



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: September 9, 2004

SUBJECT: Emergency Regulations concerning Home and Community Based Services Mental Retardation Waiver

I have reviewed the above-referenced emergency regulations that make modifications to the current regulations governing DMAS's Mental Retardation Waiver.

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 this emergency action is found in Va. Code § 2.2-4011, which provides that emergency regulations are "[r]egulations that an agency finds are necessitated by an emergency situation." The amendments to the regulations will enable the Director, in lieu of the Board of Medical Assistance Services, to comply with the 2004 Appropriation Act (2004 Acts of Assembly chapter 4), Item 326(PP), which states that "[u]pon approval by the Centers for Medicare and Medicaid Services of the application for renewal of the Mental Retardation Waiver, expeditious implementation of any revisions shall be deemed an emergency situation pursuant to § 2.2-4002 of the Administrative Process Act. Therefore, to meet this emergency situation, the Department of Medical Assistance Services shall promulgate emergency regulations to implement the provisions of this act."

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

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for no more than twelve months from the emergency regulatory action on this subject matter. 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