



COMMONWEALTH of VIRGINIA
Office of the Attorney General
Richmond 23219

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MEMORANDUM

TO: RENEE WHITE
Regulatory Coordinator
Virginia Department of Medical Assistance Services

FROM: USHA KODURU
Assistant Attorney General

DATE: October 24, 2005

SUBJECT: Emergency Regulation to Clarify Medicaid Utilization Calculation

I am in receipt of the attached regulation to clarify the definition of Medicaid Utilization calculation by explaining what constitutes a “Medicaid inpatient day” for the purposes of the calculation. You have asked the Office of the Attorney General to review and determine if the Department of Medical Assistance Services (“DMAS”) has the legal authority to promulgate the regulation and if the regulation comports with state and federal law.

The authority for these emergency actions is found in Va. Code § 2.2-4011, which provides that an “emergency situation” includes a situation “in which Virginia statutory law, or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment...” The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2005 Appropriations Act, Item 326 (PPP). Item 326 (PPP) states that DMAS shall “amend the State Plan for Medical Assistance to further clarify the definition of “Medicaid Utilization” used in calculating Disproportionate Share Hospital payments.” The Department shall promulgate emergency regulations within 280 days from the enactment date of this act.

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This situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) according to the language of the 2005 Appropriations Act, Item 326 (PPP). As such, these regulations may be adopted without public comment with the prior approval of the Governor.

Accordingly, with the prior approval of the Governor, these regulations will 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. 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). 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 contact me at 786-4905.

cc: Kim F. Piner, Esquire

Attachment