§ 365-j. Advisory opinions. 1. General. (a) Definition and nature of advisory opinions. An advisory opinion is a written statement, issued pursuant to the provisions of this chapter, by the commissioner of the department of health or his or her specifically authorized designee or designees setting forth the applicability to a specified set of facts of pertinent statutory and regulatory provisions relating to the provision of medical items or services pursuant to the medical assistance program administered by the department of health as the single state agency responsible for the administration of the program. Advisory opinions are issued at the request of any provider enrolled in the medical assistance program, and are binding upon the commissioner with respect to that provider only.

(b) Areas in which advisory opinions may be requested. An advisory opinion may be sought with respect to a substantive question, or a procedural matter. Advisory opinions may be requested with respect to questions arising prior to an audit or investigation with respect to questions relating to a provider's claim for payment or reimbursement. Advisory opinions may also be utilized for purposes of service planning. Thus, they may be requested with respect to a hypothetical or projected future set of facts.

(c) An advisory opinion will not be issued where the petition for an advisory opinion relates to a pending question raised by the provider in an ongoing or initiated investigation conducted by the Medicaid inspector general, deputy attorney general for the Medicaid fraud unit, or any other criminal investigation or any civil or criminal proceeding, or where the provider has received any written notice of the commissioner or the Medicaid inspector general which advises a provider of an imminent investigation, audit, pended or otherwise suspended claim, or withhold of payment or reimbursement.

(d) Nothing in this section shall be construed as superseding any federal rule, law, requirement or guidance.

(e) The commissioner shall promulgate rules and regulations establishing the time period for issuance of such advisory opinion and the criteria for determining the eligibility of a request for departmental response.

2. Effect of advisory opinions. (a) An advisory opinion represents an

expression of the views of the commissioner of health as to the application of law, regulations and other precedential material to the set of facts specified in the petition for advisory opinion. An advisory opinion shall apply only with respect to the provider to whom the advisory opinion is rendered.

(b) A previously issued advisory opinion found by the commissioner to be in error may be modified or revoked, provided, however, that a subsequent modification by such commissioner of such an advisory opinion shall operate prospectively. The department shall promptly notify the provider of modification or revocation of an advisory opinion.

(c) All advisory opinions shall include the following notice: "This advisory opinion is limited to the person or persons who requested the opinion and it pertains only to the facts and circumstances presented in the petition."

(d) All advisory opinions shall cite the pertinent law and regulation upon which the advisory opinion is based.

(e) All advisory opinions and all modifications and revocations of a previously issued advisory opinion shall be deemed a public record.