Virginia Regulatory Town Hall

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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	DEPT OF MEDICAL ASSISTANCE SERVICES
Virginia Administrative Code (VAC) citation	12 VAC 30 -70 and 12 VAC 30-80
Regulation title	Methods and Standards for Establishing Payment Rates: Long Term Care and Methods and Standards for Establishing Payment Rates: Other Types of Care
Action title	Outpatient Rehabilitation Agency and Long Stay Hospital Reimbursement
Date this document prepared	

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Preamble

The APA (Code of Virginia § 2.2-4011) states that an "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

1) Please explain why this is an "emergency situation" as described above.
2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

The Administrative Process Act (Section 2.2-4011) states that an agency may adopt regulations in an "emergency situation": (A) upon consultation with the Attorney General after the agency has submitted a request stating in writing the nature of the emergency, and at the sole discretion of the Governor; (B) a situation in which Virginia statutory law, the Virginia appropriation act,

or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of Subdivision A.4 of § 2.2-4006; or (C) in a situation in which an agency has an existing emergency regulation, additional emergency regulations may be issued as needed to address the subject matter of the initial emergency regulation provided the amending action does not extend the effective date of the original action. This suggested emergency regulation meets the standard at *COV* 2.2-4011(B), the 280 day standard as discussed below.

The Governor is hereby requested to approve this agency's adoption of the emergency regulations entitled (Prospective reimbursement for outpatient rehabilitation agencies (12 VAC 30-80-200) and long-stay hospitals (12 VAC 30-70-50). The emergency regulations also authorize the initiation of the promulgation process provided for in § 2.2-4007.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Specifically, Item 306 XX and 306.BBB of the 2009 *Act of the Assembly* (Chapter 781) requires DMAS to make these changes:

> **XX. Effective July 1, 2009, the Department of Medical Assistance Services shall amend the State Plan for Medical Assistance to convert the current reimbursement methodology for rehabilitation agencies to a statewide prospective rate for individual and group services to achieve estimated savings of $185,909 the second year in general funds and $185,909 the second year in nongeneral funds. The department shall have the authority to promulgate emergency regulations to implement this amendment within 280 days or less from the enactment of this act. This shall not apply to rehabilitation services furnished by the Community Services Boards.**
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> **BBB. Effective July 1, 2009, the Department of Medicaid Assistance Services shall amend the State Plan for Medical Assistance to reduce reimbursement to long-stay hospitals to achieve savings in the second year of $990,000 general fund and $990,000 nongeneral fund The department shall promulgate regulations to implement this amendment no more than 280 days from the enactment of this act.**

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

This proposed regulation is not essential to protect the health, safety, or welfare of citizens. This action modifies the methodology for reimbursing outpatient rehabilitation agencies. This new methodology is similar to the methodology used by Medicare and commercial insurers including Medicaid MCOs. There are no expected environmental benefits from this change. The changes to the Long-Stay Hospital piece of the package are being made to implement the budget reduction mandated by the 2009 General Assembly.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

Both of these changes were mandated by the 2009 General Assembly. The need for this package arises out of the requirement that DMAS fulfill these legislative mandates.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

Outpatient Rehabilitation Agency Reimbursement

The section of the State Plan of Medical Assistance that is affected by these changes is the Methods and Standards for Establishing Payment Rates- Other Types of Care (amending 12 VAC 30-80-200).

Currently, the Virginia Administrative Code contains a cost-based methodology for computing reimbursement for outpatient rehabilitation services which is subject to a ceiling (12VAC30-80-200). For rehabilitation services, Medicare and most commercial insurers use a fee schedule. As a result, outpatient rehabilitation agencies bill differently and submit a cost report only for Medicaid. Implementation of a fee schedule methodology will align the DMAS reimbursement methodology for outpatient rehabilitation services more closely to the Medicare methodology and other reimbursement methodologies used by commercial insurers, including Medicaid's enrolled Managed Care Organizations (MCOs). Providers will no longer have to submit cost reports and DMAS will no longer have to settle the cost reports. Discontinuing both of these activities will result in administrative savings to both rehab providers and the Commonwealth. This action will also change Comprehensive Outpatient Rehabilitation Facilities (CORFs) from a cost-based methodology to the new fee schedule methodology; CORFs are being removed from the list of providers who are reimbursed on a cost-basis in 12 VAC 30-80-20.

