



STATE OF NEW YORK DEPARTMENT OF HEALTH

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Commissioner

Wendy E. Saunders
Executive Deputy Commissioner

December 5, 2008

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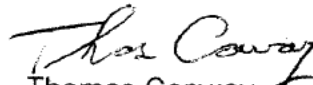
Dear Mr. LaBarbera:

Your letter of November 25, 2008, requested a legal opinion from this office. In brief, you asked whether the phrase "therapeutic device" in the definition of "pharmacy services" in Public Health Law (PHL) § 238(14) includes "durable medical equipment" under 42 USC § 1395nn(h)(6)(F), as defined in 42 CFR § 411.351. If so, is there any durable medical equipment under 42 USC § 1395nn(h)(6)(F) that is not a therapeutic device under PHL § 238(14)?

Your letter suggests that certain durable medical equipment that has been prescribed for a patient by a practitioner, such as crutches, wheel chairs and glucose monitoring devices, might not be "therapeutic devices on the basis of prescriptions," because the devices are not "therapeutic," but rather functional as informative in nature. The Department of Health has determined, however, that any device prescribed by a practitioner is therapeutic and would therefore be a "therapeutic device" under PHL § 238(14). Since a physician should only prescribe a device when the prescription is "warranted by the condition of the patient" (see, Education Law § 6530(35)), any device that is prescribed is considered "therapeutic" for purposes of PHL § 238(14).

While it is true that 42 USC § 1395nn(h)(6) lists "outpatient prescription drugs" and "durable medical equipment" as two separate "designated health services," in New York law, both fall within the definition of "pharmacy services." If you have any further questions on this issue, please call Jonathan Karmel of my office at 518-473-3304.

Very truly yours,


Thomas Conway
General Counsel

