Board of Social Services may not authorize or permit expenditure of federal LIHEAP grant for weatherization services, unless those services fall within fuel assistance or crisis assistance component, as approved in State plan submitted to federal government. Board must comply with Administrative Process Act in amending its public assistance program regulations. Governor may not supersede federal procedural requirements for expending LIHEAP funds by issuing executive order allocating such funds for weatherization assistance.

The Honorable James F. Almand

Member, House of Delegates

January 25, 1996

You ask whether the State Board of Social Services (the "Board") is required to amend its Virginia Energy Assistance Program ("VEAP") regulations before allocating Low-Income Home Energy Assistance Program ("LIHEAP") funds to the Low-Income Weatherization Assistance Program ("WAP"). You also ask whether the Board must comply with the requirements of the Administrative Process Act ("APA") to amend its VEAP regulations. Finally, you ask whether LIHEAP funds may be allocated to WAP by executive order of the Governor.

You relate that the Virginia Coal and Energy Commission (the "Commission") believes that WAP and LIHEAP should be better coordinated to ensure that individuals and families eligible for fuel assistance benefits have weatherized homes and heating systems in good repair, to help reduce the heating costs of such housing while freeing up fuel assistance dollars for other eligible program participants. You note that federal law permits up to fifteen percent of a states' LIHEAP grant to be spent on weatherization. An additional ten percent may be spent on weatherization when approved by LIHEAP federal administrators.

You also relate that the Commission recently was advised that the Board met during the summer of 1995 to discuss the allocation of some LIHEAP funding to WAP. The Board approved the transfer of up to eight percent of LIHEAP funding for weatherization. You advise that representatives from the Department of Housing and Community Development have submitted for consideration a proposed implementation plan for the transferred funds, with two principal components: (1) the transferred funds would be used by WAP for basic weatherization services, such as caulking, insulation and window repair, furnished exclusively to persons receiving fuel assistance through LIHEAP; and (2) the transferred funds would provide higher-cost weatherization services, such as furnace repairs and replacements.
Finally, you advise that the Commission has been advised that the LIHEAP funds cannot be allocated to WAP for weatherization unless and until the VEAP regulations are amended pursuant to the APA. You advise that the APA process may take several months, which would mean that the LIHEAP funds will not be available for weatherization during the 1995-1996 heating season. Furthermore, you advise that the Commission understands that funding will not be transferred to WAP until this procedural issue is resolved.

Federal law permits the allocation of LIHEAP funds for weatherization activities; however, a state must expend LIHEAP funds in accordance with the terms adopted in the state plan. Currently, the VEAP regulations and the State plan provide for the allocation of LIHEAP funds between fuel assistance and crisis assistance, and neither includes a weatherization component. Accordingly, it is my opinion that the Board may not authorize or permit the expenditure of LIHEAP funds for weatherization services, such as those provided by WAP, unless those services fall within either the fuel assistance component or crisis assistance component.

You next ask whether the Board must comply with the requirements of the APA to amend its VEAP regulations. The APA governs the promulgation of regulations and the issuing of case decisions by agencies of the Commonwealth. The APA provides for extensive notice and public comment procedures prior to the enactment and revision of regulations. While certain agency actions relating to grants of federal funds are exempted from the requirements of the APA, the promulgation and amendment of regulations for public assistance programs do not fall within this exemption. LIHEAP is a public assistance program for purposes of the APA. It is well-settled that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it." It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous. In those situations, the plain meaning and intent of the statute govern. Accordingly, it is my opinion that the Board is required to comply with the APA in order to amend its VEAP regulations.

Your final question is whether LIHEAP funds may be allocated to WAP by executive order of the Governor. Prior opinions of the Attorney General discuss the authority of a Governor to issue executive orders and the appropriate context for executive orders:

Although no provision of the Constitution explicitly authorizes the Governor to issue executive orders and no Virginia statute provides a general grant of authority to issue such orders, Governors of the Commonwealth have historically issued executive orders in the absence of a specific statute expressly or generally conferring the authority. The Governor has the inherent authority to issue executive orders in order to 'take care that the laws be faithfully executed.' It is recognized that there is a general reservoir of powers granted by the Constitution to the Governor as the Chief Executive of the Commonwealth.

These prior opinions of the Attorney General conclude that the use of executive orders is appropriate

(1) Whenever a provision of the Code of Virginia expressly confers that authority upon the Governor;

(2) Whenever there is a genuine emergency which requires the Governor, pursuant to his constitutional responsibility and power, to issue an order, to abate a danger to the public regardless of the absence of explicit authority; and

(3) Whenever the order is administrative in nature, as opposed to legislative.
An executive order may not, however, be employed when a law is required.\[17\]

This is because the legislative power of the Commonwealth is vested in the General Assembly pursuant to Article IV, § 1 of the Constitution of Virginia (1971).\[18\]

The General Assembly has not expressly authorized the Governor to order such an allocation of LIHEAP funds to WAP. The Governor would not be acting in response to an emergency when the proposed transfer of funds is from LIHEAP activity (immediate assistance with heating emergencies) to WAP activity (reduction of energy costs over the long-term through weatherization services). While the allocation of funds may appear to be administrative in nature, federal law requires certain procedural requirements for the expenditure of the funds, which cannot be superseded by executive order. It is, therefore, my opinion that the allocation of LIHEAP funds to WAP is not an appropriate subject matter for the Governor to consider in issuing an executive order. Accordingly, allocation of LIHEAP funds to WAP may not be accomplished by means of an executive order.

