



COMMONWEALTH of VIRGINIA

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MEMORANDUM

TO: **BRIAN McCORMICK**
Regulatory Coordinator
Department of Medical Assistance Services

FROM: **USHA KODURU**
Assistant Attorney General

DATE: **January 11, 2005**

SUBJECT: **Emergency Regulation Concerning Nursing Facility Reimbursement for Treatment of Stage IV Pressure Ulcers**

I have reviewed the attached emergency regulation that will reimburse nursing facilities an additional ten dollars per day for residents with at least one treatable stage IV pressure ulcer who require a specialized treatment bed.

Based on that review, it is this Office's view that the Department of Medical Assistance Services, pursuant to Item 326(RR) of the 2004 Acts of the Assembly, has the authority to promulgate this regulation, 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" The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2004 Appropriation Act (2004 Acts of the Assembly, Chapter 4), Item 326(RR). Item 326(RR) states that DMAS "shall amend the State Plan of Medical Assistance Services effective July 1, 2004 to provide an additional \$10 per

day to nursing facilities for those days when Medicaid recipients, who have at least one treatable Stage IV pressure ulcer, require the use of specialized treatment beds.” Item 326(RR) requires that emergency regulations to enact this item of the Appropriations Act be promulgated 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 this change. 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 will 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, and this appears to have been accomplished in the “Agency Background Document.” 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 225-2741.

cc: Kim F. Piner, Esquire

Attachment