DECISION BRIEF FOR:
The Honorable James S. Gilmore, III
Governor

SUBJECT: EMERGENCY REGULATION for Hospice Services

ACTION NEEDED
BY ----NOV 30
RETURN TO DMAS

SUMMARY

1. REQUEST: The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled Hospice Services. These regulations will re-conform DMAS' rules to the recent changes of the Medicare program and to the General Assembly's mandate for this already-covered service.

2. RECOMMENDATION: Recommend approval of the Department's request to take an emergency adoption action regarding Hospice Services. The Department is simultaneously initiating the public notice and comment requirements contained in the Code of Virginia §9-6.14:7.1.

/s/ Dennis G. Smith 11/19/99
Dennis G. Smith, Director Date

3. CONCURRENCES:

| Secretary of Health and Human Resources: | | Department of Planning and Budget: | |
|---|---|---|---|
| Concur | X | Concur | X |
| Concur w/Modifications | | Concur w/Modifications | |
| Disapprove | | Disapprove | |
| /s/ Claude A. Allen | 12/20/98 | /s/ Scott D. Pattison | 12/3/98 |
| Claude A. Allen | Date | Signature | Date |
| | | Title | |

4. ACTION: Governor

| | | | |
|---|---|---|---|
| | | Approve | X |
| | | Approve w/ Modifications | |
| /s/ James S. Gilmore, III | 12/23/98 | Deny | |
| James S. Gilmore, III | Date | | |

5. FILED: Deputy Registrar of Regulations

Jane D. Chaffin Date

## DISCUSSION

6. BACKGROUND: The sections of the State Plan affected by this action are Narrative for the Amount, Duration, and Scope of Services (12 VAC 30-50-270), Standards Established and Methods Used to Assure High Quality of Care (12 VAC 30-60-130), Methods and Standards for Establishing Payment Rates-Other Types of Care (12 VAC 30-80-30). The regulations affected by this action are Hospice Services (12 VAC 30-130-470 through 12 VAC 30-130-530).

HISTORY

Hospice services were originally added to the Title XIX package of available services by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA '85) in section 9505. DMAS did not, however, begin to offer this service to its recipients until July 1, 1990. At the time of this original offer, DMAS was federally required to have its Medicaid-hospice services mirror the Medicare-hospice services, with few exceptions. This policy stemmed from the requirement that Title XIX hospice services could only be provided by hospice organizations which met the Title XVIII (Medicare)-certification requirements.

As originally covered, hospice services are a medically-directed, interdisciplinary program of palliative services for the terminally ill and their families. Hospice emphasizes pain and symptom control provided by a team of professionals, including physicians, nurses, counselors, therapists, aides and volunteers. The majority of hospice services are delivered in the home with inpatient care available as needed. The services which are covered include: nursing care, medical social services, physician services, counseling services, short-term inpatient care, durable medical equipment and supplies, drugs and biologicals, home health aide and homemaker services, and rehabilitation services. The original program also had specified benefit periods and required physician certifications of terminal conditions for individuals' participation.

CURRENTLY

Hospice services are currently open to Medicaid recipients who have been certified by an attending physician and a hospice medical director as having 6 months or less to live. Services provided by the hospice agency include: physician, nursing, social work, counseling, personal care, and any other services necessary to carry out a plan of care related to the effects of the terminal illness.

Recipients of hospice services have four benefit periods available: there are two 90-day periods, followed by a 30-day period, followed by an indefinite period. Once the recipient has signed a hospice election form, both the hospice medical director and the attending physician must also sign it within two days or if each certifies verbally not later than two days after hospice care is initiated, then written signatures can be obtained up to eight days after such care is initiated.

Payment for these services is currently based on the location of the hospice agency which is providing the service. There are different payment rates for different areas of the State, for

example Northern Virginia versus the remainder of the state. At the time of the initial availability in 1990 of this service, the payment methodology was one of the areas where the mirroring of the Medicare-hospice program was required.

The 1998 General Assembly has mandated, in Chapter 464 Item 335S, that the Department revise its regulations concerning the reimbursement of hospice organizations to be consistent with Medicare. The Balanced Budget Act of 1997 (BBA 1997) §§4441 through 4449 made the following changes to the current Medicare hospice program necessitating changes to the Virginia Medicaid Hospice Program:

- Payment for hospice services shall be based on the location of the service rather than the location of the agency. This will negate the financial advantage some hospice providers may have by virtue of the physical location in a higher rate area even though the provided services may be in a lower rate area.

