



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1
7-1-1

MEMORANDUM

TO: **BRIAN MCCORMICK**
Regulatory and Manual Section Manager
Department of Medical Assistance Services

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

DATE: May 9, 2007

SUBJECT: Emergency Regulations concerning Substance Abuse Treatment Services

I have reviewed the attached emergency regulations concerning substance abuse treatment services.

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 ("APA") 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 Item 302(PPP) of the 2007 Appropriation Act which states "[t]he State Board for Medical Assistance Services shall develop amendments to the State Plan for Medical Assistance to provide coverage of substance abuse treatment

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services for children and adults including emergency services; evaluation and assessment; outpatient services, including intensive outpatient services; targeted case management; and day treatment effective July 1, 2007. The State Board shall seek approval from the Centers for Medicare and Medicaid to implement the State Plan amendments. The Department shall promulgate emergency regulations to implement this amendment within 280 days or less from enactment 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.” 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. 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 786-4074.

cc: Kim F. Piner, Esquire

Attachment