\[1\]Federal law requires that each state submit annually an application to the Secretary of Health and Human Services for a grant of LIHEAP funds to assist certain low-income households with low-cost weatherization and other cost-effective energy-related home repair. 42 U.S.C.A. §§ 86218629 (1995). The Commonwealth submitted its application for fiscal year 1996, which was approved in November 1995 (see letter from Donald Sykes, Director, Office of Community Services, U.S. Department of Health & Human Services, to Carol A. Brunty, Commissioner, Department of Social Services), providing for such fund allocation as follows: 81% for heating assistance; 10% for administrative and planning costs; 8% for crisis assistance; and 1% for carryover to fiscal year 1997. No LIHEAP funds will be expended for services to reduce home energy needs, including needs assessment. See Dep’t Soc. Serv., Low Income Home Energy Assistance Program (LIHEAP), 1996 State Plan and Application, at 12 (Sept. 1995) [hereinafter State plan] (on file with Department of Social Services). This allocation of funds is mirrored in the VEAP regulations promulgated by the Board, which provide for fuel assistance and crisis assistance components. See 11:2 Va. Regs. Reg. VR 615081, pts. II-III (1994).

Neither the VEAP regulations nor the State plan provides for the use of LIHEAP funds for weatherization activities.

With respect to the federal requirement for public notice and comment on the use of LIHEAP funds, the State plan provides for a 30-day review of the VEAP regulations, use of an advisory group comprised of representatives from the public and private sector and a sounding board comprised of representatives from local social services departments, and a public hearing. See 42 U.S.C.A. § 8624(a)(2), (c)(2); State plan at 1718.

\[2\]Sections 96.14:1 to 96.14:25. Generally, a state agency must promulgate and amend its regulations pursuant to the APA, which requires public notice and participation. See § 96.14:7.1.

\[3\]While weatherization activities are an authorized use of LIHEAP funds, some restrictions apply. Unless a state obtains a waiver, not more than 15% of LIHEAP
funds available in a given year may be used for weatherization. 42 U.S.C.A. § 8624(k)(1). In order to obtain a waiver to use up to 25% of LIHEAP funds for weatherization, a state must demonstrate, among other things, that the additional expenditure on weatherization will not reduce the number of households benefitting from the fuel assistance and crisis assistance components. 42 U.S.C.A. § 8624(k)(2).

4See 42 U.S.C.A. § 8624(b)(1)(C) (as part of state's annual application for allotment of LIHEAP funds, state's chief executive officer shall certify that state will "provide low-cost residential weatherization and other cost-effective energy-related home repair").

5See 42 U.S.C.A. § 8624(d). The federal government, in making grants of LIHEAP funds to the states to assist low-income households in meeting their immediate home energy needs, permits each state to allocate those funds among certain specified components to

"(A) conduct outreach activities and provide assistance to low income households in meeting their home energy costs, particularly those with the lowest incomes that pay a high proportion of household income for home energy …;

"(B) intervene in energy crisis situations;

"(C) provide low-cost residential weatherization and other cost-effective energy-related home repair; and

"(D) plan, develop, and administer the State's program[.]" 42 U.S.C.A. § 8624(b)(1).

Federal law imposes certain procedural restrictions pertaining to public notice and comment on each state's yearly plan for the use of LIHEAP funds by requiring that "[n]o funds shall be allotted to such State for any fiscal year … unless such State conducts public hearings with respect to the proposed use and distribution of funds …." 42 U.S.C. § 8624(a)(2). Furthermore, "[e]ach plan … and each substantial revision thereof shall be made available for public inspection within the State involved in such a manner as will facilitate timely and meaningful review of, and comment upon, such plan or substantial revision." 42 U.S.C. § 8624(c)(2); see also § 8624(b)(12) (requiring state's chief executive officer to certify that state agrees to "provide for timely and meaningful public participation in the development of the plan").


7For example, the replacement or repair of heating equipment falls within the crisis assistance component and could be funded without change in the VEAP regulations and the State plan. See 11:2 Va. Regs. Reg. VR 615081, supra note 1, § 3.1(C)(1), (4), at 3146; State plan, supra note 1, at 13.

9Section 96.14:7.1.

10Section 96.14:4.1(B)(4).

11See § 96.14:7.1(E), (I) (directing that public assistance programs conform to APA requirements).

12See § 96.14:7.1(J); see also § 63.187 (defining "public assistance," "fuel assistance").


15"The chief executive power of the Commonwealth shall be vested in a Governor." VA. CONST. art. V, § 1 (1971). When a Governor may properly issue an executive order has been the subject of much debate. See, e.g., Note, Gubernatorial Executive Orders as Devices for Administrative Direction and Control, 50 IOWA L. REV. 78 (1964); see also, 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 587-90 (1974).


18Accord Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (federal constitution limits presidential power in lawmaking process; all legislative powers are vested in Congress).