



COMMONWEALTH of VIRGINIA
Office of the Attorney General

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August 19, 2011

MEMORANDUM

TO: BRIAN MCCORMICK
Regulatory Supervisor
Department of Medical Assistance Services

FROM: JENNIFER L. GOBBLE
Special Counsel to DMAS

DATE: August 19, 2011

SUBJECT: Emergency Regulations – 2011 Exceptions to Personal Care Service Limit

I have reviewed the attached emergency regulations that would implement exceptions to the cap on personal care service hours.

Based on my review, it is this Office's view that the Director of the Department of Medical Assistance Services ("DMAS"), acting on behalf of the Board of Medical Assistance Services pursuant to Virginia Code § 32.1-324, has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Virginia Administrative Process Act ("APA") and has not exceeded that authority.

The authority for this emergency action is found in Virginia Code § 2.2-4011(B), which provides that emergency regulations may be adopted in "situations in which Virginia statutory law, the [Virginia] appropriation act, or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment" The attached emergency regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the mandate set forth in the 2011 *Acts of Assembly*, Chapter 890, Item 297 CCCCC.

Please be advised that under Virginia Code §2.2-4011(B), the Department must state in writing "the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § 2.2-4012, such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations." The Department's statement of the nature of the emergency and necessity for such action appears to have been accomplished in the "Agency Background Document." In addition, the emergency regulations shall be effective for no more than 12 months. If the Department intends to continue regulating the subject matter

governed by these emergency regulations 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 Register within 60 days of the effective date of the emergency regulations. The proposed regulations must be filed with the Register within 180 days after the effective date of the emergency regulations. Va. Code § 2.2-4011(C).

If you have any questions or need any additional information, please feel free to contact me at 786-4905.

cc: Kim F. Piner
Senior Assistant Attorney General