



HAP BULLETIN

October 6, 2016

TO: Chief Executive Officers, Chief Financial Officers, Chief Operating Officers, Compliance Officers, and Government Relations Officers of HAP Member Hospitals and Health Systems

FROM: Jennifer Jordan, Vice President, Regulatory Advocacy

SUBJECT: DOH Licensing Guidance relating to Hospital Outpatient Department (HOPD)—Provider-Based and Shared Space

Issue: The Department of Health's (DOH) Division of Acute and Ambulatory Care (DAAC) posted [policy guidance](#) on the DOH message board on September 28, 2016 entitled "Guidance regarding Hospital Outpatient Department (HOPD)—Provider-Based and Shared Space". This guidance is intended to inform hospitals regarding how DOH will be evaluating requests by hospitals to add provider-based locations to a hospital license and reviewing shared space arrangements at existing provider-based HOPDs.

This guidance was issued based on recent information provided to DOH by the Centers for Medicare & Medicaid Services (CMS) regarding shared space and provider-based entities. As HAP and many hospitals are aware, there is a larger effort at the federal level to limit provider-based HOPDs, such as the passage of Section 603 of the Bipartisan Budget Act of 2015 (BBA15) which, effective January 1, 2017, prevents payment under the outpatient prospective payment system for most services rendered at off-campus provider-based HOPDs with some exceptions (including in cases where hospitals were billing for services rendered at such HOPDs effective November 2, 2015).

Summary of Guidance: As noted in the DOH Guidance, CMS requires that each state survey agency including DOH evaluate hospitals "as a whole" for compliance with Medicare Conditions of Participation (CoPs) set forth in 42 CFR 482, including any "components" of hospitals that are separately housed from the main provider such as some HOPDs. To be reimbursed at hospital-level rates, these HOPDs must also comply with the provider-based rules at 42 CFR 413.65 and be included on the hospital's CMS Certificate Number ("CCN").

The guidance addresses how DOH will evaluate HOPDs that "share space" with an entity or facility that is not part of the hospital, such as an HOPD located in a suite in an office building. The guidance states that it is not possible "to consider only parts of a singularly-contained, clearly-defined space" for purposes of compliance with the CoPs and the provider-based rules. Instead, DOH will consider whether the use of the "space, equipment and personnel" in the

HOPD indicates that it constitutes a “singular component”. As stated in the guidance, “[h]ospitals may not situate themselves inside a freestanding office space and consider certain services furnished therein as ‘hospital’ services while other services furnished within the same overall space are not hospital services. This is true even when the hospital attempts to create a subsection of the overall space through a sublease or other agreement.” DOH will consider features such as shared entryways, interior hallways, bathroom facilities, treatment rooms, waiting rooms and registration areas in determining whether an HOPD is instead part of a larger component.

DOH is encouraging hospitals to evaluate all existing provider-based locations for uses of “shared space” which would not be permitted under the Medicare provider-based rules. The DOH will be evaluating established HOPDs for possible “shared space” issues when performing a complaint investigation or a State licensure, recertification, or validation survey.

The DOH guidance also explains how the department will approach HOPD licensure requests moving forward. Specifically, DOH states that if either before or during the occupancy survey, “uses of shared space which would prevent [Medicare] certification of a space as provider-based” are identified, the DOH will:

- Deny licensure to the location if the hospital also will be adding the location to the hospital CCN; or
- Grant the state licensure occupancy contingent upon the hospital not adding the location to the hospital CCN.

HAP Seeking Clarification: Based on HAP’s initial review of this guidance and discussions with counsel, it is clear that the document contains significant areas of ambiguity. For example, the document does not describe the specific criteria that DOH will apply to determine whether a provider-based location is improperly sharing space, e.g., when a particular entryway or hallway arrangement suggests that the HOPD is not a singular component.

As part of our effort to further clarify the requirements, provide further guidance to members, and otherwise advocate on your behalf, HAP will evaluate feedback received from members on this topic and reach out to DOH to seek clarification and/or advocate for changes to the guidance document. We also will ask DOH to schedule a webinar to walk through this guidance and address questions and concerns from the hospital community. Finally, we anticipate preparing and distributing a frequently asked question (FAQ) document or other materials that provide additional guidance relating to this issue.

HAP also will be considering the implications of heightened evaluation of compliance with provider-based status requirements, including “shared space”, relative to the implementation of the new payment policy for off-campus provider-based HOPDs under section 603 of the BBA15. The association will consider advocacy strategies to ensure appropriate payment for hospital level care.

Member Action: HAP recommends the following actions:

- Review the guidance
- Consult your legal staff to evaluate compliance

- Forward any questions/concerns you have relating to this guidance, and examples of recent experiences in “shared space” determinations by DOH, to [me](#) by **Friday, October 14th**

For More Information: HAP will continue to monitor this issue and advocate on behalf of our members. Please contact [me](#) at (215) 575-3741 with questions or concerns.