



February 9, 2017

TO: Chief Financial Officers, Chief Operating Officers, Compliance Officers, and Grassroots Advocacy Officers of HAP Member Hospitals and Health Systems

FROM: Jennifer Jordan, Vice President, Regulatory Advocacy

SUBJECT: Update on Department of Health Licensing Guidance Relating to Hospital Outpatient Department (HOPD)—Provider-Based and Shared Space

Issue: The Pennsylvania Department of Health (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." HAP issued a [bulletin](#) during October 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 bulletin restates previous guidance and provides an update on HAP's advocacy on this issue to date.

Summary of Guidance: DOH stated that it issued the guidance based on recent information provided by the Centers for Medicare & Medicaid Services (CMS) regarding shared space and provider-based facilities. 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 (CoP) 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 also must comply with the provider-based rules at 42 CFR 413.65 and be included on the hospital's CMS Certificate Number.

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, "hospitals 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.

The DOH guidance 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 either deny licensure to the location or grant the state licensure occupancy contingent upon the hospital not adding the location to the hospital’s CMS Certificate Number. Additionally, DOH will be evaluating existing HOPDs for possible “shared space” issues when performing a complaint investigation or a state licensure, recertification, or validation survey.

HAP Action to Date: Recognizing the magnitude of potential impact on hospital operations and the potential interaction between shared space oversight and the new Section 603 HOPD payment policy, HAP has worked to advocate on behalf of Pennsylvania hospitals.

- **Engaged DOH:** As part of our effort to clarify the requirements and address the large volume of questions we received from members, HAP has had ongoing discussions with DOH to clarify the guidance and understand the regulatory underpinnings put forward in the posted guidance and evaluate the impact on new and existing facilities.

As noted in the DOH message board post and confirmed verbally by DOH staff, the language in the guidance was pulled verbatim from CMS Region 3 denial of certification of a Pennsylvania provider’s provider-based, shared space project. DOH reports that as state survey agency contractor to CMS, the department is compelled to enforce the interpretation put forward in that recent denial. DOH posted the message board post to alert the provider community to CMS Region 3 restrictions regarding shared space.

DOH stated that, as of late December, it had not yet been instructed to actively reconsider existing provider-based determinations; however, surveyors will evaluate existing HOPDs for possible “shared space” issues when performing a complaint investigation or a state licensure, recertification, or validation.

- **Coordinated with AHA:** HAP is in close communication with staff at the American Hospital Association (AHA) regarding their ongoing advocacy to obtain favorable clarification of shared space requirements and uniform implementation across CMS regions. AHA has been informed that CMS Central Office staff intend to issue sub-regulatory guidance to clarify shared space requirements and inform surveyors and regulated community of shared space restrictions.
- **Communicated with CMS Region 3:** HAP discussed the DOH guidance with Region 3 staff to clarify and understand the regulatory basis put forward in the DOH message board post. Region 3 staff affirmed the information conveyed in the DOH message board post and stated that it is not a departure from past practice. Region 3 staff referenced the same regulatory and sub-regulatory citations identified in the DOH guidance, as the basis for the restrictions on shared space. Region 3 staff offered to respond to questions regarding the permissibility of specific shared-space arrangements on a project-by-project basis.

HAP Continuing to Seek Clarification: Considering the potential financial implications of heightened evaluation of compliance with provider-based, shared space requirements, HAP will

continue to work with AHA in communications with CMS to ensure that the entire stakeholder community is fully informed of shared space policy interpretation and developments. Additionally, we will closely monitor DOH implementation efforts and alert members to any new developments.

Member Action: HAP recommends that members take the following actions:

- Review the DOH guidance
- Consult your legal staff to evaluate compliance
- Alert HAP if you experience any unfavorable “shared space” determinations on new project
- Alert HAP if DOH surveyor or Joint Commissions surveyors flag or cite “share space” issues while surveying existing locations

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