



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*  
*Richmond 23219*

**Jerry W. Kilgore**  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
804-371-8947 TDD

**MEMORANDUM**

**TO: VICTORIA P. SIMMONS**  
Regulatory Coordinator  
Department of Medical Assistance Services

**FROM: PAIGE S. FITZGERALD**  
Special Counsel to DMAS

**DATE: May 2, 2003**

**SUBJECT: Emergency Regulations concerning Methods and Standards for Establishing Payment Rates:  
Other Types of Care: Hospital Outpatient Reimbursement and Rehab Agencies  
Reimbursement: Limit Outpatient Hospital Payment to 80% of Allowable Cost;  
Establish Prospective Reimbursement for Rehab Agencies**

I have reviewed the attached emergency regulations that set out criteria limiting outpatient hospital payment to 80% of allowable cost and establishing a prospective reimbursement system for rehabilitation agencies.

Based on that review, it is this Office's view that the Director, acting on behalf of the Board pursuant to Va. Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act and has not exceeded that authority.

The authority for these emergency actions is found in Va. Code § 2.2-4011, which provides that an "emergency situation" includes "a situation in which Virginia statutory law or the appropriation act . . . requires that a regulation be effective in 280 days or less from its enactment . . ." This regulation will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2003 Appropriation Act, Item 325 KKK, which states that "[t]he Department of Medical Assistance Services shall amend its State Plan for Medical Assistance to reduce reimbursement for outpatient hospital services to 80 percent of allowable Medicaid cost, with the exception of direct graduate medical education for interns and residents and Type One hospitals." In addition, Item 325 NNN requires that "[t]he Department of Medical Assistance Services shall amend its State Plan for Medical Assistance to revise the payment methodology for rehabilitation agencies from a retrospective reasonable cost basis to a prospective methodology based on establishing a ceiling at 112 percent of the weighted median cost of all rehabilitation agencies, with the exception of any rehabilitation agencies operated

by Community Services Boards.” Regulations to enact both of these items of the Appropriation Act are required to become effective within 280 days or less from the enactment of the Act.

This situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) because the Appropriation Act requires these regulations to be effective within 280 days of enactment of this provision. Without emergency regulations, the Department would be unable to meet the time frame established by the General Assembly for making these reimbursement changes. As such, these regulations may be adopted without public comment with the prior approval of the Governor.

Accordingly, with the prior approval of the Governor, these regulations qualify for the “emergency” exemption from Article 2 requirements. Please be advised, however, that under Va. Code § 2.2-4011(A), the Department must state in writing the nature of and necessity for such emergency action. In addition, the regulations shall be effective for no more than twelve months. As the Department intends to continue regulating the subject matter governed by this emergency regulation beyond 12 months, it will be necessary to replace these emergency regulations with regulations duly promulgated under Article 2 of the APA. A Notice of Intended Regulatory Action relating to the proposed replacement regulations must be filed with the Registrar within 60 days of the effective date of the emergency regulations (and it appears that this has been done). The proposed replacement regulations must be filed with the Registrar within 180 days after the effective date of the emergency regulations.

If you have any questions or need any additional information, please feel free to call me at 786-3450.

cc: Siran S. Faulders, Esquire

Attachment