

DECISION BRIEF FOR:  
The Honorable James S. Gilmore, III  
Governor

SUBJECT: EMERGENCY REGULATION for NURSING  
FACILITY SERVICES RATE INCREASE

GOV ACTION  
NEEDED by JUNE 29<sup>th</sup>  
RETURN to DMAS

SUMMARY

1. REQUEST: The Governor is hereby requested to approve this agency's adoption of the emergency regulation entitled Nursing Facility Services Rate Increase. This regulation funds the costs of increasing nursing facility per diems. The 1999 General Assembly appropriated the funds necessary for this increase.
  
2. RECOMMENDATION: Recommend approval of the Department's request to take an emergency adoption action regarding a nursing facility services rate increase. The Department intends to initiate the public notice and comment requirements contained in the Code of Virginia §9-6.14:7.1.

\_\_\_\_\_  
Dennis G. Smith, Director Date

3. CONCURRENCES:

Sec. of Health and Human Resources:  
Concur \_\_\_\_\_  
Concur w/Modifications \_\_\_\_\_  
Disapprove \_\_\_\_\_

Department of Planning and Budget:  
Concur \_\_\_\_\_  
Concur w/Modifications \_\_\_\_\_  
Disapprove \_\_\_\_\_

\_\_\_\_\_  
Claude A. Allen Date

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Title

4. ACTION: Governor  
  
\_\_\_\_\_  
James S. Gilmore, III Date

Approve \_\_\_\_\_  
Approve w/ Modifications \_\_\_\_\_  
Deny \_\_\_\_\_

5. FILED: Registrar of Regulations

\_\_\_\_\_  
Jane D. Chaffin Date

## DISCUSSION

6. **BACKGROUND:** The section of the State Plan affected by this action is 12VAC 30-90-340.

The Nursing Home Payment System (NHPS) has three primary reimbursement components: indirect operating costs, direct operating costs, and capital costs. Capital costs are the costs of equipment, building, and mortgage interest expenses. Indirect operating costs are the costs of administrative staff, housekeeping, laundry, nutrition, etc. Direct operating costs are the costs of nursing staff salaries and fringe benefits, professional (physician and pharmacy) fees, minor medical and surgical supplies, oxygen, nutrient tube feeding, etc. (12 VAC 30-90-270). There are also two minor reimbursement components (Nurse Aide Training and Competency Evaluation Program and Criminal Record Checks) that do not affect this regulation.

Presently, DMAS reimburses the costs of nursing services (for Registered Nurses (RNs), Licensed Practical Nurses (LPNs) and Certified Nurse Aides (CNAs)) as part of the direct operating cost component of the NHPS. Nursing facilities (NFs) report, in their submitted cost reports, their nursing staff salaries/fringe benefits costs and, if the NF costs are below the established ceiling, DMAS reimburses 100% of these costs plus an efficiency incentive. If the NF's reported costs exceed the established ceiling, then the NF is reimbursed at the level of the established ceiling without the efficiency incentive.

During the 1999 General Assembly, the nursing facility industry requested an increase in funding for nurse aide salaries which was approved by the legislature and signed into law on April 7, 1999, by the Governor. In response to this specific appropriation, DMAS has developed a methodology for an increase (to be contained in 12 VAC 30-90-340) in direct operating costs (to cover salary increases for CNAs) in conformance to the Assembly's mandate.

DMAS has developed an implementation plan to ensure that appropriated funds are expended to the fullest extent possible consistent with the constraints imposed by the General Assembly. Briefly, the plan is to obtain from all facilities base line data on nurse aide costs and anticipated increases in those costs for SFY 2000. Subject to the limitations of the appropriation and the targeted nature of the funding, anticipated increases in the costs will be converted to per day amounts that will be added to payment rates that would otherwise prevail during SFY 2000. After one year, additional data will be collected to determine the actual level of expenditure during SFY 2000, for the intended purposes. Facilities' year end cost reports will be settled based on the actual increase in the types of expenditures for which this appropriation is intended. All data collected for this purpose will be subject to audit.

It is expected that this increase in nurse aide salaries will reduce staff turnover thereby improving the quality of care to NF residents and protecting the health of the citizens of the Commonwealth.

The only impact on families of this regulation is expected to be the improvement in care that their institutionalized family members will receive in NFs.

7. **AUTHORITY TO ACT:** The Code of Virginia (1950) as amended, §32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code of Virginia (1950) as amended, §32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The Code also provides, in the Administrative Process Act (APA) §9-6.14:4.1(C)(5), for an agency's adoption of emergency regulations subject to the Governor's prior approval. Chapter 935 of the 1999 Acts of Assembly, Item 335 II

mandated that DMAS increase nursing facility reimbursement to the direct care operating ceiling to provide a salary increase for certified nurse aides across the state, to be effective July 1, 1999.

Subsequent to the emergency adoption action and filing with the Registrar of Regulations, this agency intends to initiate the public notice and comment process contained in Article 2 of the APA. Therefore, approval to file the required Notice of Intended Regulatory Action is also necessary and hereby being requested by this action.

Without an emergency regulation, this amendment to the State Plan cannot become effective until the publication and concurrent comment and review period requirements of the APA's Article 2 are met. Therefore, an emergency regulation is needed to meet the July 1, 1999, effective date established by the General Assembly.

