



COMMONWEALTH of VIRGINIA
Office of the Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

Mark R. Herring
Attorney General

TO: **KARIN CLARK**
Virginia Department of Social Services

FROM: **MICHELLE A. L'HOMMEDIU**
Assistant Attorney General

DATE: **June 13, 2018**

**SUBJECT: Exempt Final Regulation – Assisted Living Facility Mixed Population
Staffing Requirement, 22 VAC 40-73. (5068/8311)**

I am in receipt of the attached regulation to amend the Assisted Living Facility staffing regulations 22 VAC 40-73-1020 and 40-73-1030. You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate this regulation and if it comports with applicable state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2. The proposed amendment to the regulation is necessary to implement the exception to assisted living facility staffing requirements required by the adoption of identical Chapters 248 and 686 of the 2018 Acts of Assembly (House Bill 1439 and Senate Bill 875, respectively).

Based on my review, it is my view that the State Board has the authority to promulgate the final regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 17 (2014), and has not exceeded that authority. To date, the Board has not yet acted on this regulation; and the Agency Background Document available on Town Hall reflects the anticipated future date of Board action. Based on the foregoing, it is my view that the amendments to this regulation are exempt from the procedures of Article 2 of the APA under Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about this regulation, please contact me at 786-6005.

cc: Kim F. Piner, Esq.
Attachment

Project 5536 - Final

DEPARTMENT OF SOCIAL SERVICES

Assisted Living Facility Mixed Population Staffing Requirement

22VAC40-73-1020. Staffing.

A. When residents are present, there shall be at least two direct care staff members awake and on duty at all times in each building who shall be responsible for the care and supervision of the residents.

B. The requirements of subsection A of this section do not apply to assisted living facilities that are licensed for 10 or fewer residents if not more than three of the residents have serious cognitive impairments. The staffing provisions of 22VAC40-73-280.D apply.

C. During trips away from the facility, there shall be sufficient direct care staff to provide sight and sound supervision to all residents who cannot recognize danger or protect their own safety and welfare.

22VAC40-73-1130. Staffing.

A. When 20 or fewer residents are present, at least two direct care staff members shall be awake and on duty at all times in each special care unit who shall be responsible for the care and supervision of the residents, except as noted in subsection B of this section. For every additional 10 residents, or portion thereof, at least one more direct care staff member shall be awake and on duty in the unit.

B. Only one direct care staff member has to be awake and on duty in the unit if sufficient to meet the needs of the residents, if (i) there are no more than five residents present in the unit and (ii) there are at least two other direct care staff members in the building, one of whom is readily available to assist with emergencies in the special care unit, provided that supervision

necessary to ensure the health, safety, and welfare of residents throughout the building is not compromised.

The requirements in subsections A and B of this section are independent of 22VAC40-73-280 D and 22VAC40-73-1020 A and B.

C. During trips away from the facility, there shall be sufficient direct care staff to provide sight and sound supervision to residents.