This new methodology shall implement a prospective statewide fee schedule methodology for outpatient rehabilitation agencies based on CPT codes. Rehabilitation services furnished by community services boards and state agencies will continue to be reimbursed on a cost basis. The fee schedule will be developed to achieve savings totaling $185,900 general fund dollars as required in Chapter 781, Item 306 XX of the 2009 Appropriation Act.

Please Note: DMAS has been in the process of implementing the Outpatient Rehabilitation Agency Reimbursement changes through a non-emergency regulatory process initiated in 2008. DMAS published a NOIRA (TH 2690/4671) on 9/24/08 (VAR 25:3) and has a proposed regulation (TH 2690/4933) currently in the regulatory process addressing this element of this Emergency/NOIRA package. Because the 2009 budget required DMAS to implement the Outpatient Rehabilitation Agency Reimbursement changes prior to its originally scheduled implementation date, the Agency included Outpatient Rehabilitation Agency Reimbursement in this Emergency/NOIRA package. The Agency will rely upon the previously initiated full regulatory process to make final the changes regarding Outpatient Rehabilitation Agency Reimbursement, and will move the Long-Stay Hospital Reimbursement portion of this package forward in a separate proposed and final regulation process.

Long-Stay Hospital Reimbursement

Long-Stay Hospitals currently are reimbursed based on the methodology in effect for all hospitals prior to the implementation of the prospective reimbursement methodology based on diagnosis-related-groups effective July 1, 1996. Several aspects of the methodology are no longer appropriate, but have never been changed since there are only a few hospitals (two currently) being reimbursed using this methodology. The changes to the old methodology include the reduction of the "incentive plan", the elimination of an additional 2% annually added to the "escalator", and modification of the Disproportionate Share Hospital (DSH) utilization threshold percentage.

The incentive plan currently pays a hospital up to 25% of the difference between the ceiling and its cost per day. As a result of the incentive plan, hospitals can be reimbursed more than their costs. The regulatory change reduces the maximum incentive plan to up to 10.5% of the difference between the ceiling and its cost per day. The escalator, which is currently inflation plus 2%, is used to increase the ceilings and the operating cost per day. The regulation will change the escalator to just inflation. Currently, DSH is calculated by multiplying the difference between the Medicaid utilization percentage and the Medicaid utilization threshold of 8% times the prospective cost per day. The regulation will increase the utilization threshold from 8% to 10.5%. The regulatory changes are projected to save $1.98 million in FY10.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

Outpatient Rehabilitation Agency Reimbursement

An alternative to this regulatory action is to convert the outpatient rehabilitation methodology to a timed-unit base methodology, paying the same rate for all rehabilitation services in 15-minute increments. Since the cost to prepare a cost report does not vary significantly by size of business, it's more burdensome on small businesses. Either proposal would eliminate the requirement to prepare and submit a cost report. However, the proposed reimbursement methodology is the least burdensome because it is the most similar to the methodology used by other payers, including Medicaid MCOs.

Long-Stay Hospital Reimbursement

DMAS considered other alternatives, particularly the elimination of the incentive plan as well as reductions to the ceilings. The alternative chosen, however, most closely achieves the required savings while sharing the reduction appropriately between the affected hospitals.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

In addition to any other comments, DMAS is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, DMAS is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Carla Russell, Manager, Div. of Provider Reimbursement, DMAS, 600 E. Broad Street, Suite 1300, Richmond VA 23219 (804/225-4586; fax 804/371-8892) (**Carla.Russell@dmas.virginia.gov**) **.** Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period. Written comments may also be submitted via the Virginia Regulatory Town Hall website (www.townhall.virginia.gov).

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency will use the participatory approach to develop a proposal if it receives at least 20 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting the agency use the participatory approach and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. It does not strengthen or erode the marital commitment, but may decrease disposable family income depending upon which provider the recipient chooses for the item or service prescribed.