



**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: June 15, 2004**

**SUBJECT: Emergency Regulations concerning Elimination of Disproportionate Share Hospital Payment for Medicaid-Recognized Neonatal Intensive Care Unit Programs and Modification of Indirect Medical Education Payments**

I have reviewed the attached emergency regulations that eliminate disproportionate share hospital payment for Medicaid-recognized neonatal intensive care unit programs and that modify indirect medical education payments.

Based on that review, it is this Office's view that the agency, 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 2004 Budget Bill (H.B. 5001), Item 326(OO). Item 326(OO) states that DMAS "shall amend the State Plan for Medical Assistance to modify the methodology used to calculate the Disproportionate Share Hospital (DSH) Payments and the methodology used to calculate Indirect Medical Education (IME) payments. The revised DSH methodology shall not treat Neonatal Intensive Care Units as distinct providers. The revised IME methodology shall be designed to increase IME payments by an amount approximately equal to the decrease in DSH payments resulting from the change to the DSH methodology." Item 326(OO) requires that emergency regulations to enact this item of the Appropriation Act be promulgated within 280 days or less from the enactment of the Act.

Victoria P. Simmons

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Provided that H.B. 5001 becomes law, this situation qualifies as an emergency as provided in § 2.2-4011(A)(ii) because the Appropriation Act will then require that these regulations 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 this change. 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 and the passage of H.B. 5001 into law, 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 call me at 786-0095.

cc: Kim F. Piner, Esquire