

POLICY NOTE

Testimony on Alaska Bill SB 26 – To Repeal the State’s Certificate of Need Law

By Roger Stark, MD, FACS, Senior Fellow

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Key Findings

1. In the 1960s and 70s states and the federal government imposed Certificate of Need (CON) laws to limit the number of hospital beds.
2. The purpose of the restrictive laws was to try to use central planning to make health care more affordable.
3. By the early 1980s it was clear the idea didn’t work, and the federal government and many states repealed their CON laws.
4. In 2020 the onset of the COVID health crisis led states, including Alaska, to suspend their CON laws to make sure enough hospital beds were available to patients.
5. In 2021 Alaska Senate Bill 26 was introduced to make the suspension of the state’s CON law permanent.
6. WPC Senior Fellow Dr. Roger Stark was invited to provide expert testimony.
7. His research showed that CON laws restrict patient access to health care services and do not make care more affordable, as its advocates claim.

On April 23, Dr. Roger Stark was invited to give expert testimony before the Senate Labor and Commerce Committee of the Alaska state legislature on SB 26. The statement he provided is below.

Introduction – Brief history of Certificate of Need laws

New York state passed the first Certificate of Need law in 1966. Businesses, insurers, consumers and providers came together to study the need for providing additional hospital beds. The group determined there was a surplus of beds and recommended that state officials restrict further hospital expansion with special legislation.¹ The law made it illegal for health care planners to add beds to an existing hospital or to treat patients in a new facility without first gaining permission from state officials.

The federal government became involved in 1972 when Congress amended the Social Security Act to require all states to review new health care construction projects that exceeded \$100,000 in value. Failure to comply with this rule would result in the federal government withholding Medicare and Medicaid money from the offending state.

In 1974, because of exploding costs in health care, Congress passed the National Health Planning and Resource Development Act (NHPRDA). This law established a comprehensive federal health care CON regulation, with the penalty for a state’s non-compliance being forfeiture of federal Medicare and Medicaid dollars.²

The policy goals of NHPRDA were two-fold – to limit the number of health care facilities available to patients in a specific geographic area and, because of more volume and higher payments directed to existing facilities, provide more charity care at those hospitals and clinics allowed to operate in an exclusive area.

States were encouraged to establish their own CON programs and officials in all 50 states complied.

By 1982, however, the federal government realized the national CON law was not saving money, but it was restricting care and limiting available health services for patients. No increase in charity

1 “Certificate of Need: State health laws and programs,” National Conference of State Legislatures, September, 2015, at <http://www.ncsl.org/research/health/concertificate-of-need-state-laws.aspx>.

2 National Health Planning and Resources Development Act (NHPRDA) of 1974, Section 2(a)(1), see Public Law 93-641.

care occurred. Recognizing this failure, Congress repealed the federal law in 1987 and subsequently, 12 states repealed their individual CON laws.³

Alaska Senate Bill SB 26

Alaska is one of 38 states that still have some type of Certificate of Need (CON) law. A CON is now required for any medical building, or remodel, or equipment purchase greater than \$1.5 million. SB 26 would repeal the state's CON law as of July 1, 2024, the beginning of FY 2025. The savings to Alaska state taxpayers are estimated at \$232,000 per year.

Certificate of Need law suspended during the COVID-19 pandemic

The COVID-19 pandemic has caused state governments to respond compassionately and aggressively to provide medical care to the victims of the virus. Twenty-four states, including Alaska, suspended burdensome CON laws to emergently expand health care in 2020.⁴

On March 31, 2020, Governor Dunleavy suspended Alaska's CON to expand hospital capacity at least until May 12, 2020.⁵

Policy analysis

The argument in support of the Certificate of Need concept was that the federal government, through Medicare and Medicaid, had paid for health care in the U.S., and this funding, in turn, gave the government the justification to limit the expansion of the health care system through CON laws. These CON limits, however, artificially created monopolies and restricted access to health care for patients, leading to Congress's repeal of the national CON law in 1987.

Certificate of Need limits still restrict access for patients, however, in states like Alaska that still have these laws in force. Over 60 percent of all Americans do not have government-paid health insurance, yet CON laws have an adverse effect on everyone.

The evidence is now clear that CON laws increase the cost of health care. Researchers Stratmann and Russ at George Mason University found that lack of normal competition raised the price of medical care and reduced the availability of hospital beds and medical equipment.⁶ An earlier study found almost a 14 percent increase in per-patient health care costs in states with CON laws.⁷ The Kaiser Family Foundation reported that health care costs are 11 percent higher overall in states with CON laws compared to states without the restrictive law.⁸

3 Bill history/Action for 32nd legislature/SB26, The Alaska State Legislature, at http://www.akleg.gov/basis/BillDetail/32?Root=SB%20%2026#tab2_4.

