

SELF-REFERRAL ACT ADVISORY OPINION
RE: Application of InVision Healthcare, Inc.

FACTS

On July 2, 2004, InVision Healthcare, Inc. (“InVision”), submitted an application for an advisory opinion under the Virginia Practitioner Self-Referral Act, Sections 54.1-2410 through 54.1-2414 of the Code of Virginia (1950), as amended (the “Act”).

InVision is a Maryland corporation licensed in that state to provide physical and occupational therapy services. In Virginia, InVision would supply management services to medical group practices (“Practice”). In turn, the Practice would provide an outpatient physical and/or occupational therapy program (“Program”) as part of that Practice. InVision would work with a Practice to establish and operate its Program and receive in return a management fee based upon patient contacts with the Program.

The Practice would bill patients for all services rendered through its Program and InVision would not have an ownership interest in either the Practice or the Program. The services rendered at the Program would be provided by employees of InVision and leased employees of the Practice. These leased employees would meet the common law definition of “employee” for the Practice, as the Practice would be able to terminate, supervise and control the leased employees rendering services at the Program.

QUESTIONS

- 1. Does InVision have any investment interest in any of the Programs by virtue of its receipt of management service fees, as outlined in the Management Service Agreement?**

InVision does not have an investment interest in any Program because it does not own or hold an equity or debt security in the Program.

Under the Act, possessing an investment interest requires “ownership or holding of an equity or debt security....” Receipt of a management fee for services rendered would not fall under the definition of what constitutes an “investment interest.” Therefore, InVision would not possess an investment interest in any Program.

2. Will each Program be part of its Practice’s group practice, within the meaning of Virginia Code Section 54.1-2410, if it is an asset of the Practice?

If a Program is organized as an asset of the Practice, it will be part of the Practice’s group practice if it is integral to the Practice.

In the Vistar Eye Center, Inc., advisory opinion (the “Vistar opinion”), the Board of Health Professions (the “Board”) considered the case of Vistar Eye Center, Inc. (“Vistar”), a group practice with shareholders identical to the members of Southwest Virginia Ambulatory Surgery Center, L.L.C. (“Southwest”). According to the Vistar opinion, referrals by a member of Vistar, and therefore a member of Southwest, to another member of Vistar for surgery to be performed at Southwest would fall outside the referring member’s group practice because the surgery is to be performed at Southwest, an entity outside the referring member’s group practice. However, if Southwest is organized as an integral part of Vistar, Southwest will be part of the Vistar entity, which is a group practice.

Direct ownership of a Program, however, is not necessarily equivalent to direct ownership of the ambulatory surgery center contemplated in the Vistar opinion. Whether a Program would qualify as part of a Practice’s group practice would depend upon the specific relationship between the Program and the Practice.

An important variable is whether the physical therapists and/or occupational therapists staffing the Program provide services on behalf of other practices. If a Program’s employees

also serve as employees of other Programs, established by other Practices, the Program, while being an asset of the Practice, would not necessarily be integral to that Practice.

On the other hand, a Program may provide services to patients from other group practices as long as the group practice does not have an investment interest in the Program. If the group practice does not have an investment interest in the Program, then there is no “referral” from the group practice to the Program under the Act. A Program does not cease to be an integral part of a Practice merely by providing services to patients of other group practices, whether the patients are referred to the Practice or directly to the Program.

3. Will a Program be part of a Practice’s group practice, within the meaning of Virginia Code Section 54.1-2410, if the Program is an asset of a wholly-owned subsidiary of the Practice?

If a wholly-owned subsidiary of a Practice holds a Program as an asset, the Program will not be part of the Practice’s group practice because the subsidiary is a separate legal entity.

Under the Act, a group practice involves “two or more health care practitioners who are members of the same legally organized” entity. Organization of a Program, even if the relevant ownership interests are held by the partners in the Practice, in the form of a wholly-owned subsidiary necessarily creates a separate legal entity. Instead of being part of the Practice’s group practice, the Program would, if it met all the other criteria for formation of a group practice, be its own group practice, separate from the Practice. Even though the individuals with ownership stakes in the Program and Practice may be identical, the group practices would be separate and distinct.

The Program would not be part of the Practice’s group practice because it would be part of its own group practice, meaning that there exist two legally organized entities. Coincidence of

ownership does not mean that the Program's group practice and Practice's group practice are joined into a single, overarching group practice.

It is recognized that the Act may not allow a Program to be organized in a manner that would constitute best practices for business purposes. A statutory change would be necessary to permit a Program that is organized as a separate legal entity from the Practice to be considered part of the Practice's group practice, even if the Program is organized as a wholly-owned subsidiary of the Practice.

