



COMMONWEALTH of VIRGINIA
Office of the Attorney General

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MEMORANDUM

TO: **BRIAN MCCORMICK**
Regulatory and Manual Section Manager
Department of Medical Assistance Services

FROM: **REATHA B. KAY**
Special Counsel to DMAS

DATE: June 20, 2005

SUBJECT: Emergency Regulations concerning Modification of Indirect Medical Education Payments

I have reviewed the attached emergency regulations concerning the modification of indirect medical education payments.

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 ("APA") and has not exceeded that authority.

The authority for this emergency action is found in Va. Code § 2.2-4011, which provides that emergency regulations are "[r]egulations that an agency finds are necessitated by an emergency situation." The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with Item 326(ZZZ) of the 2005 Appropriation Act (2005 Acts of Assembly, Chapter 951) which states "[t]he Department of Medical Assistance Services shall amend the State Plan for Medical Assistance governing Medicaid

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reimbursement for hospitals to provide an increase in Indirect Medical Education payments for non-state owned hospitals that do not meet the criteria to receive Medicaid payments pursuant to paragraph HHH. of this item, but who have Medicaid Neonatal Intensive Care Unit (NICU) utilization greater than 4,500 Medicaid NICU inpatient days using base year 2003 data, as reported to the Department as of March 1, 2005. Out of this appropriation, \$250,000 from the general fund and \$250,000 from nongeneral funds the second year shall be provided for this purpose. Such amendments to the State Plan shall become effective within 280 days or less from the enactment of this act.”

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, 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 from the emergency regulatory action on this subject matter. 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. 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 786-1841.

cc: Kim F. Piner, Esquire

Attachment