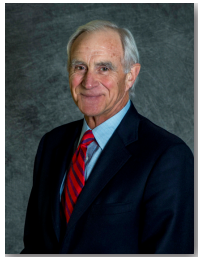
4 "States are suspending Certificate of Need laws in the wake of COVID-19 but the damage might already be done," by A.C. Erickson, Pacific Legal Foundation, January 11, 2021, at <https://pacificlegal.org/certificate-of-need-laws-covid-19/>.

5 "Governor announces progress on Alaska COVID-19 economic stabilization plan," Office of Governor Mike Dunleavy, March 31, 2020, at <https://gov.alaska.gov/newsroom/2020/03/31/governor-announces-progress-on-alaska-covid-19-economic-stabilization-plan/>.

6 "Do certificate of need laws increase indigent care?," by T. Stratmann and J. Russ, Mercatus Center, George Mason University, July, 2014, at <http://mercatus.org/sites/default/files/StratmannCertificate-Need.pdf>.

7 "Endogenous hospital regulation and its effects on hospital and non-hospital expenditures," by J. Lanning, et. al., *Journal of Regulatory Economics*, June, 1991, at <http://link.springer.com/article/10.1007%2FBF00140955>.

8 "Health care expenditures per capita by state of residence," The Henry J. Kaiser Family Foundation, 2009, at <http://kff.org/other/state-indicator/health-spending-per-capita/>.



Dr. Roger Stark is a Senior Fellow at Washington Policy Center and served as its Center for Health Care Policy Analyst from 2008 to 2020. He is the author of three books including the just-published *Healthcare Policy Simplified: Understanding a Complex Issue*, and *The Patient-Centered Solution: Our Health Care Crisis, How It Happened, and How We Can Fix It*.

Dr. Stark has also authored numerous in-depth studies on health care policy for WPC, including *Health care reform: lowering costs by putting patients in charge*. Over a 12-month period in 2013 and 2014 he testified before three different Congressional committees in Washington DC regarding the Affordable Care Act. Prior to his work with WPC, Dr. Stark completed his general surgery residency in Seattle and his cardiothoracic residency at the University of Utah. After practicing in Tacoma he moved to Bellevue and was one of the co-founders of the open heart surgery program at Overlake Hospital. He has served on the hospital's governing board.

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Although health care in the U.S. is not delivered in a free market system, patients are now spending more of their own money on medical treatments. There is greater use of high-deductible insurance plans, health savings accounts, and cash-only procedures such as Lasik eye surgery. Patients deserve to have choices in care, which CON laws limit.

Over the decades, at both the federal and state levels, there has been no evidence that CON laws increase the availability of charity care.⁹

The following is a direct quote from the Department of Justice and the Federal Trade Commission when the agencies commented on Virginia's CON law repeal on October 26, 2015:¹⁰

“The evidence suggests that certificate-of-need laws have not served consumers well... They raise the cost of investment in new health care services and can shield incumbents from competition that would benefit consumers and lower costs. By reexamining the certificate-of-need process state policymakers have an opportunity to invigorate competition in this important sector, to the benefit of patients, employers and other health care consumers.”

The federal review also raised important questions about how state CON laws encourage cronyism and favoritism in selecting who is allowed to legally provide care for patients:

“Incumbent providers may use CON laws when seeking to stop or delay entry by new competitors. CON laws can also deny consumers the benefit of an effective remedy for antitrust violations and can facilitate anticompetitive agreements.”

Conclusion – Certificate of Need laws do not reduce health care costs

The argument has been made that health care is not done in a free market. This is somewhat accurate since over 80 percent of health care is paid for by a third party, either the government or employers. Yet there is a growing trend for patients to use their own dollars to pay for medical treatments, with the increased utilization of high-deductible insurance plans, health savings accounts, and cash-only procedures such as Lasik eye surgery. Patients, as consumers of health care, need choices, which are limited by CON laws.

With 50 years of real-world experience, the evidence is now clear that neither federal nor state-level CON laws reduce health care costs. They do, however, reduce patient access to care. Congress repealed the federal CON law, finding it to be a failure. States should follow the federal government and repeal their restrictive CON laws.

⁹ “Do certificate of need laws increase indigent care?,” by T. Stratmann and J. Russ, Mercatus Center, George Mason University, July, 2014, at <http://mercatus.org/sites/default/files/StratmannCertificate-Need.pdf>.

¹⁰ “Department of Justice and Federal Trade Commission support reform of Virginia laws that curb competition, limit consumer choice and stifle innovation for health care services,” Justice News, The United States Department of Justice, October 26, 2015, at <http://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-support-reform-virginia-laws-curbcompetition>.