4. When a Program is part of a Practice's group practice, may the physical location of the office for the Program be anywhere within the Practice's service area and not be part of or adjacent to another office of the Practice?

If the Program office is located within the Practice's service area, the Program office may be located anywhere without regard to the location of the Practice office. Neither the Act nor the Vistar opinion make mention of Program location vis a vis Practice location as being a relevant consideration in determining the existence of a group practice.

5. If a Program and Practice fail to qualify under the group practice exemption, may the Program be part of the same office practice for any practitioner who provides supervision of the physical therapy or occupational therapy services provided at the Program?

A Program may qualify as part of the same office practice for a practitioner who, on an ongoing basis, supervises the provision of physical or occupational therapy services provided at the Program. According to the Act, any facility where a practitioner supervises the provision of health services to consumers on an ongoing basis qualifies as an office practice. Therefore, if a practitioner provides "supervision" of physical or occupational therapy services at a certain facility on an ongoing basis, that facility would necessarily fall within the practitioner's office practice.

6. Does compliance with the requirement for supervision of physical or occupational therapy services for an office practice require the practitioner to be physically present at the Program?

The practitioner is not required to be physically present at the Program in order for the facility to qualify as part of the practitioner's office practice, as long as the practitioner provides a suitable level of supervision. The Act only specifically requires that the facility that is attempting to qualify as an office practice of the practitioner be one at which the "practitioner, on an ongoing basis, provides or supervises the provision of health services to consumers."

7. Does a practitioner who supervises therapy services for each of his or her patients satisfy the "ongoing basis" test for an office practice by complying with generally accepted medical practices in ordering and supervising such services?

A practitioner who complies with the laws and regulations of the Commonwealth of Virginia, to include appropriate supervision of therapy services, practices medicine within the bounds of common and accepted medical practices and may satisfy the "ongoing basis" portion of what qualifies as an office practice.

The Act does not define the term "ongoing basis." In the Vistar opinion, the Board decided that the phrase should be given its usual, commonly understood meaning, in accordance with rules of statutory construction. The Vistar opinion went on to state that court decisions in other states suggest "a definition consistent with the concept of services being available on 'a continuing, day to day basis,' 'an exclusive, permanent and full time' basis or a 'regular or regularly' scheduled basis." (Vistar Eye Center, Inc., Advisory Opinion, p. 5).

Although the statutes authorizing the practice of physical and occupational therapy are silent on the required level of practitioner supervision, complying with generally accepted medical practices may be considered supervision on an ongoing basis, if in his clinical judgment, the referring physician considers himself to be supervising the care provided by the therapist.

RECOMMENDATION

For the reasons set forth above, the Committee shall recommend to the Board of Health Professions, pursuant to 18 VAC 75-20-60(E), that:

(1) InVision does not have an investment interest in any Program because it does not hold an equity or debt security in the Program;

(2) a Program that is organized as an asset of a Practice is part of the Practice's group practice if the Program is integral to the Practice. Whether a Program is integral to a Practice is a fact-specific inquiry that could vary on a case-by-case basis. Among the important variables in the inquiry is the nature of the Program-Practice relationship, to include whether Program employees also provide therapy services for other Practices. A Program may provide services to patients of other group practices as long as the other group practice does not have any investment interest in the Program;

(3) a Program that is an asset of a wholly-owned subsidiary of a Practice will not be part of the Practice's group practice because a group practice consists of multiple health care practitioners who are members of the same legally organized entity. If a Program is an asset of a wholly-owned subsidiary of a Practice, the wholly-owned subsidiary is a separate legally organized entity from the Practice, thus taking the Program outside of the Practice's group practice. While the Act may not allow a Program to be organized according to best business practices, a statutory change is necessary to permit a Program that is organized as a separate legal entity from the Practice to be considered part of the Practice's group practice, even if the Program is a wholly-owned subsidiary;

(4) if the Program is part of the Practice's group practice, the Program may be located anywhere within the Practice's service area;

(5) a Program may be part of a practitioner's office practice if the practitioner supervises the provision of physical or occupational therapy services at the Program on an ongoing basis;

(6) a practitioner is not required to be physically present at the Program for it to qualify as an office practice, as long as the practitioner provides the required ongoing supervision of his patients who receive services at the Program; and

(7) a practitioner does not necessarily provide supervision of therapy services on an "ongoing basis" by complying with generally accepted medical practices and the laws and regulations governing physical and occupational therapy services. However, complying with generally accepted medical practices may be considered supervision on an ongoing basis, if in his clinical judgment, the referring physician considers himself to be supervising the care provided by the therapist.