8. NEED FOR EMERGENCY ACTION: The Code §9-6.14:4.1(C)(5) provides for regulations which an agency finds are necessitated by an emergency situation. To enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the General Assembly mandate, he is required to make these changes. This issue qualifies as an emergency regulation as provided for in §9-6.14:4.1(C)(5)(ii), because the Virginia Appropriation Act requires this regulation to be effective within 280 days from the enactment of the law. As such, this regulation may be adopted without public comment with the prior approval of the Governor.

Since this emergency regulation will be effective for no more than 12 months and the Director wishes to continue regulating the subject entities, the Department is initiating the Administrative Process Act Article 2 procedures by requesting approval to file its Notice of Intended Regulatory Action. At the time that DMAS publishes its Article 2 proposed regulations, the entire NHPS will be revised in accordance with Chapter 935 of the 1999 Acts of Assembly, Item 335 CC.

9. FISCAL/BUDGETARY IMPACT: The providers that would be affected are the approximately 270 nursing facilities. The projected costs appropriated in the budget were \$21,716,649 (\$10,500,000 GF) for FY 2000 to provide for nursing staff pay increases, including certified nursing aides' salary increases.

The money appropriated will be divided among approximately 270 nursing homes throughout the Commonwealth. There are approximately 27, 000 recipients receiving care in these nursing facilities.

10. RECOMMENDATION: Recommend approval of this request to adopt this emergency regulation to become effective July 1, 1999. From its effective date, this regulation is to remain in force for one full year or until superseded by final regulations promulgated through the APA. Without an effective emergency regulation, the Department would lack the authority to provide an increase in payments to nursing facilities as mandated by the General Assembly.
11. APPROVAL SOUGHT FOR 12 VAC 30-90-340.

Approval of the Governor is sought for an emergency modification of the Medicaid State Plan in accordance with the Code of Virginia §9-6.14:4.1(C)(5) to adopt the following regulation:

VAC Citation

Federal Citation

Substance of the Suggested Change

*ADD MORE ROWS TO THIS TABLE AS NEEDED TO ACCOMMODATE ALL SIGNIFICANT (NON-EDITORIAL) CHANGES*

*\*\*\*\*\* Do Not Go Past This Point --- the coordinators will finalize the supporting documentation that follows \*\*\*\*\**

## Agency Adoption of Emergency Regulation

I, Dennis G. Smith, Director, do hereby adopt in lieu of action by the Board of Medical Assistance Services, according to the Code of Virginia §32.1-324 C and with the approval of the Governor, the emergency regulation entitled "NURSING FACILITY SERVICES RATE INCREASE".

This regulation is to become operative once adopted and filed with the Registrar of Regulations (Code of Virginia §9-6.14:9 A) on July 1, 1999. The Department of Medical Assistance Services will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Dennis G. Smith, Director  
Department of Medical Assistance Services

Attachment: NURSING FACILITY SERVICES RATE INCREASE Emergency Regulation

BUDGETARY APPROVAL for REGULATORY ISSUE

Name:        **Nursing Home Payment System: Direct Operating Cost Reimbursement Increase**

Source:        1999 General Assembly mandate in Appropriations Act

Impact:        see attached Decision Brief

Submitted to Budget Office: 5/21/99\_

Please reply by: 5/25 \_\_\_\_

DMAS Budget Office Review

Received by Budget Office: \_\_\_\_\_

\_\_\_\_\_

Date

Name

Please reply by: \_\_\_\_\_

Department of Planning and Budget Review

\_\_\_\_\_

Date

Name

POLICY APPROVAL for REGULATORY ISSUE

Name:        **Nursing Home Payment System: Direct Operating Cost Reimbursement Increase**

Source:        1999 General Assembly mandate in Appropriations Act

Impact:        See attached Decision Brief

Submitted to Policy Office: 5/21\_\_\_\_\_

Please reply by: 5/25\_\_\_\_\_

DMAS Policy Office Review

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Date

Name

May 21, 1999

MEMORANDUM

TO: Siran S. Faulders, Senior Assistant Attorney General  
Office of the Attorney General

FROM: Victoria P. Simmons, Regulatory Coordinator

RE: Emergency Regulations concerning Nursing Facility Reimbursement Changes

I am forwarding for your review and approval this agency's emergency regulation regarding Nursing Facility Reimbursement Changes. Your standard statement of filing authority is required by the Registrar for all regulations.

This emergency regulation is intended to carry out the mandate of the General Assembly in the Appropriation Act to make additional funds available to nursing facilities for the purpose of increasing their nursing staff salaries.

Your response is needed no later than May 26<sup>th</sup> in order to permit Director signature and lead-time for DPB/Secretary/Governor reviews. I always appreciate your careful attention to this agency's regulations. If there are questions, I am available at 1-8850 to discuss these rules.

Attachment

pc: Chris Schroeder  
Stan Fields  
Kathryn Kotula



June 4, 1999

MEMORANDUM

TO: John Forbes, Department of Planning and Budget

FROM: Vicki Simmons, Regulatory Coordinator

RE: Emergency Regulations concerning Nursing Home Payment System: Increase to Direct Operating Costs

I am transmitting the agency's emergency regulation regarding Nursing Home Payment System: Increase to Direct Operating Costs for review and approval by DPB, the Secretary and Governor.

This emergency regulation conforms the Nursing Home Payment System to the mandate of the 1999 General Assembly in Chapter 935 of the Acts of Assembly Item 335 II to reimburse nursing facilities additional funds to be used to increase salaries of Certified Nurse Aids.

I always appreciate your careful attention to this agency's regulations. If there are questions, I am happy to be of further assistance.

Attachment

pc: Chris Schroeder  
Stan Fields  
Kathryn Kotula  
Keith Martin