

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY DURHAM DIAGNOSTIC) DECLARATORY RULING
IMAGING, LLC)**

I, Jeff Horton, as Acting Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A.0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Durham Diagnostic Imaging, LLC (“DDI”) has requested a declaratory ruling allowing it to utilize on a temporary basis, a mobile magnetic resonance imaging (“MRI”) scanner, which is owned by MedQuest and currently located outside of North Carolina, while DDI’s existing fixed MRI scanner undergoes an upgrade. For the reasons stated below, I approve the request.

This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Denise M. Gunter of Nelson Mullins Riley & Scarborough, L.L.P. has requested this ruling on behalf of DDI and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

Effective 28 August 2003, the CON Section issued a CON to DDI-Independence Park located at 4323 Ben Franklin Boulevard in Durham, to acquire a fixed MRI scanner, Project I.D. No. J-6760-03 (the “DDI Scanner”). On 9 October 2009, DDI filed a no review request with the CON Section to install a component upgrade (the “Upgrade”) on the DDI Scanner. On 18

November 2009, the CON Section issued its decision that the Upgrade does not require a CON. DDI estimates that it will take approximately fifteen business days to install the Upgrade (the “Upgrade Period”). During the Upgrade Period, the DDI Scanner must be completely turned off. Thus, DDI will not be able to use the DDI Scanner during the Upgrade Period.

In this request, DDI proposes to use on a temporary basis, a mobile MRI scanner owned by MedQuest which is currently utilized out of state (the “Temporary Scanner”). The Temporary Scanner will be brought into North Carolina for temporary use at DDI during the Upgrade Period. The Upgrade Period will last no longer than fifteen business days and will be measured from the time the vendor arrives at DDI to install the Upgrade on the DDI Scanner.

DDI represents that the scope of services offered at DDI and the costs and charges to the public for MRI services during the Upgrade Period will not change. DDI already has a mobile MRI pad and electrical power for mobile MRI service, so there will be no capital costs associated with the use of the Temporary Scanner. The mobile MRI service agreement for DDI during the Upgrade Period will be substantially similar to those in place at other sites where MedQuest provides mobile MRI services. DDI further represents that it will comply with all other representations in the original CON application for the DDI Scanner.

ANALYSIS

If DDI was offering or developing a new institutional health service, it would be required to obtain a CON. N.C.G.S. § 131E-178(a). On the narrow facts of this case, the use of the Temporary Scanner as a temporary replacement for the existing fixed DDI Scanner does not constitute a new institutional health service, because DDI has no ownership or property interest in the Temporary Scanner, and it is simply using it as a temporary replacement for an out-of-

service MRI scanner during a limited period of time while the DDI Scanner undergoes an upgrade.

This ruling does not permit DDI to use the Temporary Scanner on a permanent basis or even indefinitely. DDI has represented that it wishes to begin installation of the Upgrade on 30 November 2009 and it anticipates that the Upgrade Period will take no longer than fifteen business days. If the Upgrade Period does not begin on 30 November 2009 or if it appears to DDI that the Upgrade Period will be longer than fifteen business days, DDI shall be required to seek an additional or a revised ruling to extend the period of time it uses the Temporary Scanner based on the facts and circumstances at the time.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that DDI's use of the Temporary Scanner as a temporary replacement for the DDI Scanner, Project I.D. No. J-6760-03, does not violate its CON. If DDI does not begin installation of the Upgrade on 30 November 2009 or if it appears to DDI that the Upgrade Period will be longer than fifteen business days, DDI shall be required to seek an additional or a revised ruling extending the time for using the Temporary Scanner based on the facts and circumstances at the time.

This the _____ day of November, 2009.

Jeff Horton, Acting Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States Postal Service in first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

Denise M. Gunter
Nelson Mullins Riley & Scarborough, LLP
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103

This the _____ day of November, 2009.

Jesse Goodman
Acting Chief Operating Officer