



**COMMONWEALTH of VIRGINIA**  
*Office of the Attorney General*

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**MEMORANDUM**

**TO:** L. RICHARD MARTIN, JR.  
Virginia Department of Social Services

**FROM:** REATHA B. KAY  
Special Counsel to DMAS

**DATE:** August 5, 2005

**SUBJECT:** Final Regulation 22 VAC 40-745-10 *et seq.*, Assessment in Assisted Living Facilities

I have reviewed the attached final regulation to determine if the changes made to the proposed regulation exceed the statutory authority of the State Board of Social Services ("State Board") to promulgate the final regulation and if the final regulation comports with applicable state law. As noted in the memorandum from Allen T. Wilson dated October 7, 2003, it is this Office's view that the State Board has the authority to promulgate the proposed regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act and Executive Order 21 (2002), and has not exceeded that authority.

It appears that several changes to the final regulation are not changes with "substantial impact," and, therefore do not necessitate an additional comment period. Those changes are merely technical in nature or clarify the language in the regulation.

It also appears that there are several changes that may constitute changes with "substantial impact," and could necessitate an additional comment period. Please note that Va. Code § 2.2-4013(B) requires that all changes to the proposed regulations be highlighted in the final regulations, and it appears that this requirement has been fulfilled. Also, pursuant to § 2.2-4013(C), if the

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Governor finds that one or more changes with substantial impact have been made to the proposed regulation, he *may* (but is not required to) direct DSS to provide an additional thirty days to solicit additional public comment on the changes. In addition, Va. Code § 2.2-4007(K) requires the agency to solicit additional public comment, *if* it receives requests from at least twenty-five persons for an opportunity to submit oral and written comments on the changes to the regulation and if one or more changes with substantial impact were made to the proposed regulation.

If you have any questions, please feel free to call me at 786-1841.

cc: Kim F. Piner, Esquire

Attachment