



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: November 26, 2003

SUBJECT: Emergency Regulations concerning Utilization Review of High Drug Thresholds

I have reviewed the attached emergency regulations that establish utilization review requirements for individuals meeting certain high drug thresholds in accordance with the General Assembly's mandate.

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 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 . . . 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 2003 Appropriation Act (2003 Acts of Assembly chapter 1042), Items 325(UU) and (VV). Item 325(UU) states that DMAS "shall amend the State Plan for Medical Assistance to require prior authorization of prescription drugs for non-institutionalized recipients when more than nine unique prescriptions have been prescribed within a 180-day period. Over-the-counter prescriptions shall not count as a unique prescription for the purposes of prior authorization. For the purposes of prior authorization, non-institutionalized recipients do not include recipients of services at Hiram Davis Medical Center." Similarly, Item 325(VV) states that DMAS "shall amend the State Plan for Medical Assistance to require prior authorization of prescription drugs for nursing facility residents when more than nine unique prescriptions have been prescribed within a 30-day period. Over-the-counter prescriptions shall not count as a unique prescription for the purposes of prior authorization. For the purposes of prior authorization, nursing facility residents do not include residents of the Commonwealth's mental retardation

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training centers.” Both items 325(UU) and (VV) require that emergency regulations to enact these items of the Appropriation Act be promulgated within 280 days or less from the enactment of the Act.

This situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) because the Appropriation Act requires these regulations to be effective within 280 days of enactment of this provision. Without emergency regulations, the Department would be unable to meet the time frame established by the General Assembly for making these changes. 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 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 call me at 786-3450.

cc: Kim F. Piner, Esquire

Attachment