



**COMMONWEALTH of VIRGINIA**

M. Norman Oliver, MD, MA  
State Health Commissioner

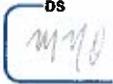
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April 16, 2020

**DECISION MEMORANDUM**

**TO:** The Honorable Daniel Carey, MD  
Secretary of Health and Human Resources

**FROM:** M. Norman Oliver, MD, MA   
State Health Commissioner

**SUBJECT:** Waiver of Regulatory Provisions Pursuant to Executive Order 51 – Definition of General Hospital

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**PURPOSE**

To recommend waiver of certain regulatory provisions pursuant to Executive Order 51, specifically waiving the definition of “general hospital.”

**BACKGROUND**

The novel coronavirus (COVID-19) is a viral disease that spreads easily from person to person, and may result in serious illness or death. COVID-19 has been classified by the World Health Organization as a worldwide pandemic and has spread throughout the Commonwealth, significantly increasing the threat of serious associated health risks statewide. The number of COVID-19 positive patients are increasing rapidly, both nationally and in the Commonwealth.

On March 12, 2020, Governor Ralph Northam declared a state of emergency due to novel coronavirus (COVID-19). In the declaration, Executive Order 51, the Governor directed state agencies to render appropriate assistance to prepare for and mitigate the effects of the coronavirus (COVID-19) outbreak. In doing so, he ordered authorization for the heads of executive branch agencies, on behalf of their regulatory boards as appropriate, and with the concurrence of their Cabinet Secretary, to waive any state requirement or regulation.

On March 13, 2020, President Donald Trump issued a proclamation declaring that the COVID-19 outbreak in the United States constitutes a national emergency under sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.). On that same day, pursuant to section 1135(b) of the Social Security Act (Act), the Secretary of the U.S. Department of Health and Human Services invoked his authority to waive or modify certain requirements of titles XVIII, XIX, and XXI in response to the COVID-19 pandemic to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in the Medicare and Medicaid programs.

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Pursuant to section 1135(b) of the Social Security Act, the U.S. Centers for Medicare and Medicaid Services (CMS) issued a waiver to allow currently enrolled ambulatory surgical centers (ASCs), to temporarily enroll as hospitals and to provide hospital services to help address the urgent need to increase hospital capacity to take care of patients.

**JUSTIFICATION**

12VAC5-410-10 states, in relevant part, ““General hospital” means institutions as defined by § 32.1-123 of the Code of Virginia with an organized medical staff; with permanent facilities that include inpatient beds; and with medical services, including physician services, dentist services and continuous nursing services, to provide diagnosis and treatment for patients who have a variety of medical and dental conditions that may require various types of care, such as medical, surgical, and maternity.” There is no definition of “general hospital” in the Code of Virginia.

On March 20, 2020, Governor Northam issued Executive Order 52 that permitted the State Health Commissioner, at his discretion, to authorize any general hospital to increase licensed bed capacity as determined necessary by the State Health Commissioner to respond to increased demand for beds resulting from COVID-19. In the absence of a waiver to the regulatory definition of “general hospital,” EO 52 would only apply to facilities licensed as inpatient hospitals and not outpatient surgical hospitals (OSHs). OSHs are the state equivalent to federal ASCs; in fact, most ASCs are required to be licensed as OSHs first, before being eligible to seek federal certification.

At least one facility licensed as an outpatient surgical hospital has approached the Virginia Department of Health about adding beds at its facility. Without a waiver, this facility would be required to proceed through the normal licensing process as well as obtain a certificate of public need from the State Health Commissioner to operate hospital beds. These processes would dramatically impede OSHs’ ability to assist in the response to COVID-19 through the addition of beds. Because not all facilities licensed as OSHs are certified as federal ASCs, it would be overly broad to allow all OSHs to function as general hospitals during the COVID-19 pandemic. Instead, expanding the definition of general hospital to include OSHs certified as ASCs that are invoking the CMS 1135(b) waiver achieves the optimal amount of regulatory flexibility.

**RECOMMENDATION**

Approve the attached regulatory waiver to temporarily waive the definition of “general hospital.”

**APPROVAL**

Recommend     Recommend with Modification     Deny

Daniel Carey, MD

Date

*Daniel Carey* 4/24/2020