

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

<b>IN RE: REQUEST FOR REVISED</b>	)	
<b>DECLARATORY RULING BY DURHAM</b>	)	<b>REVISED</b>
<b>DIAGNOSTIC IMAGING, LLC</b>	)	<b>DECLARATORY RULING</b>

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 Revised 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 revised declaratory ruling allowing it to utilize a temporary mobile magnetic resonance imaging (“MRI”) scanner while DDI’s existing fixed MRI scanner undergoes an upgrade beginning December 10, 2009 instead of beginning November 30, 2009 as allowed in the Department’s Declaratory Ruling issued 24 November 2009. 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 revised 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.

On 20 November 2009, DDI requested a Declaratory Ruling allowing it to utilize a temporary mobile MRI scanner to provide MRI services during the time the Upgrade was being installed on its fixed scanner (the “Upgrade Period”). DDI represented in its Request that it expected to begin the Upgrade on 30 November 2009 and that it would take approximately fifteen business days to install the Upgrade. On 24 November 2009, the Department issued a Declaratory Ruling allowing DDI to use on a temporary basis, a mobile MRI scanner owned by MedQuest which is currently utilized out of state (the “Temporary Scanner”) during the Upgrade Period. The 24 November 2009 Declaratory Ruling required DDI seek a revised ruling extending the time for using the Temporary Scanner if it did not begin installation of the Upgrade on 30 November 2009 or if it appeared to DDI that the Upgrade Period would be longer than fifteen business days.

DDI now represents that a part needed for the Upgrade did not arrive as expected and the vendor was not able to begin installing the Upgrade on 30 November 2009. DDI further represents that the vendor has advised DDI that it can begin installing the Upgrade on the DDI Scanner on 10 December 2009 and that all other representations in its original Request for Declaratory Ruling submitted 20 November 2009 are the same.

### **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 revised ruling does not permit DDI to use the Temporary Scanner on a permanent basis or even indefinitely. DDI has now represented that it anticipates beginning installation of the Upgrade on 10 December 2009 and it estimates that the Upgrade Period will take no longer than fifteen business days. If the Upgrade Period does not begin on 10 December 2009 or if it appears to DDI that the Upgrade Period will be longer than fifteen business days, DDI shall again 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 10 December 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 December, 2009.

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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 Revised 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 December, 2009.

\_\_\_\_\_  
Jesse Goodman  
Acting Chief Operating Officer