, Everett MSO has extensive authority to direct where and how TEC will deliver health care services even though physicians and advanced care practitioners have ultimate authority over clinical decisions, which is required by law. The fact that TEC and DaVita use each other's names in marketing shows clear intent that the two entities intend to be perceived as a single entity regardless of their legal organization.

- Because of the significant redactions to the AS agreement and the unavailability of the Agreement and Plan of Merger between TEC and DaVita Medical Group, et al, it is difficult to

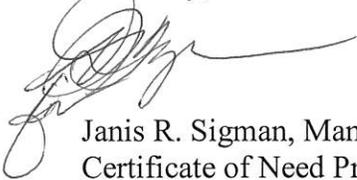
assess the full extent of TEC's dependency on MSO. In light of this uncertainty, the Program cannot ascertain whether allowing the exception for this ASC will establish a precedent for future application by TEC or its competitors that will eviscerate the statutory obligation to obtain a CN for ambulatory surgical facilities.

- The Department acknowledges that TEC had made available preliminary information about the merger transactions at the time of the Kemp Surgical Center application (DOR #16-18). The documents provided at that time were in draft form and apparently incomplete. The Department made its decision on the basis that TEC was converting from a professional service corporation to a professional limited liability corporation.

APPEAL

This decision may be appealed as set forth in the stipulated joint motion for consolidation and expedited decision in Matter No. M2017-348.

Sincerely,



Janis R. Sigman, Manger
Certificate of Need Program
Community Health Systems

cc: Janis Snoey, AAG