- Hospice benefit periods are restructured to include two ninety day periods, followed by an extended period in which certifications must be made every sixty days until the recipient is no longer in the hospice program (either by demise or by electing to leave).

- For each benefit period, physician signatures must be obtained at the beginning of the period.

- Hospice agencies may now contract with physicians for services rather than employing them directly.

The effect of these recommended changes will be to 'catch Medicaid up' with changes made in by the BBA 1997 in Medicare. Except for the fact that Medicaid Hospice Criteria will be consistent with Medicare and, therefore, should be easier to comprehend, the implementation of these provisions will be transparent to the recipient and will have no impact on families. Hospice providers will have only one set of criteria to follow for Medicare and Medicaid which should increase their understanding and streamline their documentation process. No policy alternatives were available due to the mandate from the General Assembly.

7. AUTHORITY TO ACT: The Code of Virginia (1950) as amended, §32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code of Virginia (1950) as amended, §32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The Code also provides, in the Administrative Process Act (APA) §9-6.14:4.1(C)(5), for an agency's adoption of emergency regulations subject to the Governor's prior approval.

Simultaneously with this request for an emergency adoption action and filing with the Registrar of Regulations, this agency intends to initiate the public notice and comment process contained in Article 2 of the APA. Therefore, approval to file the required Notice of Intended Regulatory Action is also necessary and hereby being requested by this action.

The Balanced Budget Act of 1997 §§4441 through 4449 modified hospice services for the Title XVIII Medicare Program. The modifications affected areas of payment location, benefit periods, contracting of physicians' services, and physician service certification requirements.

Without an emergency regulation, these amendments to the State Plan and regulations cannot become effective until the publication and concurrent comment and review period requirements of the APA's Article 2 are met. Therefore, an emergency regulation is needed to meet the January 1, 1999, effective date established by the General Assembly in Chapter 464 of the 1998 Virginia Acts of the Assembly, item 335 S.

8. NEED FOR EMERGENCY ACTION: The Code §9-6.14:4.1(C)(5) provides for regulations which an agency finds are necessitated by an emergency situation. To enable the Director, in lieu of the Board of Medical Assistance Services, to comply with Chapter 464 of the 1998 Acts of the Assembly, he must adopt this emergency regulation. This issue qualifies as an emergency regulation as provided for in §9-6.14:4.1(C)(5)(ii), because Virginia Appropriation Act requires this regulation to be effective within 280 days from the enactment of the law or regulation. As such, this regulation may be adopted without public comment with the prior approval of the Governor.

Since this emergency regulation will be effective for no more than 12 months and the Director wishes to continue regulating the subject entities, the Department is initiating the Administrative Process Act Article 2 procedures.

9. FISCAL/BUDGETARY IMPACT:

Implementation of these changes to the Medicaid Hospice Program should have no impact on the recipients of hospice services. Hospice providers who follow the specific criteria will continue to be reimbursed for services provided to recipients who are appropriate for the hospice program. Payment at the site of service may result in a slight reduction of expenditures to the Agency.

Currently, there are 45 hospice providers enrolled in Medicaid but this number can fluctuate monthly. The total expenditures from October, 1997, to October, 1998, was $2,960,226. The total number of recipients to use this service since 1994 (including those deceased and those still extant) is 2,274. The average length of stay for those deceased recipients is 70 days. The average length of stay for living individuals who are still receiving services is 544 days.

There are no localities which are uniquely affected by these regulations as they apply statewide. The only hospice providers DMAS expects to be negatively affected by this regulatory action are those which opened managerial home offices in Northern Virginia when the clients they served resided in Central or Southwest Virginia.

10. RECOMMENDATION: Recommend approval of this request to adopt this emergency regulation to become effective on January 1, 1999. From its effective date, this regulation is

to remain in force for one full year or until superseded by final regulations. Without an effective emergency regulation, the Department would lack the authority to modify its payments for hospice services in keeping with the same changes in the Medicare hospice program and the mandate in Chapter 464 of the 1998 Virginia Acts of the Assembly, item 335 S.

11. APPROVAL SOUGHT FOR 12 VAC 30-50-270, 12 VAC 30-60-130, 12 VAC 30-80-30.

Approval of the Governor is sought for an emergency modification of the Medicaid State Plan in accordance with the Code of Virginia §9-6.14:4.1(C)(5) to adopt the following regulation: