



Virginia  
Regulatory  
Town Hall

## Emergency Regulation Agency Background Document

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| <b>Agency Name:</b>        | Dept. of Medical Assistance Services; 12 VAC 30   |
| <b>VAC Chapter Number:</b> | 12 VAC 30, Chapters 40 and 130  |
| <b>Regulation Title:</b>   | <b>Reasonable Limits on Amounts for Necessary Medical or Remedial Care Not Covered Under Medicaid</b> |
| <b>Action Title:</b>       | Limits on Patient Pay Amounts   |
| <b>Date:</b>               | GOV ACTION NEEDED BY  |

Section 9-6.14:4.1(C)(5) of the Administrative Process Act allows for the adoption of emergency regulations. Please refer to the APA, Executive Order Twenty-Four (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the emergency regulation submission package.

### Emergency Preamble

*Please provide a statement that the emergency regulation is necessary and provide detail of the nature of the emergency. Section 9-6.14:4.1(C)(5) of the Administrative Process Act states that an "emergency situation" means: (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. The statement should also identify that the regulation is not otherwise exempt under the provisions of § 9-6.14:4.1(C)(4).*

*Please include a brief summary of the emergency action. There is no need to state each provision or amendment.*

This regulatory action qualifies as an emergency, pursuant to the authority of the Code of Virginia, 1950 as amended, § 2.2-4011, because it is responding to a mandate in the Virginia Appropriations Act (the 2003 Acts of Assembly, Item 325 BBB) that must be effective within 280 days from the date of its enactment and this regulatory action is not otherwise exempt under the provisions of the Code § 2.2-4006. Since the Department of Medical Assistance Services (DMAS) intends to continue regulating the issue contained in this emergency regulation past the effective period permitted by this emergency action, it is also requesting approval of its Notice of Intended Regulatory Action in conformance with § 2.2-4007.

## Basis

*Please identify the state and/or federal source of legal authority to promulgate the emergency regulation. The discussion of this emergency statutory authority should: 1) describe its scope; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, should be provided.*

*Please provide a statement that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.*

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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

## Substance

*Please detail any changes, other than strictly editorial changes, that would be implemented. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Please provide a cross-walk which includes citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of Virginians. The statement should also delineate any potential issues that may need to be addressed as a permanent final regulation is developed.*

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The section of the State Plan for Medical Assistance that is affected by this action is Reasonable Limits on Amounts for Necessary Medical or Remedial Care Not Covered Under Medicaid (Attachment 2.6-A, Supplement 3 (12VAC 30-40-235)). The regulation affected by this action is Limitations on Patient Pay Deductions for Non-Covered, Medically Necessary Items or Services, 12 VAC 30-130-620.

In conformity to 42 CFR Part 435, the Department's payment to nursing facilities is reduced by the amount of the patient's income, less certain deductions. The Medicaid resident pays this income-based amount, called "patient pay," to the nursing facility. Nursing facility residents are permitted to deduct from their patient pay obligation any amount necessary to cover the cost of medical or remedial goods and services not subject to payment by a third party and not covered under the State Plan for Medical Assistance (the Plan).

Any amounts spent by the resident for such medically indicated goods and services are deducted from the patient pay amount paid to their nursing facility; additional Medicaid funds paid to the nursing facility to cover amounts are deducted for the resident's medical expenses. To date, there is no cap on the nursing facility resident's medical expenditures. This has resulted in Medicaid funds being expended to pay for medically indicated, but non-covered, patient expenditures.

Under 12 VAC 30-130-620, the current patient pay adjustment scheme permits essentially unlimited payment for non-covered, medically necessary, resident-specific, customized items or services prescribed for a Medicaid nursing facility resident. Whatever resulting shortfall in the amount due the nursing facility from the patient pay amount is covered by DMAS.

This regulation amends 12VAC 30-130-620 by establishing upper payment limits for non-covered, medically necessary items and services allowed as adjustments to Medicaid enrolled nursing facility residents. Medicaid will permit expenditures up to the maximum amount reimbursed by Medicare or Medicaid for the same items or services. This regulation limits reimbursement to providers of these non-covered, medically necessary items and services to no more than the Medicare or Medicaid rate.

There should not be a significant consequence for enrolled Medicaid providers, since their provider agreements stipulate that they must accept the Medicaid reimbursement levels as payment in full. However, non-Medicaid providers are under no contractual obligation to accept Medicaid reimbursement levels as payment in full.

Such non-Medicaid providers may bill the nursing home residents the difference between their customary charges and what Medicaid pays for a given item or service. In order to prevent this, both the nursing home, which may arrange for the item or service, and the nursing home resident will be advised that they should, whenever possible, select a participating Medicaid provider. In the event a non-Medicaid provider provides an item or service, the resident runs the risk of being billed for the difference between the amounts allowed by Medicaid and the provider's charges.

This regulation is needed in order to establish consistent and cost effective reimbursement levels for non-covered medically necessary items and services provided to Medicaid recipients residing in a nursing home.

## Alternatives

*Please describe the specific alternatives that were considered and the rationale used by the agency to select the least burdensome or intrusive method to meet the essential purpose of the action.*

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The Agency was not permitted any alternative policies due to the legislative mandate.

### Family Impact Statement

Please provide a preliminary analysis of the potential impact of the emergency action on the institution of the family and family stability including to what extent the 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.

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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.