



COMMONWEALTH of VIRGINIA
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MEMORANDUM

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

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

DATE: July 16, 2003

SUBJECT: Emergency Regulations concerning Inpatient Operating, Disproportional Share Hospital (DSH), and Indirect Medical Education (IME) Payments for Type One Hospitals

I have reviewed the attached revised emergency regulations regarding changes to the regulations governing payment rates for inpatient hospital services, specifically those of Type One hospitals.

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 this emergency action is found in Va. Code § 2.2-4011, which provides that an "emergency situation" includes "a situation involving an imminent threat to public health or safety." These regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with changes in the federal law that affect the methodology that DMAS may use in reimbursing Type One hospitals (state teaching hospitals). This situation qualifies as an emergency as provided in § 2.2-4011(A) because without these changes, DMAS will be prohibited from maintaining current reimbursement levels to Type One hospitals, because of changes to the federal regulations affecting HMO rates (specifically, 42 C.F.R. § 438.6). As of August 13, 2003, DMAS will be barred from making supplemental payments to Type One hospitals, and this prohibition will create a significant disincentive for the Type One hospitals to participate in Medallion II, DMAS's managed care program. If Type One hospitals choose not to participate in Medallion II, the managed care program could be seriously harmed, and this could jeopardize access and quality of care by forcing many patients out of their customary provider arrangements (with HMOs). Because, as discussed above, the health of Medicaid recipients could be

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adversely affected if this change is not made, and the Medicaid program could be significantly affected, an argument can be made that the "health and safety" criterion is satisfied.

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) and 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